

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 774/MB-IV/2021

Under Section 9 of the I&B Code, 2016

In the matter of:

NCL INDUSTRIES LIMITED

[CIN: L33130TG1979PLC002521]

...Operational Creditor/Applicant

V/s

LARSEN & TURBO LIMITED

[CIN: L99999MH1946PLC004768]

...Corporate Debtor/Respondent

Order Dated: 16.05.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Dharam Jumani, a/w Mr. Harsh
Behany and Ms. Saloni Manjrekar i/b
Harsh L. Behany, Ld. Counsel.
For the Respondent(s) : Mr. Shyam Kapadia , Ld. Counsel.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an application being CP (IB) No. 774/MB-IV/2021 filed by NCL Industries Limited, (“Operational Creditor/Applicant”), under Section 9 of the Insolvency & Bankruptcy Code, 2016 (“I&B Code”) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of Larsen & Toubro Limited (“Corporate Debtor”).
 - 1.1. This application is filed by Mr. N. G. V. S. G. Prasad, Executive Director/CFO of the Operational Creditor in terms of Resolution dated 13.02.2017 passed by the Board of Directors, claiming a total default of Rs. 3,04,23,199/- (Rupees Three Crores Four Lacs Twenty Three Thousand One Hundred & Ninety Nine only) as principal as on 9.1.2020 and a sum of Rs. 24,56,655/- as interest @ 18% p.a. for delayed payment till January 9, 2020. The date of default is stated as 26.08.2019 in Part IV of the Application. However, as per invoice wise details of default, the default in relation to each invoice occurred on different dates between the period from 26.08.2019 to 25.10.2019.
2. The Operational Creditor submits that that the Corporate Debtor had placed several work orders upon the Operational Creditor for supply and fixation of TV cabinets, terrace doors using Bison panels (Cement bonded particle board), Doors/frames, etc., for its project in Andhra Pradesh during April, 2018 to June, 2018. In furtherance of the work orders as placed by the Corporate Debtor, the Operational supplied the goods/materials as required by the Corporate Debtor and even installed the same in accordance with their

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No. 774/MB-IV/2021

specifications during the period from April, 2018 to September, 2018. It further submits that -

- 2.1. The Corporate Debtor never raised any dispute as to the quality, quantity and/or price of the goods/materials as supplied by the Operational Creditor. Despite being in receipt of the said goods, the Corporate Debtor failed to pay the entire amount to the Operational Creditor.
- 2.2. The Operational Creditor was constrained to issue the statutory demand notice dated 9.01.2020, under section 8 of the I&B Code, calling upon the Corporate Debtor to clear the outstanding dues with interest as stated more particularly in the said statutory demand notice. The same was duly received by the Corporate Debtor. After receiving the said statutory demand notice, the Corporate Debtor vide their letter dated 20.01.2020 replied to the same and denied the contents thereof. By the said letter, the Corporate Debtor sought time to file a detailed reply to the statutory demand notice. Pertinently, save and except bare denials, the Corporate Debtor failed to point out existence of any dispute and/or pendency of any suit or arbitration proceedings filed before the receipt of the statutory demand notice. Also, the Corporate Debtor failed to discharge the outstanding dues despite being in receipt of the statutory demand notice.
- 2.3. Till date, the Corporate Debtor has not issued any detailed reply as stated by the Corporate Debtor in its reply dated January 20, 2020. The Operational Creditor states that the said letter dated January 20, 2020 was issued by the Corporate Debtor with the only intention of avoiding its admitted liability. The Corporate Debtor has failed to point out existence of any dispute and/or pending of any suit or arbitral proceedings pertaining to the issue in hand within the period

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No. 774/MB-IV/2021

of 10 days as required under the code. Thus, the Corporate Debtor has accepted its liability to pay the outstanding sum with interest as claimed in the statutory demand notice dated January 9, 2020.

3. The Corporate filed affidavit in reply dated 22.12.2021 stating that -
 - 3.1. The Respondent has made payments of 7,82,25,615/- including IT-TDS certificates (Rs.15,08,140/-), that have been certified till date to the Applicant; and that no further amount as allegedly claimed by the Applicant is due and payable under the present Application.
 - 3.2. The Applicant has claimed outstanding against three different project sites namely, Bhimavaram, Palacolli and Tadepalligudem for which different World Orders have been issued, and clubbing of outstanding of different work orders is not permissible in view of decision of Hon'ble National Company Law Appellate Tribunal ("NCLAT") in the matter of *International Road Dynamics v Reliance Infrastructure* in Company Appeal (AT) Insolvency No. 72 of 2017, wherein it was held *that that the different claims arising out of different agreements or work order. having different amounts and different dates of default. cannot be clubbed together for alleged default of debt. the cause of action being separate.* The Respondent had placed four Work Orders upon the Applicant for supply and installation of TV cabinets, terrace doors using Bison panels for three separate projects, namely Bhimavaram, Palacolli and Tadepalligudem in Andhra Pradesh. These projects were being undertaken by the Government of Andhra Pradesh through their government syndicate (government body) i.e. APTIDCO (Andhra Pradesh Township and Infrastructure Development Corporation Limited).

3.3. The Applicant has also suppressed the Reply to the Demand Notice dated 6th July 2020 addressed by the Advocates on behalf of the Respondent wherein the stand of the Respondent has been expressly set out in detail.

3.4. The work orders contained General Terms & Conditions (Annexure II) (**“General Terms & Conditions”**) pertaining to the aforesaid three project sites. Clause 8 B of the General Terms and Conditions provides for R.A Bills/Stage-wise Payment indicating that payment towards running bill shall be made on a monthly basis. As per the Terms, the Applicant was to submit bills based on detailed joint measurement between their representatives and the Respondent’s Engineer in Charge (EIC) for work done every month along with correct tax invoice, abstract measurement sheets, checklist, manufacturer’s test certificates of materials (if applicable). Payment was to be made as per the relevant quantities certified by EIC appointed by the Respondent as per stages mentioned below. Completion of these compliances and submission of these documents is paramount for the dues becoming payable. The Stages of Payment were decided as:

- 60% against supply of material,
- 35% against installation,
- 5% against handover.

3.5. The Payment against all Running Account Bills would have to be released within 30 days from submission of correct invoice. The General Terms & Conditions also specifies that no claim pertaining to delay of

payment shall be entertained.

3.6. Furthermore, payment of final bill as *per* Clause D of the General Terms & Conditions is subject to submission of the following:

3.6.1. 'No Claim Undertaking' confirming that the Contractor/ Applicant has no claims of any nature against the Work order and/or work done against the work order;

3.6.2. Clearance Certificate from Main Contractor/ Respondent's stores confirming no shortfall of any material issued to the Applicant/ Contractor for the purpose of work;

3.6.3. All submittals.

3.7. The parties have been in settlement talks from August 2020 to October 2021 and had in fact agreed upon payments in two parts i.e. Rs. 1,85,00,000/- as Part -I being the certified amount and Rs. 1,08,00,000/- as Part-II i.e. the uncertified amount which is linked to matters like handing over/client certification, pending final completion/reconciliation and retention for which the Applicant agreed to extend co-operation for achieving the contractual and statutory compliances based on which the parties were to discuss and settle the payments that become due.

3.8. The Respondent has in line with the Payment Terms set out in the work order, made payment of Rs. 1,85,00,000/- (Part-I) to the Applicant against all the certified dues as per its books and accounts which has been duly accepted by the Applicant. The statutory and contractual

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No. 774/MB-IV/2021

compliances regarding these payments were completed by the Applicant and accordingly payment was released by the Respondent. Therefore, the claim of Rs. 3,28,79,854/- including interest has been erroneously and falsely claimed by the Applicant. The payments were released by the Respondents on 10.2.2021, 24.09.21, 20.10.21 aggregating to Rs. 1,80,00,000/-, and thus, the Respondent has paid of all the certified dues of the Applicant.

3.9. An amount of Rs. 1,19,23,199/- being the balance of Rs. 3,04,23,199/- as claimed by the Applicant (not including interest of Rs. 24,56,655/-) is premature as the applicant has failed to achieve statutory and contractual compliances i.e. 5% stage payment against handover & Retention. Thus, this amount is not payable by the Respondent. In any case, the Applicant has also acknowledged in several communications during settlement talks that payment of Rs. 1,08,00,000/- (Part-II) is linked to matters like handing over/client certification, pending final completion/reconciliation and retention for which the Applicant agreed to extend co-operation for achieving the contractual and statutory compliances based on which the parties were to discuss and settle the payments that become due.

3.9.1. Rs. 45,000/- has been withheld by the Respondent on account of non-submission of PF challans.

3.9.2. The Applicant has incorrectly calculated the retention amount payable as Rs. 57,38,038/-. As per the records of the Respondent, an amount of Rs. 54,24,000/- is towards retention out of which Rs. 35,38,000/- shall be released upon completion of the scope of *work*

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No. 774/MB-IV/2021

and successful handing over to the client i.e. APTIDCO and the balance amount shall be released only after completion of the Defect Liability Period. As per the General Terms & Conditions, the Defect Liability Period is 24 months from completion/Handing over to Owner/Main Contractor.

3.9.3. Furthermore, an amount of Rs. 22,46,184/- out of the principal amount is part of the retention amount of Rs. 54,24,000/- which was to be released against submission of Performance Bank Guarantee (“PBG”) for equivalent amount. The Applicant has failed to mention that amounts due front the PBG is not due or payable by the Respondent since the project undertaken by the Government of Andhra Pradesh has been put on hold vide a Government Notification U.O. Note No: F1N01- FMUOASD(WR1)/80/2018 dated 29” May 20.19. Accordingly, the dues have been prematurely raised by the Applicant, as they have not yet become payable.

3.9.4. The interest amount of Rs. 24,56,665/- as claimed by the Applicant is against Clause 8 (b) of the General Terms and Conditions which states that the Respondent would not entertain any claims pertaining to the delay of payments. Thus, no interest arises from the alleged claim made by the Applicant against the Respondent.

4. The Applicant has filed a Rejoinder dated 17.08.2022 stating that -

4.1. All such email correspondence was exchanged in the course of settlement discussions on a without prejudice basis, and cannot be produced in any legal proceedings without the express written consent of both parties.

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No. 774/MB-IV/2021

- 4.2. Prior to the issuance of the Section 8 Notice in January, 2020 and / or prior to the filing of the present Petition in June, 2020, the Corporate Debtor has never intimated the Operational Creditor of these so-called deficiencies in the documents. There is thus no pre-existing dispute in relation to the quality and/ or quantity of the goods supplied.
- 4.3. The original contract period is long over. The Operational Creditor has not delayed and/ or failed in the supply and performance under the Work Orders in any manner whatsoever. It is not even the case of the Corporate Debtor that there is any deficiency in quality or quantity on the part of the Operational Creditor and/ or that there is any discrepancy in the amounts claimed. The only contention of the Corporate Debtor is the Project is not completed since it was put on hold by its client. The project was put on hold in June 2019 and 3 years have since lapsed, and there is no change of circumstances. It is further submitted that the Work Orders issued by the Corporate Debtor to the Operational Creditor are not back-to-back contracts.
- 4.4. The Operational Creditor had submitted 3 BGs for Rs. 7,47,444/, Rs. 9,28,525/- and Rs. 5,70,215/- which were issued on 26/07/2018 and subsequently extended.
5. The Operational Creditor has filed an additional affidavit dated 27.02.2023 stating that the Work-Orders raised by the Corporate Debtor upon the Operational Creditor contains specific terms and conditions, which are *ex facie* contrary to and inconsistent with the General Terms and conditions relied upon by the Corporate Debtor as they provide for certain terms and conditions that are contrary to the General Terms and Conditions i.e. amount of

retention, defect liability period, completion of work, etc. The said terms and conditions supersedes and over-rides the terms and conditions of the General Terms and Conditions relied upon by the Corporate Debtor. The special terms and conditions make it clear that the work was to be deemed to be completed upon handing over to the Corporate Debtor and not to the main client. Thus, the terms as contained in the General Terms and Conditions are not applicable to the present transaction. The reliance upon the said terms of the General Terms and Conditions are misplaced. It is pertinent to note that the Work-Orders stipulate a date for completion of work. It is not the case of the Corporate Debtor in its reply notice to the demand notice under section 8 of the IBC and / or the Affidavit-in- Reply to the captioned Petition that the work was not done in the period as stipulated in the Work-Orders and hence the Corporate Debtor has admitted that the work was done within the stipulated date and cannot now be heard to contend otherwise. It is also pertinent to note that the Work-Orders also specify the date from which the Defect- Liability Period is to start vis a vis the said Work-Order. The Defect- Liability Period is to start once the work is completed. The date with-effect- from which the Defect- Liability Period was to start in each Work-Order has elapsed.

6. This Bench heard both the Counsel(s) and perused the material available on record.

6.1. This Bench finds that there is dispute as to interpretation of terms & conditions of the work order in the sense whether the conditions stated in General Terms & Conditions are in addition to Specific Terms & Conditions stated in the work order or such specific terms supersedes the

general terms. This Bench also finds that the Specific Terms contained in work order does not contain any stipulation for payment terms and defect liability period. There is no dispute that the General Terms & Conditions categorically specifies name of the Party for whom the said work is being undertaken by the Corporate Debtor; it stipulates defect liability period; and also stipulates no compensation for delayed payment. It is case of Operational Creditor that the payment of defect liability period becomes due upon submission of Bank Guarantee, also it can not be made to wait till conclusion of work, in view of Andhra Government putting such work on hold. These arguments clearly indicate the existence of the dispute in relation to time at which the balance payment becomes due for payment by the Corporate Debtor and requires adjudication. This Bench has to satisfy itself that the debt claimed in default is in dispute and, if a dispute in relation thereto is raised, such dispute is not feeble or superficial. This Bench finds that the dispute in relation to interpretation of clauses of work order can not fall under the category of feeble or superficial dispute.

6.2. Further, even if this Bench proceeds on a proposition that the defect liability period is to be determined with reference to delivery of work at the end of the operational creditor and the same becomes payable upon submission of Bank Guarantee(s), this Bench finds that the Operational Creditor has furnished 3 Bank Guarantee(s) for an aggregate sum of Rs. 22,46,184/-. Even then, the 5% of gross value of supplies is to be retained by the Corporate Debtor in terms of specific condition that 5% retention money is to be released only upon successful handing over to the client, which in this case is the client of the Corporate Debtor. Again, whether

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No. 774/MB-IV/2021

this 5% can be retained in view of the fact that the project has been put on hold by client of the Corporate Debtor and the Corporate Debtor cannot be made to suffer, is matter of adjudication, which this Bench can not go into.

6.3. Accordingly, this Bench is of the considered view that the present application is not maintainable u/s 9(5)(d) of the I&B Code in view of existence of prior dispute in relation to the debt claimed to be in default.

ORDER

7. The petition bearing CP(IB) 774/MB-IV/2021 filed by NCL Industries Limited, (“Operational Creditor/Applicant”), under Section 9 of the Insolvency & Bankruptcy Code, 2016 (“I&B Code”) for initiating Corporate Insolvency Resolution Process (CIRP) in the case of Larsen & Toubro Limited (“Corporate Debtor”) is **Dismissed**.
8. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
16.05.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)