NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 726 of 2019
&
I.A. No.1975 of 2021

IN THE MATTER OF;

Continental Piling & Excavation Pvt. Ltd.
Having its Registered office at:
Flat No. 5D, Priyanka Apartment,
S.C. Goswami Road, Panbazar, Guwahati,
Kamrup, Assam

And its Corporate Office at
A-73, New Friends Colony,
New Delhi. ….**Appellant**

Versus

Capacit'e Infraprojects Limited,
(earlier known as Capacit'e Infraprojects Pvt. Ltd.)
605-607, Shrikant Chambers, Phase-I,
6th Floor, Adjacent to R.K. Studios,
Sion-Trombay Road,
Mumbai-400071. …**Respondent**

PRESENT

For Appellant: **Mr. Saurabh Seth and Ms. Sumeera Seth, Advocates**

For Respondent: **Mr. Rishi Bhatnagar and Mr. Mohan Kumar Khullar, Advocates**

JUDGMENT
(14.07.2022)
(Virtual Mode)

[Per.: Dr. Alok Srivastava, Member (Technical)]

This appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereafter called 'IBC') by the Appellant, who is aggrieved by the order dated 14.12.2018 (hereafter called Impugned Order) passed by the National Company Law Tribunal, Mumbai (Adjudicating Authority) in CP 435/I&BP/NCLT/MAH/ 2018, by which the application filed by the Operational Creditor Continental Piling & Excavation Pvt. Ltd. under section 9 of the IBC was dismissed by the Adjudicating Authority on the ground of a dispute which was existing between the Operational Creditor and Corporate Debtor prior to the serving of demand notice under section 8 to the Corporate Debtor.

2. In brief, the facts of the case are that the Corporate Debtor had given two work orders dated 17.8.2013 and 22.10.2013 to the Operational Creditor (attached at pp.57-61 of the appeal paperbook) relating to piling and foundation work in a project undertaken by the corporate debtor. The Appellant has stated that after completion of the work, certain invoices were raised by the Appellant/Operational Creditor for payment of the said invoices for work done (invoices attached at pp.62-72 of the appeal paperbook) and some payments were made by the corporate debtor against

these invoices. He has further stated that he had submitted all the necessary documents such as Provident Fund challans, ESI challans, wage register copy etc. to the corporate debtor vide letter dated 13.8.2016 (attached at pg. 89 of the appeal paperbook). The Appellant has claimed that despite submission of the detailed documents, he was sent e-mail communication(s) dated 26.9.2016, 3.10.2016 and 12.10.2016 (attached at pp. 85, 86 and 88 of the appeal paperbook) asking him to submit account statement alongwith relevant documents in respect of labour and other statutory compliances required under law for release of pending payment after due verification. He has, further, stated that vide e-mail dated 12.11.2016, he informed the corporate debtor that all labour compliances have been made and the operational creditor was willing to hand over a indemnity letter in the event any legal consequences/damages were faced by the corporate debtor in respect of the works carried out by the operational creditor.

3. As certain payments amounting to Rs.38,34,843.53 were due against invoices issued during the period 26.10.2013 to 6.9.2014, the operational creditor sent a section 8 demand notice dated 16.8.2017 to the corporate debtor (attached at pp.92-97 of the appeal paperbook), which was replied to vide letter dated 25.8.2017

by the corporate debtor wherein he pointed out that the operational creditor was required to fulfil all the labour law related and other statutory compliances, which were part of the 'Other Terms and Conditions' of the work order and these documents were not submitted to the corporate debtor.

4. We heard the arguments advanced by the learned counsels for both the parties. The Learned Counsel for Appellant has argued that the Respondent has made vital admissions with regard to the existence of debt in various documents, as well as in reply to section 8 notice and in reply to the section 9 application, and a total amount of Rs. 39,14,843.53 is due and payable by the corporate debtor to the operational creditor. He has further submitted that the work order required the Appellant to comply with the labour rules, regulations and laws and other statutory compliances, but there is not a single clause in the work order which entitles the Respondent to withhold payments which are due to the Appellant on account of any non-compliance of labour laws and related statutory compliances. He has also submitted that Respondent has deposited TDS due on the amounts given to the Respondent/Operational Creditor and has placed Form 26AS (attached at pp. 76-78 of the appeal paperbook) before us in proof of the same. He has argued

that Form 26AS amounts to a clear and unambiguous admission by the Respondent regarding the existence of debt which is payable to the Appellant. He has also submitted that the fact about depositing the TDS has also been admitted by the Respondent in reply to the section 8 demand notice (attached at pp.100-103 in paragraph 7). In addition, the Learned Counsel for Appellant has stated that the Respondent has also placed on record a ledger/statement of account (attached at pg. 151 of the appeal paperbook) as admission of the operational debt and, therefore, looking at all these admissions and evidences the existence of operational debt, that is due and payable to the appellant is clearly established.

5. Additionally, the Learned Counsel for Appellant has argued that while the Appellant was required to comply with labour laws under the work order payments that are due should have been made to the Appellant as the 'Terms and Conditions' in the work order makes it incumbent on the respondent/corporate debtor to make payment within 10 days of submission of invoice. He has stated that the Appellant has complied with labour regulations and subjected itself to regular audit from time to time, and in such a situation the due and payable amount cannot be withheld. Finally, the Learned Counsel for Appellant has claimed that the Impugned

Order is not fully reasoned and does not deal with the points raised by the Appellant. In support of his contention, the Learned Counsel for Appellant has claimed that in the present case the dispute being raised by the corporate debtor is a hypothetical and illusory one which cannot be a ground for denial of debt payment by the corporate debtor. He has referred to the judgment of the Hon'ble Supreme Court in the matter of **Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353,** wherein it is held that the defence put up by the Respondent which is hypothetical and moonshine, cannot help him evade his responsibility to pay the operational debt which is otherwise established as due and payable.

6. In reply, the Learned Counsel for Respondent has pointed out to the various communications made between the Appellant and the Respondent regarding non-submission of documents showing compliance of labour laws and other statutory compliances very clearly and unambiguously establish the existence of dispute between them. In proof, he has cited letters dated 31.8.2016 (attached at page 89 of the appeal paperbook), undated letter (attached at page 86 of the appeal paperbook), dated 26.9.2016 (attached at page 87 of the appeal paperbook), dated 3.10.2016

(attached at page 85 of the appeal paperbook) and dated 12.10.2016 and e-mail dated 12.10.2016 (attached at pages 88 and 90 of the appeal paperbook) and e-mail dated 12.11.2016 (attached at page 91 of the appeal paperbook) to argue that the respondent had been continuously requesting the appellant to submit various documents to show compliance with requirements of labour laws and other statutory compliances as detailed in the respondent's letter dated 3.10.2016 but no such documents/statements were submitted by the appellant. He has also pointed out that in the e-mail dated 12.11.2016 (attached at page 91 of the appeal paperbook), the appellant has stated that the requirements of labour compliances are not relevant for the purpose of clearing the outstanding dues payable to him .

7. The Learned Counsel for Respondent has brought to our attention the clauses (i) and (j) in the section 'Other Terms and Conditions' of the work order (attached at pp.57-60 of the appeal paperbook) to claim that the contractor (the appellant in this case) has to abide by all the laws/provisions of the Central/State/Local authorities that may be related (whether directly or indirectly) to the construction activity at site and to also strictly follow the provisions of law related to labour e.g. minimum wages, working hours and

conditions, ESIS and PF provisions etc. He has argued that the respondent received enquiries from labour/PF authorities regarding compliance of labour laws, and in support of his contention he has pointed out to the letter from EPFO dated 30.11.2018 (attached at pg. 23 of Respondent's reply, diary. No. 15053 dated 11.10.2019).

8. In rejoinder, the Learned Counsel for Appellant has stated that the appellant had submitted the documents relating to ESI/PF payments and other compliances for the period September, 2013 to February, 2014 with his letter dated 31.8.2016, and furthermore, the letter from the EPFO dated 30.11.2018 (attached at pg. 23 of Respondent's reply, diary. No. 15053 dated 11.10.2019) is a general letter addressed to the corporate debtor and is not specific to the work carried out by the operational creditor. He has also referred to the Appellant's e-mail dated 12.11.2016 wherein the Appellant has expressed willingness to hand over indemnity letter that no legal consequences/damages will be faced by the Respondent in respect of the work carried out by the operational creditor in respect of the project, and the letter from EPFO dated 30.11.2018 was not placed before the Adjudicating Authority for consideration by the respondent.

9. The Appellant has submitted IA No. 1975/2021, an application under rules 11 and 14 of the NCLT Rules, 2016, for filing additional documents before this tribunal. With this interlocutory application, the Appellant has placed Annexure A-16 (attached at pps. 249-314 of the appeal paperbook) in support of his claim that the work was completed in accordance with the terms and conditions of the work order and TDS was paid by the corporate debtor and labour laws' compliances were also made by the appellant. He has placed documents regarding payments to the EPFO with copies of challans (attached at pp.283/296 of appeal paperbook) and reports of visits by EPFO officers (attached at pp.297-310 of the appeal paperbook). It is noted by us that these documents were not placed before the Adjudicating Authority, and the list of documents attached to section 9 application (attached at pp.121-126 of appeal paperbook) also shows that these documents were not part of the section 9 application.

10. Hon'ble Supreme Court in the matter of **Dena Bank vs C. Shivakumar Reddy, (2021) 10 SCC 330** has held as follows regarding filing of additional documents in a section 7 application:-

> ***"142.*** *There is no bar in law to the amendment of pleadings in an application under Section 7 IBC, or to the filing of*

additional documents, apart from those initially filed along with application under Section 7 IBC in Form 1. In the absence of any express provision which either prohibits or sets a time-limit for filing of additional documents, it cannot be said that the adjudicating authority committed any illegality or error in permitting the appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate delay, the adjudicating authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the adjudicating authority to entertain and/or to allow the request of the appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal.

11. It is noted that the appellant did not seek the permission of the Adjudicating Authority to place any additional documents in support of his section 9 application. As is evident from the judgment in **Dena Bank (supra)**, the Adjudicating Authority can accept additional documents at the stage of adjudication of section 7 application. It stands to reason that a similar condition will apply in the matter of section 9 application.We find that in this case the applicant/appellant did not make any request to the Adjudicating Authority for accepting additional documents. We also note that the Adjudicating Authority, in accordance with the requirement of section 9, decided the application keeping in view the information and documents presented in the section 9 application. We,

therefore, are of the view that it would not be appropriate that the additional documents placed before us through I.A. 1975/2021 be accepted at the stage of appeal. I.A. 1975/2021 is therefore rejected.

12. The Terms and Conditions of the work order provide for compliance of labour laws. The relevant clauses in the work order regarding labour law and statutory compliances which are included in the section "Terms and Conditions" and "Other Terms and Conditions" of the work order" are reproduced below for ready reference:-

> ***<u>Terms and Conditions:</u>***
>
> *xx xx xx xx*
>
> *13. On receipt of monthly bill payment will be released in 10 days.*
>
> ***<u>Other Terms and Conditions:</u>***
>
> *xx xx xx xx*
>
> *(i) Contractor has to abide all the laws/Provisions of Central/State/Local authorities that may be related (whether directly or indirectly) to construction activity at the site.*
>
> *(j) Contractor will strictly follow the provisions of law related to labour, e.g. minimum wages, working hours and conditions, ESIS & P.F provisions etc.*

13. Clauses (i) and (j) contained in the 'Other Terms and Conditions' are quite clear that the operational creditor has to comply with all the laws/provisions of Central/State/Local authorities that may be related to the construction activities at site and also to strictly follow the provisions of law related to the labour etc. It is also not denied by the parties that this work order relates to a labour contract where the material is being supplied by the corporate debtor and the labour is being arranged by the operational creditor. Therefore, the compliance of all the statutory requirements of Central/State/Local authorities regarding construction and following of provisions of labour laws squarely falls on the operational creditor, and in our view, are not just relevant but a pre-condition for payment to the operational creditor. Therefore, we are not persuaded by the argument of the Appellant that on receipt of monthly bill, payment has to be released in 10 days irrespective of whether due compliances regarding statutory requirements and labour laws have been made.

14. We note that in the undated letter from the Corporate Debtor to the Operational Creditor (attached at page 86 of the appeal paperbook) the operational creditor is reminded to submit final bill with documents for reconciliation. Another letter dated 12.10.2016

of the corporate debtor, while referring to his earlier letter dated 26.9.2016 asks the operational creditor to submit necessary documents regarding labour law compliances. Aanother e-mail dated 12.10.2016 from the corporate debtor to operational creditor (attached at page 90 of the appeal paperbook) wherein it is stated as follows:-

> "Xx xx xx
>
> *May we invite your kind attention to our communications dated 26/09/2016 and 30/10/2016, whereby we have had stressed upon you to kindly visit our office along with relevant documents in respect of labour compliances done by you under law and statement of accounts so that payment if any due after verification of the same, could be released?*
>
> *It is regretted that you have not so far complied with the requirements of documents and given undertaking as detailed in our letter of 3rd October, 2016 also.*
>
> *Hope you will do the needful at an early date to enable us to settle this issue, we therefore in write this to inform you that we shall await for period of thirty days (30 days) to enable you to comply the requirements as intimated failing which, we will be taking it for granted that the issue should be treated as closed from your side."*

Thereafter, an e-mail dated 12.11.2016 is sent by the operational creditor to the corporate debtor (attached at page 91 of the appeal paperbook) which states the following:-

'Xx xx xx xx

With regard to your requirements of labour compliances as contained in your previous communications as well as meetings, it is stated that the same is not relevant for the purposes of clearing the outstanding dues payable to us. The purchase order and relevant documents executed between us does not in any manner empower you to withhold payments on account of any such requirement.

Be that as it may, we have already informed you that all labour compliances have been made and are even willing to hand over an indemnity letter from our end that no legal consequences/damages would be faced by you in respect of the works carried out by us in respect of the project.

It is further stated that 3C has independent and distinct transactions with us and is no way related to our transaction.'

15. We thus find that while the operational creditor claims to have submitted all the relevant documents regarding labour compliances, the corporate debtor has been repeatedly asking the operational creditor to submit the relevant documents. We also note that the operational creditor, in his e-mail dated 12.11.2016 states that the requirement of labour compliances as contained in (corporate debtor) previous communication as well as meetings are not relevant for the purposes of clearing outstanding dues payable to the operational creditor, but he is still willing to hand over an indemnity letter regarding no legal consequences/damages to be faced by the

corporate debtor. No indemnity letter is also found to be handed over to the corporate debtor.

16. Hon'ble Supreme Court, in its judgment delivered in the **Mobilox Innovations case** (supra), has decided as follows:-

> *"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 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."*

17. We note from the reply sent by the corporate debtor to the section 9 application that the corporate debtor had been repeatedly pointing out the deficiency/insufficiency of documents relating to labour law compliances submitted by the operational creditor. At one point in his e-mail dated 12.11.2016, the operational creditor claims that the requirements of labour compliances are not relevant

for the purpose of clearing the outstanding dues. The sections on 'Terms and Conditions' and 'Other Terms and Conditions' of the work order dated 17.8.2013 very clearly show that the work order relates to a labour contract and therefore the conditions regarding compliance of all labour laws and Central/State/Local authorities' statutory requirements are necessary and have to be done. We are, therefore, not convinced by the claim of the Appellant that compliance of labour laws and other statutory requirements including PF/ESIS compliances are not relevant to the contract. Suffice to say that there is a dispute between the parties that existed prior to the sending of the section 8 notice which is not merely a hypothetical dispute or a dispute raised in moonshine defence.

18. On the basis of aforementioned discussion, we are of the view that the Adjudicating Authority, who has relied on the facts and documents presented before it alongwith the section 9 application, has not erred in holding that a 'pre-existing dispute' was present in the case, and has, therefore, correctly rejected the section 9 application. We, thus, find that the appeal is devoid of any merit and accordingly dismiss it.

19. There is no order as to costs.

(Justice Rakesh Kumar Jain)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

(Barun Mitra)
Member (Technical)

New Delhi
14th July, 2022

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