

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 738 of 2018

[arising out of Order dated 14th November, 2018 by NCLT, New Delhi Bench, in Company Petition No. IB-788/ND/2018]

IN THE MATTER OF:

Mr. Dingo Ku

Shareholder of
M/s. CINDA Engineering & Construction
Pvt. Limited,
Through its Authorized signatory
Mr. Tu Chang-Han,
R/o Flat No. 14221, ATS Advantage,
Plot No. 17, Ahinsa Khand – 1st,
Indirapuram,
Ghaziabad, U.P. - 201014

...Appellant

Versus

1. M/s. Suntech Infra Solutions Pvt. Ltd.
601, Gopal Heights (D-9),
Netaji Subhash Place, Pitampura,
New Delhi – 110 034.

2. Mr. Vijender Sharma,
Interim Resolution Professional,
11 (3rd Floor), Hargovind Enclave,
Vikas Marg,
Delhi – 110 032.

3. M/s. CINDA Engineering & Construction Pvt. Ltd.
Through the Interim Resolution Professional,
B-92, 9th Floor, Himalaya House,
23, Kasturba Gandhi Marg,
New Delhi – 110 001.

.... Respondents

For Appellant : **Mr. Ramji Srinivasan, Senior Advocate assisted by
Mr. Neil Hildreth, Mr. Rahul Jain and Ms. Sylona
Mohapatra, Advocates**

For Respondents: **Mr. Gaurav Mitra, Mr. Saurabh Seth and Ms.
Sumeera Raheja, Advocates for R-1.**

**Mr. Narender Hooda, Senior Advocate assisted by
Mr. Pradeep Dahiya, Advocate for R-2 and R-3
Mr. Vijender Sharma, RP**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

M/s. Suntech Infra Solutions Pvt. Ltd. ('Operational Creditor') filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the **I&B Code**') for initiation of 'corporate insolvency resolution process' against M/s. CINDA Engineering & Construction Private Limited. The same having been admitted by the impugned order dated 14th November, 2018, has been challenged by Mr. Dingo Ku, shareholder of 'M/s. CINDA Engineering & construction Private Limited' ('Corporate Debtor').

2. Learned Senior Counsel appearing on behalf of the appellant submitted that the impugned order has been passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No. IV) on the application under Section 9 filed by the 'Operational Creditor' without any notice to the 'Corporate Debtor'. It is further submitted that the notice has been issued and served on the 'Corporate Debtor', it could have been brought to the notice of the Adjudicating Authority that there is a pre-existing dispute. Learned counsel appearing on behalf of the 1st Respondent ('Operational Creditor') submitted that the petition under Section 9 was listed before the Adjudicating Authority on 6th July, 2018 where 1st Respondent has stated that the parties are exploring the possibility of settlement and the meeting has been scheduled on 9th July, 2018. The matter was adjourned to 25th July, 2018.

3. On 25th July, 2018, the 1st Respondent informed the Adjudicating Authority that the settlement talks had failed. It was also brought to the notice that parties earlier reached an agreement qua the amount payable,

however, subsequent insistence of 3rd Respondent on furnishing of 'corporate guarantee' came as a complete shock for the 'Operational Creditor' and the demand of 3rd Respondent is completely unjustified. It was submitted that Section 8(1) notice was served on the 'Corporate Debtor' in its registered office on 28th May, 2018. It was only thereafter the application under Section 9 was filed. It was submitted by the learned counsel for the 'Operational Creditor' that the 1st Respondent sent e-mail on 30th July, 2018 and subsequently heard by Adjudicating Authority on 27th August, 2018, the said e-mail clearly shows that the 'Corporate Debtor' was informed about the date of hearing.

4. However, it is not disputed that the Adjudicating Authority had not issued any notice to the 'Corporate Debtor'. In '**M/s. Innoventive Industries Limited v. ICICI Bank** - Company Appeal (AT)(Insolvency) No. 1 & 2 of 2017' this Appellate Tribunal observed that notice is required to be given by the Adjudicating Authority before passing order under Section 7 or 9 of the I&B Code.

5. The aforesaid issue was also noticed by this Appellate Tribunal in '**M/s. Starlog Enterprises Limited vs. ICICI Bank Limited** - 2017 SCC Online NCLAT 13', wherein this Appellate Tribunal held as follows :

5. *The aforesaid issue now stands decided by decision of the Appellate Tribunal in "M/s. Innoventive Industries Limited vs ICICI Bank & Anr. in CA (AT) (Insolvency) No. 1 & 2 of 2017" wherein the Appellate Tribunal observed and held :-*

"43. There is no specific provision under the I&B Code, 2016 to provide hearing to Corporate

debtor in a petition under Section 7 or 9 of the I&B Code, 2016."

"53. In view of the discussion above, we are of the view and hold that the Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed. Adherence to Principles of natural justice would not mean that in every situation the adjudicating authority is required to afford reasonable opportunity of hearing to the corporate debtor before passing its order."

In this connection we may state that the vires of Section 7 of I&B Code was considered by Hon'ble Calcutta High Court in " Sree Metaliks Limited & Ann" in writ petition 7144 (W) of 2017, wherein Hon'ble High Court by its judgment dated 7th April, 2017 held as follows:-

".....However, it is to apply the principles of natural justice in the proceedings before it. It can regulate it own procedure, however, subject to the

other provisions of the Act of 2013 or the Insolvency and Bankruptcy Code of 2016 and any Rules made thereunder. The Code of 2016 read with the Rules 2016 is silent on the procedure to be adopted at the hearing of an application under section 7 presented before the NCLT, that is to say, it is silent whether a party respondent has a right of hearing before the adjudicating authority or not.

Section 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. It also allows the NCLT and NCLAT the power to regulate their own procedure. Fetters of the Code of Civil Procedure, 1908 does not bind it. However, it is required to apply its principles. Principles of natural justice require an authority to hear the other party. In an application under Section 7 of the Code of 2016, the financial creditor is the applicant while the corporate debtor is the respondent. A proceeding for declaration of insolvency of a company has drastic consequences for a company. Such proceeding may end up in its liquidation. A person cannot be condemned unheard. Where a statute is silent on the right of hearing and it does not in express terms, oust the principles of natural justice, the same can and should be read into

in. When the NCLT receives an application under Section 7 of the Code of 2016, therefore, it must afford a reasonable opportunity of hearing to the corporate debtor as Section 424 of the Companies Act, 2013 mandates it to ascertain the existence of default as claimed by the financial creditor in the application. The NCLT is, therefore, obliged to afford a reasonable opportunity to the financial debtor to contest such claim of default by filing a written objection or any other written document as the NCLT may direct and provide a reasonable opportunity of hearing to the corporate debtor prior to admitting the petition filed under Section 7 of the Code of 2016. Section 7(4) of the Code of 2016 requires the NCLT to ascertain the default of the corporate debtor. Such ascertainment of default must necessarily involve the consideration of the documentary claim of the financial creditor. This statutory requirement of ascertainment of default brings within its wake the extension of a reasonable opportunity to the corporate debtor to substantiate by document or otherwise, that there does not exist a default as claimed against it. The proceedings before the NCLT are adversarial in nature. Both the sides are,

therefore, entitled to a reasonable opportunity of hearing.

The requirement of NCLT and NCLAT to adhere to the principles of natural justice and the fact that, the principles of natural justice are not ousted by the Code of 2016 can be found from Section 7(4) of the Code of 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 4 deals with an application made by a financial creditor under Section 7 of the Code of 2016. Sub-rule (3) of Rule 4 requires such financial creditor to despatch a copy of the application filed with the adjudicating authority, by registered post or speed post to the registered office of the corporate debtor. Rule 10 of the Rules of 2016 states that, till such time the Rules of procedure for conduct of proceedings under the Code of 2016 are notified, an application made under Sub-section (1) of Section 7 of the Code of 2017 is required to be filed before the adjudicating authority in accordance with Rules 20, 21, 22, 23, 24 and 26 or Part-HI of the National Company Law Tribunal Rules, 2016.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a

reasonable opportunity of hearing to the respondent before passing its order.

In a given case, a situation may arise which may require NCLT to pass an ex-parte ad interim order against a respondent. Therefore, in such situation NCLT, it may proceed to pass an ex-parte ad interim order, however, after recording the reasons for grant of such an order and why it has chosen not to adhere to the principles of natural justice at that stage. It must, thereafter proceed to afford the party respondent an opportunity of hearing before confirming such ex-parte ad interim order.

In the facts of the present case, the learned senior advocate for the petitioner submits that, orders have been passed by the NCLT without adherence to the principles of natural justice. The respondent was not heard by the NCLT before passing the order.

It would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them.

In such circumstances, the challenge to the vires to Section 7 of the Code of 2016 fails."

6. *Therefore, it is clear that before admitting an application under Section 9 of the MB Code it is mandatory duty of the 'adjudicating authority' to issue notice."*

6. In the present case admittedly no notice was issued by the Adjudicating Authority to the 'Corporate Debtor' before admitting the application under Section 9 of the I&B Code. For the said reason an order cannot be upheld having passed in violation of principles of natural justice as already held in '*M/s. Starlog Enterprises Limited (Supra)*'.

7. Learned counsel appearing on behalf of the 1st Respondent (Operational Creditor) relied on a decision of this Appellate Tribunal in '**J.B. Tiwari vs. Biostadt India Limited & Anr.** – *Company Appeal (AT)(Ins.) No. 268 of 2018*' disposed of on 30th November, 2018. It was submitted that this Appellate Tribunal though noticed that no notice was issued on the 'Corporate Debtor' but refrained from setting aside the order.

8. However, the aforesaid submission cannot be accepted as in the case of '*J.B. Tiwari vs. Biostadt India Limited & Anr.*' (*Supra*) this Appellate Tribunal observed and held as follows :

".....No doubt, it would have been appropriate if the Adjudicating Authority had also sent the Notice through its own mechanism. We have considered whether we should send back the matter for want of such procedure being followed by the

Adjudicating Authority. However, we have also heard the Appellant in details to consider if the Appellant has any grounds or material because of which, if the same had been shown to the Adjudicating Authority, the result of the proceeding under Section 8 and 9 of the Code could have been different. Looking to the admitted facts in this matter and where we find that there is no dispute regarding the amount due and as we find that the Appellant is unable to demonstrate that before Section 8 Notice was issued any dispute existed, we find no propriety in sending back this matter to the NCLT.”

9. In the present case the appellant has brought to our notice different communications made between the parties, which were suppressed by the 1st Respondent, which are as under:-

- By letter dated 26th January, 2018, the appellant ('Corporate Debtor') claimed Rs. 51,80,211/- on the respondent towards the delay in delivery of the project and the loss sustained by the 'Corporate Debtor' in rectifying the workmanship of the defects in the works also made.
- The letter aforesaid has been sent through *e-mail* dated 26th January, 2018 and enclosed as 'Annexure-A5 (Colly), relevant portion of which is as follows:

CTCI & CINDA CONSORTIUM

TEL: +91 120 4722300
FAX: +91 120 4722399

PLD3B1/R

Letter

TO: Suntech Infra Solutions Pvt. Ltd. Attn: Mr. Vishesh Gupta	E-mail: vishesh@suntechinfra.com
From: CINDA Engineering & Construction Pvt. Ltd., Dahej Attn: Mr. Feng Yi Hsu, Project Site Manager	E-mail: Feng-Yi.Hsu@cinda.in
CC: CTCI Corporation, Taipei Attn: Mr. Frank Chao, Project Manager	E-mail: F.CHAO@ctci.com.tw
CC: CINDA Engineering & Construction Pvt. Ltd., Noida Attn: Mr. Sandeep Mishra, Project Manager	E-mail: sandeep.mishra@cinda.in
CC: CINDA Engineering & Construction Pvt. Ltd., Dahej Attn: Mr. Jew Ming Chen, Project Control Manager	E-mail: jewming.chen@cinda.in
Date: 26 th , January, 2018	Your Ref. No.: NIL
Project: EPCC for Dahej Expansion-Phase IIIB1 LNG Regas Facilities	Our Ref. No.: PLD3B1-R-CND-SISPL-S-L-0057
Subject: Piling subcontract settlement	Total Number of Pages: 03 + 66 + 23 + 01 + 02

Reply required : Yes No

Dear Mr. Vishesh,

1.DND Cost: DND cost is the extra cost happened to CINDA to rectify the mistake by M/S.Suntech such as pile deviation, Sound concrete missing till cutoff level etc. Fault happen, because M/S.Suntech did not follow CINDA approved drawing which results in extra cost. Maximum. Find the attached DND report and photos as evidence. Find the below Contract Clause 5.4.3 for reference. (Attachment 1.DND Report and Photos).

5.4.3 In the event that the inspection of Company reveals defects or omissions in the Work, Company shall immediately notify the Contractor thereof in writing and the Contractor shall in consultation with Company, and at its own expenses, take such action as is necessary to make good such defects and execute such omitted work in respect of the Work, whereupon the Work or relevant part thereof shall again be subject to inspection by Company.

2. Material Cost (CEMENT and Rebar): CINDA agreed that supply of cement and rebar is in CINDA scope. But CINDA is claiming only for those additional material which has been used for pile built up occurred due to M/S.Suntech fault. Find below point mentioned in requisition attached in contract for reference.

11.6 During construction or final Inspection of the work CINDA proceed With required inspection and found the quality of the work is not in compliance with the Contract document, the relevant inspection removing or improvement shall be at Subcontractor's expenses within the allotted time.

Cinda Engineering & Construction Pvt. Ltd.

Authorised Signatory

CERTIFIED TRUE COPY

CTCI & CINDA CONSORTIUM

TEL: + 91 120 4722300
FAX: +91 120 4722399

3. After continuous followup with M/S. Suntech regarding equipment and manpower mobilization for bore muck removal, the subcontractor denied to mobilize on time. So CINDA deployed manpower (Helper, Rigger) and equipments such as excavator, dumper to continue the work. Photos in the attachment shows manpower and equipment belongs to CINDA. Cost incurred to CINDA is deductible from M/S. Suntech, as this scope belongs to subcontractor (Contract Clause. 14 for reference) Find the attached letter issue dto M/S. Suntech and photos of waste concrete disposal by CINDA as evidence. (Attachment 2. CINDA Support)

14.0 BACKCHARGE

Under the condition that the Contractor does not provide sufficient workers, necessary Construction Equipment and materials to perform the Work or any relevant item of the Work, the Company may, at its sole discretion, provide necessary task force together with necessary Construction Equipment and materials to complete the Work within the specific time frame: and all costs incurred by the Company for providing such task force. Construction Equipment and/or materials shall be reimbursed by the Contractor or be deducted from any monies due or become due to the Contractor.

4. LD Charges (10%): As per contract work schedule was 5/Dec/2016 to 30/April/2017. Actual completion date for piling work is 29/June/2016. Find below LD clause 5.5.2 mentioned in contract for reference. M/S. Suntech deviation from contract is 60 Days. So by calculation following the contract, 10% LD is applicable. Find the below clause 5.5.2 for reference.

5.5.2 If the guaranteed date of completion set forth in Article 5.1 is not achieved by the Contractor for reasons other than those set forth in Article 5.5.1, the Contractor shall, without any demonstration of actual damages suffered by the Company, be liable to pay to the Company a penalty at an amount of zero point seventy five percent (0.75%) of the final Contract Price including all agreed Changes during the performance of the Work for each calendar day that achievement of guaranteed completion date of Work is delayed. The delay penalty shall be limited to ten percent (10%) of the final Contract Price; and such delay penalty shall be promptly reimbursed by the Contractor or be deducted from any monies due or to become due to the Contractor and or the Contract. Once the maximum of delay penalty is reached, Company may, without prejudice to other remedies Company may have under the Contract, terminate the Contract under the Clause of Termination for Default in the General Terms and Conditions.

5. Pile Integrity Test: M/S. Suntech denied to conduct PIT Test for small quantity of piles. Reason provided was that M/S. Suntech agency for PIT Test will not mobilize for small quantities (Minimum required 30 No's of piles as per Suntech Information). So CINDA hire the vendor for PIT Test without any delay for progress of work. CINDA have provided the pile details which we have done the PIT Test.

Cinda Engineering & Construction Pvt. Ltd.

5

Authorised Signatory

CERTIFIED TRUE COPY

**CTCI & CINDA
CONSORTIUM**

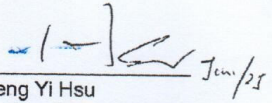
TEL: + 91 120 4722300
FAX: +91 120 4722399

6. Details of Losses Incurred by M/S.Suntech: CINDA already provided the reply for M/S.Suntech. Find the attachment FYI (Attachment 3.Reply to M/S.Suntech)

7. Details of losses incurred to CINDA: Losses incurred to CINDA because of M/S.Suntech issues such as Hydraulic hose breakdown, Engine problem, Piling rig breakdown etc. All these causes idling of our batching plant, equipment's, man hours. Total cost is INR.5, 180,211/- (Attachment 4.Losses Incurred to CINDA)

8. CP Cable Damage: In A100 area (PR 401), M/S.Suntech damaged existing CP cable while piling work.CINDA has to rectify this CP Cable. All the cost for rectification will be back charged to M/S.Suntech.Material and installation cost for CP cable damage is around INR.13 Lack.

Sincerely yours,
CINDA Engineering & Construction Pvt. Ltd.


Feng Yi Hsu
Project Site Manager

Cinda Engineering & Construction Pvt. Ltd.


Authorized Signatory

- By *e-mail* dated 20th February, 2018 the 'Corporate Debtor' sent a letter to the 1st Respondent offering to waive off its claim for

liquidated damages and reducing its claim but it was refused by the 1st Respondent by an *e-mail* dated 21st February, 2018. The aforesaid two *e-mails* were also suppressed by the 1st Respondent.

10. From the *e-mail* dated 26th January, 2018 as extracted above, we find that there is a pre-existing dispute relating to delay in delivery of project and the loss sustained by the 'Corporate Debtor' in rectifying the workmanship defects in the works made by the 1st Respondent, we hold that the application under Section 9 was not maintainable.

11. The Adjudicating Authority having failed to issue any notice to the 'Corporate Debtor' before admission of the application under Section 9, it prejudiced the 'Corporate Debtor', who could have shown pre-existence of dispute and thereby with a request to dismiss the application.

12. The 'Resolution Professional' has filed its affidavit, similar plea has been taken as 1st Respondent has taken but as 'Resolution Professional' has no role for admission of Section 9, it is not open to him to support or oppose one of the party on the question of fact except to dispute or admit one or other fact.

13. For the reasons aforesaid, we set aside the impugned order dated 14th November, 2018.

14. In effect, order (s) passed by Ld. Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the 'Resolution Professional', including the advertisement published in the newspaper calling for applications all such orders and actions are declared illegal and are set aside. The application preferred by the 1st Respondent under Section 9 of the I&B Code is dismissed. The Adjudicating

Authority will now close the proceeding. The 3rd Respondent Company is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

14. The Adjudicating Authority will fix the fee of 'Interim Resolution Professional' and 'M/s. CINDA Engineering & Construction Pvt. Ltd.' (3rd Respondent) will pay the fees for the period he has functioned. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

New Delhi

24th January, 2019

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