

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 08 of 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

Arising out of the Order dated 18.12.2020 passed in CP(IB) No. 214/BB/2020
passed by the Adjudicating Authority, (National Company Law Tribunal,
Bengaluru Bench)

In the matter of:

Shapoorji Pallonji and Company Private Limited

Regional office:

7th Floor, Surya Chambers,
No.124, HAL Airport Road,
Bengaluru 560017.

Registered office:

70, Nagindas Master Road,
Fort, Mumbai MH 400023.

...Appellant/ Operational Creditor

V

M/S. Shore Dwellings Pvt. Ltd

(formerly known as MANTRI DWELLINGS PVT. LTD.

Mantri House, 41, Vittal Mallya Road,
Bengaluru 560 001.

...Respondent/ Corporate Debtor

Present:

For Appellant : Mr. Vikas Mahendra, Advocate

For Respondent : Mr. M. S. Shyamsundar, Advocate

Coram : Mr. M Venugopal Member (J)
Mr. Kanthi Narahari Member (T)

JUDGMENT
(VIRTUAL MODE)

Kanthi Narahari Member (T)

1. The present Appeal is filed against the Order of the Hon'ble Adjudicating Authority dated 18th December 2020 whereby the application of the Appellant filed under Section 9 of IBC 2006 was disposed of with an observation that it is not a fit case for admission.

Brief Facts :-

Appellant's Submissions:

2. The Learned Counsel for the Appellant submitted that the Appellant has filed an application under Section 9 in the capacity as Operational Creditor before the Hon'ble Adjudicating Authority, Bengaluru Bench, Bengaluru seeking initiation of Corporate Insolvency Resolution Process ("CIRP") against the Respondent herein i.e., M/S. Shore Dwellings Pvt. Ltd for non-payment of Operational debt. It is submitted that the acknowledged debt has fallen due to the Appellant under a contract with the Respondent dated 14th January 2011 ("Construction Contract") under which the Appellant was to carry out the construction works in the Mantri Pinnacle High Rise Residential Project Development. The works for the project were duly carried out by the Appellant and the Respondent has issued Virtual Completion Certificate on 9th January 2020 certifying Project work completion as on 30th December 2019. The Appellant issued an application for the Final Payment Certificate ("Final Bill") on 9th May 2019 for cumulative gross value of work done of Rs. 104,74,33,943 with net payable amount calculated at Rs. 12,45,89,866.

3. The Learned Counsel for the Appellant further submitted that as per Clause 14.13 of the Construction Contract the Respondent had to certify the Final Bill raised by the Appellant within 56 days of its issuance and issue the Final Payment

Certificate bearing the certified bill amount. Further, Under Clause 14.7(c) of the Construction Contract, the Respondent was required to pay the dues under the Final Bill to the Appellant within 56 days of its issuance. The Learned Counsel submitted that pursuant to the submission of the Final Bill by the Appellant, several meetings were held between the parties and at the meeting held on 1st October 2019 and on the basis of longstanding relationship between the parties and repeated assurances made by the Respondent that they would make timely payments of the dues certified, an amount of Rs. 6,98,47,408 which included GST. It was decided that an agreement would be signed between both parties recording the payment schedule for payment of the Acknowledged Debt, as under:

- i) Rs. 2,00,00,000 by end of December 2019 (31st December 2019)
- ii) Rs. 2,00,00,000 by end of March 2020 (31st March 2020)
- iii) Rs. 2,98,47,408 by end of June 2020 (30th June 2020).

4. The above schedule of payment was recorded in the Minutes of the Settlement Meeting and Final Summary Sheet signed by both parties and circulated to the Appellant by the Respondent on 04th October 2019. Despite several reminders by the Appellant, and a clear admission of liability, the Respondent made no efforts towards signing the Proposed Agreement or making any payments instead. On 3rd January 2020, the Respondent sought for a revision of payment schedule. The Appellant, despite being under no obligation to do so, agreed to the revised schedule of payment and issued a revised Agreement with following due dates.

- i) Rs. 2,00,00,000 by 15th February 2020
- ii) Rs. 2,00,00,000 by 30th April 2020
- iii) Rs. 2,98,47,408 by 30th June 2020.

5. The Learned Counsel submitted that having not received any payments towards the Acknowledged Debt from the Respondent, the Appellant issued a Statutory Demand Notice dated 5th August 2020 under Section 8 of the IBC 2016 seeking

payment of the Acknowledged Debt. In response thereto, the Respondent issued a Letter dated 14th August 2020 seeking 15 days' time to respond to the Demand Notice issued to the Appellant. Thereafter, no further communication or payments were made by the Respondent. In view of the aforesaid reason, the Appellant filed the Application before the Hon'ble Adjudicating Authority Under Section 9 of the IBC seeking initiation of CIRP against the Respondent.

6. The Learned Counsel further submitted that the Respondent vide Letter dated 3rd January 2020 confirmed the liability of the debt to the extent of Rs. 6,98,47,408 with a request for revision of payment schedule. In view of the request, the Appellant revised the payment schedule as stated supra and it is clear admission of the Respondent recording the debt due and payable. The Hon'ble Adjudicating Authority after Hearing the Counsel for the Appellant/Applicant, even prior to issuing Notice to the Respondent, passed the Impugned Order dismissing the Application by rejecting the claim of the Appellant.

7. The Learned Counsel further submitted that the Application of the Appellant cannot be rejected on the ground of prior or pending negotiations. Further, the Hon'ble Adjudicating Authority erroneously held that the Appellant was in receipt of a substantial part of the debt. The Learned Counsel submitted that the Application cannot be rejected on the ground that the intent not for Insolvency Resolution, the Hon'ble Adjudicating Authority erroneously held that the Application was premature and in the nature of a debt enforcement proceeding which was impermissible under the Code in light of the decision in Mobilox Innovation Private Limited Vs Kirusa Software Private Limited (2018) 1 SCC 363.

8. Further, the Learned Counsel relied upon the Judgment of this 'Tribunal' in Monotrone Leasing Private Limited Vs PM Cold Storage Private Limited, in Company Appeal (AT)(INS) No.99 of 2020. This Hon'ble Tribunal held that the NCLT cannot reject an Application on the ground that the intent of the Applicant was not for Resolution for CIRP. In view of the aforesaid reasons, the Learned Counsel for the Appellant prays this bench to set aside the Impugned Order dated 18th December 2020

and allow the Appeal and direct the Learned Adjudicating Authority admitting the Application filed by the Appellant in CP(IB) No. 214/BB/2020.

Respondent's Submissions :-

9. Shri. M S Shyamsundar, Learned Advocate appearing for the Respondent submitted that there is no agreement signed between the parties for the amount as claimed by the Appellant and there is no final settlement. Therefore, the Hon'ble Adjudicating Authority rightly dismissed/rejected the Application.

10. The Learned Counsel further submitted that the claim of the Appellant was rightly rejected and it is not a Question of Law, it is only a Question of Fact. The Hon'ble Adjudicating Authority after going through the entire Application of the Appellant was convinced of the fact that there was settlement process opted in between the parties. The Learned Counsel submitted that the rescheduled payments of instalments were done due to intervening Covid 19 and slowdown of economic condition. By taking note of the facts, the Hon'ble Adjudicating Authority felt that substantial contractual compensation was already paid by the Respondent and only a small part was left over and non-payments in terms of the agreed settlement were caused due to Covid 19 slowdown. The Learned Counsel submitted that it is a settled Law that under the provisions of the IBC 2016 a Corporate Entity can be either Insolvent or Liquidated only on the account of failure caused due to a "total incapacity" of a Corporate Entity to pay the debts and not for a mere non-payment owing to circumstances. In response to the Judgment of the Hon'ble Supreme Court in Mobilox, the Learned Counsel submitted that the Hon'ble Adjudicating Authority felt that the Judicial Mechanism provided under the Code cannot be substituted for recovery as the mechanism recovery of dues against a solvent company is otherwise possible through a different process of Law. Therefore, there is no illegality in the Order of the Hon'ble Adjudicating Authority.

11. The Learned Counsel further submitted that the Hon'ble Adjudicating Authority was of the view that IBC was wrongly invoked, instead of simply rejecting

the Application and leaving open the choices of recovery to the prudence of the Applicant, it has acted as a Court of equity by allowing the Respondent to pay the dues. This in fact has ensured proper justice to the Appellant since the Hon'ble Adjudicating Authority has not rightly relegated the Applicant to seek remedies before other Forum. By its Order, the Adjudicating Authority has also placed the Respondent on a caution to discharge its liability within a reasonable time so that the dispute is ended. The Learned Counsel further submitted that by granting time to pay the Hon'ble Adjudicating Authority has ensured the Appellant that their right has not taken away. In view of the aforesaid reasons, the Appellant has not made out any case seeking setting aside the Impugned Order and admitting the Application before the Hon'ble Adjudicating Authority. The Appeal is devoid of merits liable to be dismissed.

Appraisal/Analysis :-

12. Heard the Learned Counsel appeared for the respective parties perused the pleadings, documents filed along with the Appeal. After Hearing the Learned Counsel for the respective parties, the only issue felt for consideration is whether the Appellant has made out any case invoking the jurisdiction of the Adjudicating Authority Under Section 9 of the IBC 2016.

13. The Adjudicating Authority Para 8 of the Impugned Order is of the view that the Corporate Debtor agreed to pay the instalments (Revised) on 15th February 2020, 30th April 2020 and 30th June 2020. Further it is observed as under :-

“Of these the second two instalments fall in the period of the Lockdown when business was at its lowest ebb. Major decisions had to be taken by the Government to revive business, to inject economic stimulus, enable restructuring of debts, introducing modifications and suspensions of various provisions of the Code, extending limitations of time etc. In this bleak scenario, it cannot be known whether it would be fruitful to push the Corporate Debtor into CIRP, or into liquidation if no Resolution Applicant comes forward. That would be against the objects of the Code.”

14. Further at Para 9 of the Impugned Order it is held that :-

“Be that as it may, the Petitioner and the Respondent have been negotiating the terms of payment till very recently and the same are still on. The Corporate Debtor is willing to pay, only the terms are to be settled keeping in mind the present economic scenario. Hence, the Petition appears to be not only for recovery of debt but is premature. It would be in the interest of justice to allow the Corporate Debtor a few more months to clear the debt or settle the matter with the Petitioner. We are therefore of the considered view that at present this is not a fit case for admission.”

15. The Learned Adjudicating Authority at Para 9 of the Judgment was of the view that the Appellant and the Respondent have been negotiating the terms of payment till very recently and the same are still on. The Corporate Debtor is willing to pay only the terms are to be settled keeping in mind the present economic scenario. Further the Learned Adjudicating Authority was of the view that the petition appears to be not only for recovery of debt but is premature. Prima facie we are of the view that the stand taken by the Learned Adjudicating Authority is illegal Per-se for the reason that the main objects of the IBC is for Resolution of the Corporate Debtor in a time bound manner. The Adjudicating Authority ought to have taken into consideration whether the Appellant/Applicant fulfil the criteria as contemplated under Section 9 of the IBC and if so the petition has to be admitted. If the Applicant failed to fulfil the criteria as contemplated under Section 9 the Application has to be rejected. This basis of criteria is drawn from the judgment of the Hon’ble Supreme Court in the case of Mobilox Innovations Private Limited Vs Kirusa Software Private Limited. The Learned Adjudicating Authority having taken note of the judgment of the Hon’ble Supreme Court in-re Mobilox Innovations and interpreted the said judgment that it is not intended to be substituted to a recovery forum. It is to be noted that the Hon’ble Supreme Court laid down the Law and hold that the Application has to be rejected if the Respondent/Corporate Debtor establishes that there is a pre-existence of dispute prior to issuance of demand notice. However, in the present case there is no pre-existence of dispute therefore the Application under Section 9 of the Appellant cannot

be rejected on that ground. Further from the perusal of documents it is clear admission of existence of debt which is due and payable. From the records also, it is clear that the Respondent/Corporate Debtor defaulted the payments of debt. Therefore, the Adjudicating Authority ought not to have disposed of the Application holding that there are discussions between the Appellant and the Respondent and some instalments have been paid to the Appellant and in view of the negotiations the Adjudicating Authority held that the Corporate Debtor is willing to pay keeping in mind the present economic scenario. We are of the firm opinion that the Forum i.e., NCLT/Adjudicating Authority have been created under the Code is for Resolution of Insolvency, Liquidation and Bankruptcy. The Code separates commercial aspects of Insolvency and Bankruptcy proceedings from judicial aspects. Therefore, the Adjudicating Authority (NCLT) is not a court of equity but for Resolution of Insolvency in a time bound manner. The Learned Counsel for the Respondent did not dispute the amount payable to the Appellant and did not dispute with regard to the debt and default. Further the Learned Counsel for the Respondent also did not admit that there is existence of dispute, prior to the issuance of demand notice by the Appellant.

16. From the records it is an admitted fact that on 01.10.2019 meeting held between the Appellant and the Respondent for certification of the final bill issued by the Appellant on 09.05.2019 for a net amount of Rs. 12,45,89,866 against the final bill amount and the Respondent certified a net amount of Rs. 6,98,47,408 to be paid as per the agreed payment schedule (minutes of meeting) issued by Respondent. The document is enclosed at Page 157 of Volume II of Appeal Paper Book(s). We have perused the said document and at Page 159 of the said document in a hand written it is recorded that “Final amount of Rs. 6,98,47,408 agreed as per above settlement”. The representatives of the Appellant and the Respondent have signed the said minutes of meeting. Thus, it is an admitted fact that the Respondent had agreed to pay the said amount vide minutes of meeting dated 01.10.2019. Further, the contention of the Appellant that the Appellant had sent Settlement Agreement to the Respondent as per the minutes of meeting dated 01.10.2019. However, the Respondent has not returned

the Settlement Agreement duly signed. The Respondent addressed a Letter to the Appellant that there is correspondence between the Appellant and the Respondent with regard to the payments to be made in 3 instalments i.e., Rs. 2,00,00,000 by end of December 2019, Rs. 2,00,00,000 by end of March 2020 and Rs. 2,98,47,408 by end of June 2020. In continuation of the said liability/debt the Respondent vide the Letter dated 3rd January 2020 addressed to the Appellant regarding reschedule of payments to be made in 3 instalments as under :-

- (a) Rs. 2 crores by end of 15th February 2020,
- (b) Rs. 2 crores by end of 30th April 2020 and
- (c) Rs. 2.98 crores by end of 30th June 2020.

17. Accordingly, The Respondent had requested the Appellant to send the revised agreement in 2 originals for their Counter Signature. The Letter is annexed at Page 127 of Appeal Paper Book(s). In view of the request made by the Respondent the Appellant sent/delivered 2 sets of settlement agreement in original to the Respondent. It is the contention of the Appellant that the Respondent has not returned the settlement agreement duly signed as per their request for revised payment schedule. Having no other alternate the Appellant had issued demand notice on 05.08.2020 vide page 77 of Volume 2 Appeal Paper Book(s) by demanding payment of dues as stated therein.

18. The Respondent acknowledged the receipt of Demand notice sent by the Appellant dated 05.08.2020 and stated that they will reply in detail within 15 days from date of issuance of this Letter. The Learned Counsel for the Appellant submitted that the Respondent had neither given any reply nor denied the amount payable by them. Having no other alternate the Appellant had rightly invoked the jurisdiction of the Adjudicating Authority under Section 9 of the IBC. We are of the view that it is a clear case of admission of debt and default committed by the Respondent. We are also of the view that the said debt and due falls within the meaning of Section 5(21) of the IBC i.e., “**operational debt**”.

Findings :-

19. As stated supra, the Respondent had admitted the debt on various occasions and no dispute raised prior to issuance of demand notice, the application of the Appellant is complete and fulfilled of the criteria as enumerated under Section 9 of the IBC. In view of the fulfilment of the requirements/qualifications for initiation of CIRP, the application has to be admitted. Accordingly, we set aside the impugned order of the Ld. Adjudicating Authority dated 18th December 2020 passed in CP(IB) No. 214/BB/2020 under Section 9 of IBC, 2016. We direct the Ld. Adjudicating Authority to admit the application in accordance with Law, after affording opportunity to the respective parties, The Appeal succeeds in above terms. No Orders as to Costs.

[Justice M Venugopal]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

Chennai
17.08.2021
GS