

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 354 of 2020

(Arising out of Impugned Order dated 25.02.2020 passed by the
Adjudicating Authority/National Company Law Tribunal, New Delhi
in CP (IB) No. 615 (ND) /2018)

In the matter of

**Mr. Rajpal Singh Solanki,
Ex-Director of Minarch Overseas Private Limited,
G-7, Ashok Plaza Building, 12A//14, W.E.A.,
Karol Bagh, New Delhi-110005 ... Appellant**

Vs.

**M/s. Quazar Infrastructure Pvt. Ltd.,
B-64, Chhatarpur Enclave,
Delhi-110074. ... Respondent
No. 1**

**Mr. Vinod Kumar Chaurasia,
Interim Resolution Professional for
Minarch Overseas Private Limited,
A-756, Sector-2, Rohini,
New Delhi, Delhi-110085. ...Respondent
No. 2**

Present

**For Appellant: Mr. Virender Ganda, Sr. Advocate with
Mr. Vipul Ganda, Mr. Ayandeb Mitra,
Ms. Aastha Trivedi, Mr. Guresha
Bhamra,**

Ms. Dipika Ganda, Advocates

**For Respondent: Mr. Nakul Mohta, Advocate for R-1
Mr. Vinod Kr. Chaurasia and Mr. Iswar
Mohapatra, R-2, IRP**

Judgment
(Date: 2.7.2021)

{Per: Dr.Alok Srivastava, Member (T)}

1. This appeal has been filed by Rajpal Singh Solanki, a Director in the suspended Board of Directors of the Corporate Debtor M/s Minarch Overseas Pvt. Ltd. aggrieved by the Order dated 25 February, 2020 (hereinafter called the Impugned Order) of the Adjudicating Authority (National Company Law Tribunal, New Delhi) in CP (IB) No. 615 (ND)/2018, which was filed by the Respondent Quazar Infrastructure Pvt. Ltd., an Operational Creditor.

2. The Adjudicating Authority has admitted the application filed by the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code (hereinafter called the IBC) through the Impugned Order while rejecting the contention of the Corporate Debtor that there was a pre-existing dispute between the Appellant and Respondent No.1.

3. The brief facts of the case as presented and argued by the Appellant is that by virtue of an agreement dated January 18, 2013 between the Corporate Debtor and the Operational Creditor, which

commenced on January 15, 2013, a works contract was awarded to the Operational Creditor for carrying out civil work for construction of office building for a total contract value of Rs. 5,32,74,331 by the Corporate Debtor. This project was to be completed within nine months, by October 14, 2013. The Appellant has claimed that, in addition to the original works contract, the Corporate Debtor awarded additional work relating to fire-fighting, plumbing and electrical work in the project to the Operational Debtor on December 21, 2013 and the completion date for these additional works was agreed to be September 30, 2014. The Appellant has alleged that Respondent No. 1 did not work according to the conditions of the contract - the pace of construction was slow and it was of sub-standard quality in addition to other deficiencies. He has alleged that the Operational Creditor stopped execution of the contract from April 2015 leaving the project incomplete. The Appellant has claimed that payments against certain running bills were made to Respondent No.1, but he did not raise any bill after February 16, 2015 and since the Operational Creditor left the work incomplete, it had to be completed by employing a new contractor, and as a result the Corporate Debtor suffered financial loss.

4. The Appellant has mentioned two demand notices dated 16.2.2018 and 23.2.2018, given by the Respondent No. 1
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(Operational Creditor) to the Appellant (Corporate Debtor). In his reply and oral arguments, the Learned Counsel for Respondent No. 1 has stated that for the purpose of this matter which is under the IBC, the demand notice dated 23.2.2018 issued under Section 8 of IBC is being relied upon and the reply of the Appellant to this demand notice dated 23.3.2018 is therefore to be considered. We will, therefore, consider the demand notice dated 23.2.2018 and its reply by the Corporate Debtor dated 23.3. 2018 for the purpose of this appeal, as has been done by the Adjudicating Authority.

5. The main issue on which this appeal hinges is the pre-existence or otherwise of dispute between the Appellant and Respondent No. 1 regarding the claimed operational debt. In the Impugned Order the Adjudicating Authority has not considered the dispute raised by the Corporate Debtor as a pre-existing dispute and has consequently admitted Section 9 application of the Operational Creditor.

6. In the arguments the Ld. Counsel of Appellant has cited two letters dated 14.10.2014 (page 236, volume 2 of Appeal) and dated 18.1.2016 (page 235, volume 2 of Appeal) to claim that the Appellant had raised the issues of sub-standard construction, slow pace of work and leaving the work incomplete with the Operational

Creditor, which according to the Appellant, are evidence of pre-existing dispute. The Respondent has refuted this claim of Corporate Debtor stating that the said letters are an afterthought and were not given to Respondent No. 1 by the Corporate Debtor. He has stated that the Corporate Debtor has at no place mentioned these letters or having given these letters to the Operational Creditor regarding the disputed issues, whether in reply to the demand notice dated 23.3.2018 under section 8 of IBC or in his reply to the Section 9 application. A perusal of the documents submitted by the Appellant and Respondent No. 1 in the Appeal, which includes the reply to the demand notice dated 23.3.21 (attached at pages 57-64 of the Appeal Paperbook, Vol. I) given by the Appellant-Corporate Debtor under Section 8 of the IBC, and also his reply to the Section 9 application(attached at pages 103-199 of Appeal Paperbook, Vol. I) submitted by the Corporate Debtor, makes it abundantly clear that these two letters claimed by the Appellant as evidence of pre-existing dispute are not mentioned in either of the two replies of the Corporate Debtor.

7. It would be useful to refer to Section 8 of the IBC regarding conditions for admission of Section 9 application:-

“8. *Insolvency resolution by operational creditor -*

(1) An operational creditor may, on the occurrence of a

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default, deliver a demand notice of unpaid operational debtor copy of invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -

- (a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*
- (b) the payment of unpaid operational debt-*
 - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*
 - (ii) by sending an attested copy of the record that the operational creditor has encashed a cheque issued by the corporate debtor.*

Explanation: For the purposes of this section,

a”demand notice” means a notice served by

an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.”

The provision under Section 8(2)(a) makes it clear that the corporate debtor has to bring to the operational creditor the fact of the existence of a dispute within ten days of the receipt of the demand notice.

8. Regarding judging whether a dispute is a pre-existing dispute, the Hon’ble Supreme Court has held in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. [Civil Appeal No. 9405 pf 2017, decided on September 21, 2017, (2018) 1 SCC 353]** as follows:

“Therefore all that the adjudicating authority has to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not 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.....So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject

the application.” (Para 51)

Quite obviously it follows that the existence of dispute before the Section 8 notice was delivered has to be a plausible one and not a ‘spurious defence’ and “that the “dispute” is not patently feeble legal argument or an assertion of fact unsupported by evidence”. The adjudicating authority has been enjoined with the responsibility to see that “the dispute truly exists and is not spurious, hypothetical or illusory”. Since there is no corroboration of the two letters dated 14.10. 2014 and 18.1.2016 either in the Corporate Debtor’s reply to Section 8 demand notice or in the Corporate Debtor’s reply to Section 9 application, and rebuttal of these letters by Respondent No. 1 calling them an afterthought, we are unable to be persuaded by the argument of the Corporate Debtor about pre-existence of dispute on the basis of these letters.

9. The Learned Counsel for Appellant has argued about various items of dispute, citing that the running account bills (RA bills) that have been submitted by the Operational Creditor in many volumes were not allowed to be permitted to be placed on record by the Adjudicating Authority. In his arguments, the Ld. Counsel of Appellant has referred to clauses 57, 58, 59 and 61 of the Contract Agreement to show that the RA bills were not submitted by the operational creditor after joint measurements and, therefore, in the *Company Appeal (AT) (Insolvency) No. 354 of 2020*

absence of such measurements, the bills are not liable to be paid. He has added that in the absence of joint measurements the Corporate Debtor undertook the measurements and the amount that is then arrived at for payment is much less than what is claimed by the Operational Debtor. Hence there is a dispute regarding the measurements and amount payable to the Operational Creditor. He has also referred to clause 61 of the contract agreement to claim that the work was not completed to the satisfaction of the employer (Corporate Debtor) and no completion certificate was issued by the employer. Therefore, the work was left incomplete by the operational creditor which had to be completed by another contractor, which led the corporate debtor to incur losses. Hence the amount claimed in debt by the Operational Creditor is not liable to be paid by the Corporate Debtor.

10. The Ld. Counsel for Appellant has also claimed that these RA bills were certified by one Satish Wagh, a representative of the architect, at a time when he was not assigned to the project. The Appellant has produced a letter dated 15.12.2018 of the architect of the project Nivedita and Uday Pande Consultants stating that Satish Wagh had been shifted to another project from September 2014 onwards. Therefore, he has argued, the certification of the works by Satish Wagh is not proper and such bills are not liable to

be paid. On this issue, the Learned Counsel for Respondent No. 1 has claimed that the RA bills have been submitted as evidence of the work that was carried out and Satish Wagh who certified the RA bills, was appointed by the architect of the project. He has also urged that the documents relating to of RA Bills were sent as attachment to the email dated March 22, 2018 forwarding the demand notice under section 8 to the Appellant (page 48-52 of Appeal Paperbook, Vol. I) and it has also been filed with the Written Statement of the Respondent before the Adjudicating Authority and is therefore a part of record of the Adjudicating Authority.

11. Clause 57 of the contract agreement very clearly specifies that the joint measurement has to be undertaken by the employer i.e. Corporate Debtor alongwith the contractor. The Corporate Debtor has not shown anywhere that he made any effort for joint measurement for verification of the work done in relation to the pending RA bills. As per the clauses of the contract agreement, once a bill is submitted it has to be examined and any deficiencies ought to be removed. The joint measurement, as per clause 57 of the contract agreement, is therefore something that should have been undertaken by the corporate debtor leading to final payment of these RA bills. This does not seem to have been done, and therefore the responsibility of the Corporate Debtor for verification

of the bills cannot be shifted on the Operational Creditor. On the basis of this discussion, we find that the debt that has been included in the Section 8 notice by the Operational Creditor is due and payable.

12. The Learned Counsel for Appellant has mentioned that in accordance with an MOU entered between the Corporate Debtor and Ramprastha Promoters and Developers Private Limited an amount of Rs.1,70,00,000 (Rupees One Crore and Seventy Lakhs only) was paid to Respondent No. 1 on behalf of the Appellant Corporate Debtor in terms of the MOU. In this connection, the Learned Counsel for Respondent has clarified that the said written confirmation by Ramprastha Promoters and Developers Private Limited was filed by the Corporate Debtor at the time of final arguments and has been denied by the Respondent. He has added that Respondent No. 1 being a contractor used to receive various payments from its employees and there is no basis for the Corporate Debtor to adjust such payment from its debt payable to the Respondent. He has further added that even if the said amount is deducted from the unpaid operational debt, the balance outstanding is Rs. 2,91,00,770 (Rupees Two Crore Ninety One Lakh Seven Hundred and Seventy only) which is above the threshold limit for admission of Section 9 application. We find strength in *Company Appeal (AT) (Insolvency) No. 354 of 2020*

the argument put forth by Respondent No.1.

13. It is pointed out that various elements of default by the Operational Creditor raised by the Appellant are not relevant in the adjudication of the application of the operational creditor under Section 9 of the IBC and, therefore, we do not think the correctness or otherwise of these claims/counterclaims should have any bearing on the outcome of this appeal.

14. The Ld. Counsel of Appellant has referred to the following judgments in support of his contentions–

- **Mobilox Innovations Private Limited. v. Kirusa Software Private Limited (2018) I SCC 353**
- **Innoventive Industries Ltd. v. ICICI Bank &Anr., (2018) I SCC407 Kuntal Construction Pvt. Ltd. v. Bharat Hotels Ltd. C.A.(AT)(I) No. 542 of 2020.**
- **Ved Contracts Pvt. Ltd. v. Pan Realtors Pvt. Ltd., C.A.(AT) (I) No. 908 of 2019.**
- **Sandeep Reddy &Anr. v. Jaycon Infrastructure Ltd., C.A(AT)(I) No. 228 of 2017.**

15. The judgments of the Hon'ble Apex Court in **Mobilox Innovations Private Limited and Innovative Industries Limited** civil appeals are basically about pre-existing dispute and that the Adjudicating Authority should be prima facie convinced about the

pre-existence of a dispute before notice under Section 8 was sent, and not involve itself into examining the pre-existing dispute on merits. In the present case, since no pre-existing dispute is found to be present, the ratio of these judgments are not found applicable. The judgment in **Kuntal Construction** case, decided by NCLAT only follows the dictum well-settled by Mobilox case judgment of the Hon'ble Apex Court.

16. The Ld. Counsel for Appellant has also cited the judgment of NCLAT in **Universal Woollen Mills v. Winsome Yarns Ltd., C.A. (AT) (I) No. 554 of 2018** to emphasise that it is not for the Adjudicating Authority to examine whether the two letters claiming pre-existence of dispute are fabricated or not. In the cited judgment, the fabrication of an email had been alleged. In the present case two letters of the corporate debtor have been cited as evidence of pre-existence of dispute which do not inspire our confidence as no other corroboration of their existence has been shown by the Appellant. If such letters pre-existed, Corporate Debtor did not refer to them in reply to Section 8 Notice or Reply to Section 9 Application as we have noted earlier in this judgment. Only at the time of final arguments (as claimed by Appellant) they were tendered. Operational Creditor disputes this and Operational Creditor claims they were filed by Corporate Debtor after close of *Company Appeal (AT) (Insolvency) No. 354 of 2020*

arguments, with Written Submissions, without permission of Adjudicating Authority

17. The following judgments have been cited by Learned Counsel for Respondent: –

- **Mobilox Innovations Private Limited. v. Kirusa Software Private Limited (2018) I SCC 353**
- **Innoventive Industries Ltd. v. ICICI Bank &Anr., (2018) I SCC 407**
- **K. Kishan v. Vijay Nirmal Company, (2018) SCC Online 1013**
- **Sudhir Sales v. D. Art Furnitures MANU/NL/248/2018**
- **YogendraYasupal v. Jigsaw Solutions, (2017) SCC Online NCLAT 293**

The ratio in all these judgments support the dictum that the pre-existing dispute should be real and not a spurious one. As we have found in the present appeal, the dispute raised by the Appellant is not a pre-existing one, and therefore the ratios in all these judgments only go to support the contention of the Respondent No.1.

18. It is argued by Learned Counsel for Appellant that the fact that there is no completion certificate being shown by Operational

Creditor itself is evidence of pre-existing dispute, as the project was to be completed by 14.10.2013. Learned Counsel for Operational Creditor submitted that as R.A. Bills were not being paid, he could not continue work and had to send Demand Notice u/s 8 of IBC. We find that Corporate Debtor has not shown anywhere that if the project was not completed or abandoned, any notice was sent to the Operational Creditor, before Operational Creditor sent Demand Notice u/s 8 of IBC. The Document Annexure R-1 filed by Respondent No.1 (Dy. No.25468) shows that even till August, 2016 bills were being paid. Thus, time was not essence of the contract. No dispute can be presumed merely by non-completion of the project in the fixed time or for the reason that it was the contractor's fault, when the contract shows responsibilities on both the sides. If Operational Creditor had to continue construction, Corporate Debtor also had to continue paying RA Bills. Thus we do not agree with the argument to make a presumption that there was pre-existing dispute or that the responsibility of non-completion fell on the Operational Creditor.

19. In the light of the discussion in the above-mentioned paragraphs, we come to a very clear conclusion that there was no pre-existing dispute regarding the construction works that were undertaken by the Operational Creditor for the Corporate Debtor.

Since there was no pre-existing dispute, all the other issues/disputes that relate to the various clauses of the contract agreement such as joint measurements, lack of completion certificate and inadequate and inappropriate certification of the bills become irrelevant insofar as adjudication of Respondent No. 1's application under Section 9 is concerned. We, therefore, do not find any basis for interfering with the order of the Adjudicating Authority. The appeal is dismissed. Interim orders, if any, in the appeal do not survive. The Corporate Insolvency Resolution Process (CIRP) shall proceed as required under law. The time spent in prosecuting this appeal from 28.2.2020 (when stay to public announcement and constitution of COC was granted) till today shall not be counted towards the period of CIRP.

20. There is no order as to costs.

(Justice A I S Cheema)
The Officiating Chairperson

(Dr. Alok Srivastava)
Member (Technical)

New Delhi
2nd July, 2021

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