NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 578 of 2024

08.09.2025

Present: JUSTICE N. SESHASAYEE, MEMBER (JUDICIAL)
MR. BARUN MITRA, MEMBER (TECHNICAL)

Dezire Group **...Appellant**
Through Mr. Harmanjeet Singh Bedi, Partner

Vs

M/s Indamer Mjets Airport Service Pvt. Ltd. **...Respondent**

(Arising out of Impugned Order dated 20.11.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court - III) in C.P.(IB)-1033(MB)/C-III/2022)

For Appellant:	Mr. Palash S. Singhai and Mr. Harshal Sareen, Advocates
For Respondent:	Mr. Hemant Phalpher and Mr. Kunal Sinha, Advocates

JUDGEMENT

Per Justice N. Seshasayee, Member (Judicial)

An Operational creditor, whose application for initiating a CIRP under Sec 9 of IBC was dismissed by the Adjudicating Authority on the ground of existence of a pre-existing dispute between the parties, has preferred this appeal.

The Facts

2. The material facts that provide a backdrop to this case are as below:

a) The appellant is a partnership firm and is involved in the business of construction. While so, on 01.03.2021 it entered into a Construction Contract with the respondent for the execution of certain civil work and allied interior work associated with the lounge near Terminal 3 of Delhi International Airport. Alongside this contract, both the parties entered into what is known as 'Workshop Contract' (the copy of this second mentioned contract is not made part of the record, and the debt involved in this case does not relate to this contract but to the Construction Contract).

b) The Construction Contract stipulated three months' time for completing the work. Clause 15 of the said contract provides that the contractor could submit the running bill fortnightly upon receiving which the respondent would release payment within 5 days there from. And, the contractor is required to submit its final bill within 30 days from the date of completion the contracted work duly certified by the respondent, and the payment there under would be finalised within 30 days from the date of the bill.

c) Be that as it may, the appellant had raised four Running Account bills (referred to as Running Bills in the Clause 5 of the Contract), the details whereof are as below:

Sl.No	Date	Amount (in Rs.)
1.	10.03.2021	66,17,293
2.	10.06.2021	36,25,358
3.	08.12.2021	1,11,04,433
4.	15.02.2022	86,64,411

d) Besides the above bills, the appellant claims another Rs.17.0 lakhs towards glass and aluminium vide Annexure 5, which was said to have been raised sometime in February, 2022.

e) While the contract work was in focus, on 21.03.2022 the respondent abruptly terminated the contract. And on 11.04.2022, the appellant raised its final bill. In all, the total value of the work which the appellant had done is Rs.4,66,89,639/-, out of which the respondent had paid Rs.3,09,70,026/- leaving a balance of Rs.1,57,19,613.00 to be paid.

f) According to the appellant, despite due verification of all these bills, the respondent showed no intention to honour its liability under the bills. It is in these circumstances, on 03.07.2022, the appellant had issued a demand notice as required under Sec. 8 IBC, but despite receiving it, the respondent showed no interest to pay the same.

The respondent has thus committed default in paying the debt, which in turn had given the appellant a cause for filing its petition under Sec.9 of IBC for commencing a insolvency resolution process against the respondent.

3. In its Reply, the respondent contended:

a) That the construction contract which the appellant had entered into with the respondent commenced on 01.03.2021, and it stipulated that the entire work must be completed in three months. However, the appellant did not complete the work within the time stipulated, and since the contract-period had fallen within the pandemic days due to Covid – 19, time was periodically extended and finally up to 31.01.2022. The work still was not complete. Hence the respondent was constrained to terminate the Construction Contract.

b) In terms of the contract dated 01.03.2021, if the appellant delayed in completing the work, it is liable to pay a penalty of Rs.25,000/- a day.

c) This apart vide e-mails dated 02.12.2021, 24.12.2021 and 09.01.2022, complaints were raised on the aspect of delay, on the invoice, and also on the quality of work done. In effect, the respondents have raised certain dispute even prior to the commencement of CIRP.

d) IBC is not a recovery mechanism, and if at all the appellant feels aggrieved, it should resort to arbitration in terms of the contract.

4. After considering the rival submissions, the Adjudicating Authority had concluded vide its Order dated 20.11.2023 that the appellant's Petition under Section 9 of IBC is liable to be dismissed since there exists a pre-existing dispute between parties which included delay in performance of the contractual obligation by the appellant. This Order is now under challenge.

Arguments

5. The learned counsel for the appellant submitted: that on 11.04.2022 (however, in the notes of arguments provided by the appellant it is mentioned as 14.04.2022) the appellant raised the final bill and it was verified by the respondent. When once the final bill amount was verified by the respondent, the latter's obligation to pay the amount so verified commences. Admittedly, this amount has not been paid, and it completes the debt-default equation necessary to invoke Sec.9 IBC. Reliance was placed on the ratio of this tribunal in ***R.R.Gopaljee Vs I.O.B. & Others*** [Comp. A (AT)(Ins) 748 of 2019]. The tribunal however, relied on an e-mail of the respondent dated 25.04.2022 for concluding that there existed a dispute which originated even prior to the issuance of notice under Sec.8 IBC, but this e-mail relates to what is styled as 'Workshop Contract', and does not relate to the contract vis-à-vis the final bill whose non-payment has given rise to the cause of action for invoking Sec.9 IBC.

6. Per contra, the learned counsel for the respondent submitted that the main plank of the respondent's defence was that the appellant had not completed the contracted work despite multiple extension and it forced the respondent to terminate the contract. Now for belated payment the respondent is entitled to claim penalty @ Rs.25,000/- for every day of delay. Secondly, the purported claim in the final bill is only for Rs.81,76,767/- and it does not meet the threshold limit of Rs.1.0 crore to invoke the IBC. Thirdly, that the claim of the appellant was not free of dispute is established by: (i) in the final bill, an endorsement has been made on behalf of the respondent that it is not

accepted; (ii) that vide e-mail dated 26.11.2022, the appellant had listed its difficulties in executing the work and in the respondent's mail dated 02.12.2021, the respondent had alleged the appellant of its negligence in executing the work; (iii) in its e-mail dated 09.01.2022, the respondent had raised quality-issue in the work executed by the appellant which relates to leakage due to rain. Indeed, the respondent had expressed its displeasure both regarding the pace of execution of the work and quality of the work done vide e-mails dated 01.02.2022 and 14.02.2022, and eventually the respondent was constrained to terminate the contract. In effect, the appellant attempts to brand a solvent company as insolvent when the fault lies with it. Reliance was placed on the ratio in ***Kay Bouvet Engineering Ltd., Vs Overseas Infrastructure Alliance (India) (P) Ltd.,*** [(2021)10 SCC 483].

Discussion & Decision

7. After carefully evaluating rival submissions we consider that this appeal is liable to be dismissed, and the reasons are:

a) That the final bill dated 11.04.2022 is not seen approved for payment by the respondent, nor its correctness acknowledged by it. On the contrary, the respondent's representative has made two endorsements. The first endorsement runs into two sentences and commences with the phrase: '*Not accepting…'*. The learned counsel for the appellant contended that it related to releasing the security deposit, but on a plain observation of the final bill it is not adequately evident that the phrase '*not accepting*' must be read only in relation to the security deposit, even though the endorsement also refers to security deposit. And there is a second endorsement as well. Taking both these endorsements together, it does not establish that the respondent had accepted the liability under the final bill unconditionally and without any qualification. This requires further evidence and it cannot be decided in a summary proceeding.

b) In terms of the final bill (Annexure 6), the net amount payable was mentioned as Rs.81,76,767/-. However, in the statutory demand notice dated 03.07.2022, it is mentioned as Rs.1,02,87,004/-. To this was added another Rs.17.0 lakhs as bill for glass and aluminium. It is not adequately explained how Rs.81.76,767/- has enlarged to Rs.1.02 crore and odd. Now, unless the justification for a claim of Rs.1.02 crore has been established, even the inclusion of the bill for Rs.17.0 glass and aluminium will not help in crossing the threshold limit of Rs.1.0 crore. In effect, the appellant has not been able to establish the exact debt due from the respondent, and at any rate that it is at least more than the threshold limit of Rs.1.0 crore. When the entire case of the appellant is spun around the final bill dated 11.04.2022, it is not adequately explained how it hits the threshold limit for invoking the IBC.

c) There are two e-mails, of which one is from the respondent to the appellant dated 09.01.2022 (Annexure D to the respondent's reply filed before the tribunal below) in which it had pointedly raised an issue of quality of the work done. The other e-mail is dated 31.05.2022 from the appellant to the respondent wherein the representative of the appellant writes: "*My bills have been verified and submitted, barring a few discrepancies, which have to be sorted out....*". There is no reference as to when exactly this discrepancy was and if it was sorted out. This apart, Clause 15 of the Construction Contract stipulates that the payment of the final bill would be done but after due certification of the completion of the work. To sum up, the final bill is not unqualified. This apart, the respondent himself has admitted to some discrepancies in the bill. Given the setting, there is a doubt if the time for payment of the alleged debt has arrived. In other words, both the debt and the default in paying the same which are *sine qua non* for invoking Sec.9 are in doubt.

d) That the work was not executed in time, that it was not completed despite extension of time granted by the respondent, that the respondent had terminated the contract etc., are not disputed, nor is the contractual term enabling the respondent to claim Rs.25,000/- from the appellant for every day's delay. Whether the respondent will be entitled to claim damages at Rs.25,000/- per day might have to be tested in a separate proceeding, but nothing prevents the respondent from making the claim based on this term. And, the respondent had raised this point in its defence, and if this is telescoped into the case of the appellant, it leaves the appellant's claim shaky.

8. It is very apparent that the case of the appellant is not free of factors which the IBC regime does not accommodate. Consequently, this tribunal does not find any material to interfere with the Order of the Adjudicating Authority

dated 20.11.2021 in C.P. (IB) 1033 of 2022. This appeal is accordingly dismissed.

(Justice N. Seshasayee)
Member (Judicial)

(Barun Mitra)
Member (Technical)