

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 790 of 2019

[Arising out of Order dated 14th June 2019 passed by Adjudicating Authority, Bench-III, New Delhi in Company Petition No. IB-889(N.D.)/2018]

IN THE MATTER OF:

M/s Naik Environment Engineers Pvt. Ltd.

Having registered office at:

A-686, Naik Enviro House

Pavane Industrial Area

Navi Mumbai – 400705

...Appellant

Versus

M/s Indiabulls Constructions Limited

Having its registered office at:

M-62 & 63, First Floor

Connaught Place

New Delhi – 110001

...Respondent

Present:

For Appellant : None

For Respondent : Mr Sumesh Dhawan, Ms Geetika Sharma and Ms Vatsala Kak, Advocates

J U D G M E N T

[Per; V. P. Singh, Member (T)]

This Appeal emanates from the Order dated 14.06.2019 passed by Adjudicating Authority, Bench-III, New Delhi in Company Petition No. IB-889(N.D.)/2018 titled as Naik Environmental Engineers Pvt Ltd Vs. India Bulls Construction Ltd., whereby the Adjudicating Authority rejected the application of the Appellant filed under Section 9 of the IBC. Parties are represented by their status in the company petition for the sake of convenience.

2. Brief facts of the case are as follows:

The Petitioner/Appellant of the company petition placed 3 Purchase Orders and 2 Work Orders inter-alia for comprehensive maintenance, operation of the plant including the supply of consumables and chemicals and supply of materials for reinstatements, repairs, servicing of the sewage treatment plant, equipment of different capacities, operation and maintenance of STP's, ETC at project sites at Hyderabad and Panvel. Petitioner fulfilled its part under the purchase orders/work order placed by the Respondent to its entire satisfaction and raised seven invoices upon Respondent. However, after making part-payment towards the said invoices, the Respondent failed and neglected to make the payment under the Purchase Orders and Work Orders in question. After that, the Petitioner issued a legal notice to the Respondent. The Respondent failed to make the payment qua the invoices raised. Thus, the Appellant/Petitioner preferred to file the company petition seeking the balance of Rs. 48,06,944/- along with interest.

The Appellant contends that the Adjudicating Authority failed to consider and appreciate the submissions of the Appellant and arrived at a perverse finding that there exists a pre-existing dispute between the parties, thereby, rejected the application. Feeling aggrieved by the said Order, this Appellant has been preferred by the Petitioner/Appellant.

3. The Petitioner further contends that the Adjudicating Authority erred in concluding that there exists a prior dispute between the Appellant and the Respondent based on the facts which are not even a subject matter of

the case before the NCLT. It is further contended that Adjudicating Authority erred in observing that there is a running composite account between the parties, and there is no differentiation between different work orders. In contrast, the purchase orders/work orders are separate and different. It is further contended that the finding of the Adjudicating Authority that there is a running composite account between the parties and there is no differentiation between the work orders is wrong and perverse.

4. In Reply to the Appeal, the Corporate Debtor/Respondent submits that it had received four demand notices under Section 8 of the IBC even though there is a pre-existing dispute pending prior to the issuance of the demand notices. Respondent further submits that they are not liable to pay the Appellant anything under Work Order No. 3228001829, 3228002396, 3228001827, 3228108125, 3228002395 until the Petitioner successfully complied the terms and conditions of every purchase order and work order.

5. The Ld. Adjudicating Authority has rejected the Petition mainly on the ground that there is a running composite account between the same parties, and there is no differentiation between different work orders issued between the parties. The claim of the Applicant and their application is only concerning five Work Orders and not concerning two Work Orders is not acceptable. The Adjudicating Authority further observed that the Respondent has clearly shown that disputes are pending regarding all the work orders between the Applicant and Respondent. Based on the above finding, the Adjudicating Authority dismissed the Petition, which is under challenge in this Appeal.

6. We have heard the arguments of the Learned Counsel for the parties and perused the record.

7. The point in issue in this Appeal is as follows:

Whether pre-existing dispute exists before issuance of the demand notice?

8. On perusal of the record, it appears that the Ld. Adjudicating Authority has given a finding that there is a running composite account between the same parties, and there is no differentiation between the different work orders issued between the parties. It is also on record that the Operational Creditor had filed Section 9 application in respect of outstanding dues under the following Purchase Orders and two Work Orders amounting to Rs. 48,06,944/- with the interest of Rs. 14,69,242/- aggregating to Rs. 62,76,186/- for the projects at Hyderabad Centrum Project, Hyderabad and Greena Panvel Project, Maharashtra:

- i. P.O. No. 3228001827 dated 21.12.2012
- ii. P.O. No. 3228108125 dated 04.12.2013
- iii. P.O. No. 3228002395 dated 13.03.2014
- iv. W.O. No. 3228001829 dated 21.12.2012
- v. W.O. No. 3228002396 dated 13.03.2014

9. The Adjudicating Authority rejected the application on the premise that there was a dispute about the commissioning of sewage treatment plant (STP) at Parel, Mumbai (Sky Forest Project), hence not maintainable. The Adjudicating Authority further observed that there was a running composite account between the parties, and there was no differentiation between different Work Orders issued between the parties.

10. It is pertinent to mention that separate demand notices under Section 8 were issued in respect of supplies of STP at Hyderabad and Panvel projects. The outstanding amount due from Sky Forest Project (Parel, Mumbai) is not claimed in this proceeding. No demand notice has been issued under Section 8 of the IBC regarding the outstanding amount due concerning Sky Forst Project, Parel, Mumbai. The Sky Forest Project is arising out of the W.O. No. 3228108736 and W.O. No. 3200100371 for which no demand notice has been issued.

11. The Appellant further contends that each Purchase Order/Work Order constitutes a separate contract, having different payment terms and conditions. The Corporate Debtor sent a common reply to the separate demand notices and the only ground for non-payment is shown in the Reply is regarding the default in services of Sky Forest Project, Parel, Mumbai.

12. It is necessary to quote the following para of Reply to the demand notice:

“In view thereof and circumstances aforesaid, we state that we are not liable to pay you anything under Work Order no. 3228108736 and 3200100371 until we receive successfully commissioned STP at our Sky Forest Project. On the contrary, it is us who is entitled to invoke indemnity provided under the Work Order no. 3228108736 and 3200100371 and claim refund of the entire amount paid by us to you under the aforesaid work orders with interest and recover expenses and penalties that is being suffered by us due to your failure and

negligence to provide us fully workable STP to comply with our statutory requirement”.

13. On perusal of the above-quoted Reply to the demand notice, it is clear that the Corporate Debtor has complained regarding deficiency of service in respect of only Work Order no—3228108736 and 3200100371, which relates to the ‘STP’ at Sky Forest Project. The Appellant contends that till date, no action under IBC is taken for realization of the outstanding dues relating to the Sky Forest Project, which emanates from the Work Order no. 3228108736, and 3200100371.

14. On perusal of the application filed under Section 9, it is clear that this Petition is not filed relating to the outstanding dues in connection with Work Order No. 3228108736, and 3200100371. Therefore, for the deficiency in services regarding the Sky Forest Project is not in question in this case. It is relevant to mention that each Purchase Order/Work order constitutes separate contract having separate payment terms and conditions and independent dispute resolution clause. The Corporate Debtor sent common Reply to the separate demand notices dated 08.01.2018 and only ground for non-payment was that Sky Forest Project at Parel, Mumbai was allegedly having problems concerning its commissioning. The Corporate Debtor stated that they are not liable to pay anything under Work Order about Sky Forest Project only. In fact, in the last paragraph of the Reply to the demand notice, the Corporate Debtor stated that in respect of the supply of STP at Panvel, Hyderabad, the company would respond separately. The project-wise separate calculation sheets are also filed. The Corporate Debtor did not

submit any response against the demand notices issued in respect to Panvel/Hyderabad supplies.

The Hon'ble Supreme Court in case of *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.*, (2018) 1 SCC 353: 2017 SCC OnLine SC 1154: (2018) 1 SCC (Civ) 311 at page 403 has laid down the principle for determining pre existing for allowing or rejecting application U/S 9 of the Code.

In the above mentioned case Hon'ble Supreme Court has held that:

“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.

56. Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterising the defence as vague, got up and motivated to evade liability.”

15. It is also important to mention that this Petition was initially filed at Mumbai on the assumption that the registered office of the Corporate Debtor is at Mumbai. However, subsequently, the same was withdrawn with liberty to submit a fresh application. After that, new demand notices dated 16.04.2018 were reissued inter-alia, confirming the claim under the Purchase Order/Work Order of supplies made at Hyderabad/Panvel. The Corporate Debtor sent a fresh response back, reiterating in para 11 and 12 that unless the STP at Sky Forest Project, Parel is commissioned, the Corporate Debtor is not liable to pay the amount.

16. It is stated in the second reply that:

“You are well aware that your STP installed at our Sky Forest project has failed to function at its required capacity, and you have also failed

to operate and repair it. From your notices, it appears that you want to pressurize us in expediting the payment under P.O. 3228108125 without commissioning and testing of STP at India Bulls Green Panvel Project as you fear that the same will not function similar to STP at Sky Forest Project.

In view of the aforesaid, we hereby call upon you to withdraw all your notices and letters under reference in respect of Purchase Order No. 3228108125 dated 04.12.2013. You are further called upon to comply with terms of P.O. 3228108125 and refrain from demanding full payment until all actions under the said P.O. is executed.”

17. On perusal of the above Reply to the demand notice, it is clear that service was deficient in respect of Sky Forest Project, but there was no dispute concerning P.O. No. 3228108125. The Corporate Debtor himself alleged that the Operational Creditor is pressurizing the payment under P.O. No. 3228108125 under the fear that the same will not function similar to STP at Sky Forest Project. On perusal of the Reply dated 23.04.2018 (Annexure A-7), it is clear that no dispute was existing about the P.O. No. 3228108125. There is nothing on record to substantiate that there is running composite account between the same parties, and there is no differentiation between different work orders issued between the parties. The above observation of the Adjudicating Authority is without any basis. It is also necessary to mention that each P.O./W.O. Constitutes separate contract having separate terms and conditions and independent dispute resolution clause, therefore for the alleged deficiency of service relating to

the Sky Forest Project, the outstanding payment relating to other invoices could not be stopped and the finding of the Adjudicating Authority that there was pre-existing dispute is also erroneous. Based on the above discussion, and the law laid down by Hon'ble Supreme Court in *Mobilox Innovations (P) Ltd.* it is clear that the Adjudicating Authority erred in rejecting the application filed under Section 9 of the IBC based on the pre-existing dispute. Thus, the Appeal deserves to be allowed.

ORDER

Appeal filed by M/s Naik Environment Engineers Pvt. Ltd. is allowed. We are of the concerned opinion that all the ingredients of Sec 9 application are fully satisfied. The Adjudicating Authority is directed to pass the Order of admission within seven days from the date of submission of a certified copy of Order.

[Justice Venugopal M.]
Member (Judicial)

[V. P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI
08th JUNE, 2020

pks/nn