NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 926 of 2021

(Arising out of Order dated 03.05.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-II, in (IB)586 (ND)/2017)

IN THE MATTER OF:

Zillion Infraprojects Pvt. Ltd.
5th Floor, Anushka Tower, Plot No.2,
Garg Trade Centre, Sector-11, Rohini,
New Delhi-110085.
Through its Resolution Professional
Mr. Harish Taneja
236-L, Model Town, Sonipat, Haryana .... Appellant

Vs

The Indure Private Ltd.
"Indure House", Greater Kailash-II,
New Delhi-110048. .... Respondent

Present:
For Appellant: **Mr. Ashish Makhija, Ms. Richa Singh, Mr. Deep Bisht, Advocates.**

For Respondent:

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (for short 'IB Code') has been filed against the order dated 03.05.2021 passed by the National Company Law Tribunal, New Delhi Bench-II by which the Application filed by the Appellant under Section 9 of the IB Code was rejected.

2. The Appellant was awarded three work orders by the Respondent/ The Indure Private Ltd. ('Corporate Debtor') between the year 2009, 2010 and 2012 for carrying out erection, fabrication, commissioning and painting work of the Thermal Power Plant at Chhabra Rajasthan. During the course of carrying out the work, the Appellant kept on raising Running Account Bills. Certain payments were released by the Corporate Debtor till 2016. There has been correspondence between the parties. During the continuance of work by the Appellant, letters were sent by the Corporate Debtor in 2013-14 pointing out various breaches and delays on the part of the Appellant. Ultimately, by letter dated 20th November, 2014, issued by the Corporate Debtor to the Appellant, the contract of the Appellant was terminated. The Appellant after writing several letters to the Corporate Debtor for payment of his bills, issued a Demand Notice under Section 8 of the IB Code dated 13.09.2017 demanding an amount of Rs.8,34,18,876/- (Rupees eight crores thirty four lakhs eighteen thousand eight hundred and seventy six only) with accumulated interest of Rs.2,41,38,406/- (Rupees two crores firty one lacs thirty eight thousand four hundred and six only). The Corporate Debtor immediately replied to the Demand Notice vide letter dated 23.09.2017. In its reply, the Corporate Debtor stated that contract and claim of the Appellant are in dispute. The reply notice stated that there has been several breaches and delays on the part of the Appellant due to which the Corporate Debtor suffered substantial losses. Details of communication by Corporate Debtor in this regard of the year 2013 and 2014 were also mentioned. The Appellant gave rejoinder dated 05.10.2017

to the reply of the Corporate Debtor, to which the Corporate Debtor sent another reply on 24.10.2017.

3. An Application under Section 9 of the IB Code dated 13.11.2017 was filed by the Appellant, which was dismissed as withdrawn on 16.11.2017 with liberty to file fresh petition on the same cause of action. On 16.11.2017, Appellant issued a fresh Demand Notice and thereafter filed an Application under Section 9 of the IB Code on 06.12.2017.

4. The Application filed by the Appellant was replied by the Corporate Debtor vide reply submitted in January 2018. The Adjudicating Authority vide its order dated 03.05.2021, rejected the Application of the Appellant filed under Section 9 of the IB Code, aggrieved against which order, this Appeal has been filed.

5. The learned Counsel for the Appellant contends that the Appellant successfully completed his contract work and after successful completion of the work, the Plant was also Commissioned in the year 2015. The Rajasthan Rajya Vidyut Utpadan Nigam Ltd. has also issued a Certificate in favour of the Appellant on successful completion of the work. The TDS was deducted by the Respondent on the bills, which indicate acceptance of bills by the Respondent. No suit for arbitration was filed by the Respondent prior to service of Demand Notice. There was no dispute regarding the bills prior to issuance of Demand Notice and plea of dispute as setup by the Respondent is a moonshine. Running account bills were prepared after the certification and verification of the quantity of the work at the site of the

Corporate Debtor. The Adjudicating Authority committed error in rejecting the Application under Section 9 of the IB Code on the ground that there was pre-existing dispute.

6. We have considered the submissions of the learned Counsel for the Appellant and have perused the record.

7. Section 8, sub-section (2) of the IB Code provides that Corporate Debtor shall, within a period of 10 days of the receipt of the Demand Notice, bring to the notice of the Operational Creditor about existence of dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice. In the present case, the Demand Notice was issued on 13.09.2017, which was replied by letter dated 23.09.2017. The reply dated 23.09.2017 is on the record where the Corporate Debtor has specifically stated that disputes have already arisen between the parties, which has to be resolved as per dispute resolution process as contemplated by Clause 16 of the Work Order. The details of various claims, which were raised by the Corporate Debtor against the Appellant have been enumerated in reply notice.

8. Section 9 Application filed by the Appellant was also replied by the Corporate Debtor and in the reply, letters raising different disputes were specifically mentioned and brought on record by the Corporate Debtor. The letters dated 02.06.2010, 07.06.2010, 28.04.2012, emails dated 29.04.2013, 11.10.2013, 15.10.2013, 17.10.2013, 05.11.2013 and 11.04.2014 were referred. Letter dated 10.11.2014 was also relied.

Ultimately, the contract of the Appellant was terminated by the Corporate Debtor vide letter dated 20.11.2014, which was also filed along with the reply.

9. What is the dispute, which is contemplated by Section 8, sub-section (2) and need to be brought into notice of the Appellant by the Corporate Debtor. The word 'dispute' has been defined in Section 5, sub-section (6) of the IB Code, to the following effect:

> *"5(6) "dispute" includes a suit or arbitration proceedings relating to—*
>
> *(a) the existence of the amount of debt;*
>
> *(b) the quality of goods or service; or*
>
> *(c) the breach of a representation or warranty;"*

10. The definition of 'dispute' is an inclusive definition. As per Section 8, sub-section (2), the Corporate Debtor can bring into the notice of the Operational Creditor an 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 notice. The contract of the Appellant was terminated by Corporate Debtor vide letter dated 20th November, 2014, which letter has been brought on record along with the reply to Section 9 Application. The letter terminating the contract also refers to earlier six letters issued by the Corporate Debtor. It is useful to notice the contents of the letter, which is to the following effect:

"Dear Sir

Kindly refer the Notice given by us vide our letter No.13062/Chhabra/Zillion/5366 dated 10th November, 2014 regarding your failure in performing the work in time. As stated in the Notice, we have repeatedly granted to you further time for improving the progress of work, but inspite of our repeated requests and follow up, you have not made any effort to improve the progress of work at site. You are also not making timely payment to your workers and staff at site even after getting the payment for your bills from us. As a matter of fact, you are diverting the payment given to you for paying the workers and your workers are repeatedly stopping the work at site. The same is further vitiating the working atmosphere at site.

Under the above circumstances, we are not left with any other option but to terminate your contract with immediate effect as per provisions of clause No.15 of Work Order read with Clause No.39.00 of GCC. We shall get the balance work executed at your risk and cost and excess payment in executing the balance work shall be recovered from the Securities available to us under the contract.

We would also like to inform you that we have already incurred substantial losses due to your continuous defaults and interruptions in execution of the work at site and such losses also stand recoverable from the available securities including Security Deposit Bank Guarantee."

11. The Corporate Debtor in his reply to notice dated 23.09.2017 as well as in his reply to Section 9 Application, has given details of claims, which was to be made by the Appellant. It is useful to refer to paragraph 9 to 13 and 17, which are to the following effect:

> *"9. As per clause 13 of the work order, Zillion was under an obligation to submit steel reconciliation statement which has admittedly not been submitted by Zillion till date despite several requests and reminders. As per the accounts maintained by Indure, zillion has been issued 22,495 tonnes steel out of which Indure reserves its right of recovery of approx. 200 MT steel from Zillion amounting to more than one crore rupees.*
>
> *10. As per contractual provisions, settled industry practice and based on regular dealings between Indure and Zillion, the final bills and payments are processed by Indure at its Head Office by their Authorised Representatives after taking into account all recoveries as stipulated in the Contract. Just receipt and verification of quantity of invoices at Indure site office does not confirm to the outstanding dues payable to any vendor. In*

fact admittedly the final invoices have never been verified or approved by Indure till date.

11. *In this case after final checking and reconciliation of the account as per the terms of the contract, it was found that following recoveries have to be made from zillion*

    a. *Liquidated damages,*
    b. *Amounts to be recovered on account of reconciliation of steel,*
    c. *Overcharging for contract not being executed as per the supplementary orders,*
    d. *Overhead charges,*
    e. *Idling and prolongation charges incurred by Indure due to inordinate delay by Zillion,*
    f. *Loss of profit,*
    g. *Works carried out at the risk and cost of Zillion by Indure,*
    h. *Loss of opportunity,*
    i. *Interest,*
    j. *Costs.*

12. *Apart from the above it is also stated that Invoice No.62A have never been received by us.*

13. The above stated claims of Indure against zillion running into several crores on account of idling cost, prolongation cost, overhead charges, loss of opportunity, loss of profit etc. On estimate basis the claims of Indure against zillion are in excess of Rs.25 crores. However, at a more appropriate stage detailed and more particularized claims will be raised. In the past also Indure had clearly informed Zillion about the existence of Indure's claim against Zillion. On account of which till date the final bill in respect of the contract could not be settled.

17. In view of the above it is ostensibly clear that the disputes have already arisen between the parties herein and the same have to be resolved as per the dispute resolution process as stated in the work order/ contract read with GCC. Clause 16 of the work order provides for a settlement procedure followed by arbitration under clause 17. The said relevant clause 16 of the work order is being reproduced herein for ready reference:

"16.0 SETTLEMENT OF DISPUTES

16.1 Any dispute(s) or differences arising out of or in connection with the contract shall, to the extent possible, be settled amicably between the parties.

16.2 All unsettled disputes or difference(s) arising out of or in connection with the contract shall be decided by the engineer whose decision shall be final and binding on the parties.

Prior to the initiation of and/or arbitration proceedings permitted by the contract to resolve disputes between them, in the event a dispute arises between you and us regarding the application or interpretation of this contract (a "Dispute"). Our Project Incharge and your representative shall use their best efforts in good faith to reach a reasonable and equitable resolution of the matter. If our Project Incharge and your representative are unable to resolve the matter within 30 days, either party by written notice may refer the matter for resolution by good faith negotiation between their respective senior officers with decision making power and who shall not have had substantive involvement in the matters involved in the dispute, unless the parties otherwise agree."

12. The Appellant's case is that his running bills were verified at the Site Office of the Corporate Debtor. It is the case of the Respondent that bills are finalized ultimately at the Head Office of the Corporate Debtor and final bills of the Appellant have not been verified as yet, due to various issues and recoveries to be made from the Appellant.

13. The Adjudicating Authority has gone through the reply to the Demand Notice and other materials brought on record, noted the arguments in detail of both the parties and recorded its conclusion. The Adjudicating Authority after noticing the emails and letters sent by the Corporate Debtor, recorded the following findings in paragraphs 16, 18 to 20, which reads as under:

> *16. ….On perusal of these emails, we notice that the issues of terms and conditions of the agreement were raised by the Corporate Debtor and several requests were made on behalf of the Corporate Debtor to complete the work by deputing more manpower. When the Operational Creditor failed to complete the work within the contracted period, ultimately vide letter dated 14.09.2014, the last warning was given to the Operational Creditor to restart the work immediately and ensure completion of the pending work within 14 days failing which work order shall be terminated. Accordingly, vide letter dated 20.11.2014 (Page 38 of the reply) the Corporate Debtor had terminated the contract with immediate effect as per clause*

no. 15 of the work order read with clause no. 39 of GCC. It was also mentioned in that letter that the balance work shall be executed at the operational creditor's risk and the cost and excess payment in executing the balance work shall be recovered from the securities available to the Corporate Debtor under the contract. It was also mentioned that the damages will also be recovered from the Operational Creditor.

18. We would also like to refer to the emails exchanged between the parties (from page 14 to 22 of Written Submissions filed on 27.03.2021 by the Corporate Debtor) which show that the petitioner had sent several emails for recall of the termination of contract letter. Therefore, the contention of the petitioner's counsel that the said letter was never communicated to the petitioner is contrary to the emails exchanged between the parties.

19. Further contention of the petitioner is that the matter was never referred to the arbitrator, whereas in the course of hearing and in the written submissions in para 5, the respondent has mentioned that "the dispute between the parties have also been referred under the dispute resolution mechanism to the engineer for the project vide communication dated 23.09.2017".

20. We notice that there are several emails exchanged between the parties regarding the termination of contract letter dated 20.11.2014 and dispute being raised regarding the quality of *the work and the violation of the terms and conditions of the contract by the Corporate Debtor, which compelled the Corporate Debtor to cancel the contract."*

14. The Adjudicating Authority has also referred to the termination of the contract by letter dated 20th November, 2014 and relied on the letter terminating the contract of the Appellant, contents of which letter we have already extracted above. Dispute is natural consequence of termination of the contract between the parties. The bills have been claimed by the Appellant arising out of the said contract.

15. There is overwhelming material on record to come to the conclusion that there was dispute between the parties since prior to issuance of Demand Notice on 13.09.2017. The learned Counsel for the Appellant has placed much reliance on Certificate dated 16.04.2015 issued by Rajya Vidyut Utpadan Nigam Ltd. The certificate mentions that Appellant has carried out erection work conveying System vide supplementary work order through M/s Indure Pvt. Limited. The above Certificate cannot wipe out the *inter-se* dispute between the Corporate Debtor and the Appellant, who is sub-contractor of Corporate Debtor. On the strength of Certificate dated 16th April, 2015, the emails and letters, which were issued by the Respondent to the Appellant pointing out various deficiencies in service, cannot be overlooked and no conclusion can be arrived that there was no dispute between the Corporate Debtor and the Appellant. Whereas, to the contrary many disputes have been referred to in reply to the Demand Notice

and in reply to Section 9 Application, which have been considered by the Adjudicating Authority.

16. We are of the view that no error has been committed by the Adjudicating Authority in not entertaining the Application on the ground of pre-existing dispute. We however, make it clear that the rejection of Application under Section 9 of the IB Code shall not preclude the Appellant to raise his claim for payment of bills, if any, in accordance with terms and conditions of the work order.

With the above observation, the Appeal is dismissed. There shall be no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

1st December, 2021

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