

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No. 298 of 2022

[Arising out of order dated 28.02.2022 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi, Bench-VI in (IB)-2185/(ND)/2019]

IN THE MATTER OF:

Mr. Arun Mittal
Member of the Suspended Board of Directors of
Aarcity Infrastructure Pvt. Ltd.
A-201 Omaxe Forest SPA,
Sector 93-B,
Noida – 201301.

...Appellant

Versus

1. Sun Control Systems
Plot No. 88, Phase-IV, Sector-57,
Kundli, Sonipat,
Haryana – 131028.

.... Respondent No.1

2. Mr. Arun Chadha
Interim Resolution Professional
727, Brahmpuri, Meerut
Uttar Pradesh – 250002.

....Respondent No.2

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Kunal Godhwani, Advocate.

For Respondent: Mr. Bhuvan Arora, Mr. Ramesh Gupta, Mr. Aakash

Bhardwaj, Advocates for R-1. Mr. Sanjay Pal, Mr. Rishi Sood, Advocates for IRP.

Mr. Parv Garg, Mr. Pawas Kulshreshtha, Mr. Piyush Hans, Advocates for Interveners (I.A. No. 2606/2022) Mr. Harsh Pratap Shahi, for itervener in I.A. No. 1697 of 2022

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal, filed u/s 61 of the IBC Code, 2016 ('**IBC**' in short) by the Appellant arises out of order dated 28.02.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Delhi Bench-VI) in C.P.(IB) No. 2185(ND)/2019. By the Impugned Order, the Adjudicating Authority admitted the Section 9 application under IBC filed by the Operational creditor and initiated Corporate Insolvency Resolution Process ('**CIRP**' in short) against the Corporate Debtor with immediate effect. Aggrieved by this impugned order, the present appeal has been preferred by the Corporate Debtor.

2. The brief facts of the case necessary to be noticed for deciding the appeal are :-

(a) The Corporate Debtor, Aarcity Infrastructure Pvt. Ltd., present Appellant issued a Work Order to Sun Control Systems, Operational Creditor/ Respondent No. 1 to supply and install UPVC Profile of doors and windows including toughened glasses of Tower-A (81 Units) and Tower - F (86 Units) @ Rs. 376.50/- per sq. ft. in the Regency Park Project of the Corporate Debtor/Appellant. This work order was issued on 10.06.2016.

(b) The Corporate Debtor issued another work order on 05.05.2017 to supply and install UPVC Profile of doors and windows including toughened glasses for Tower-D (60 Units) of the above project @ Rs. 333/- per sq. ft.

(c) On 16.08.2017 another work order for additional work at Tower-A and Tower-D was also issued.

(d) The payment terms for the work orders are as follows:-

- a) 30% advance along with order;
- b) 50% after delivery of material at site;
- c) 15% after installation at site;
- d) 5% retention after six months of completion of installation;
- e) Work Contracts Tax (WCT) and Tax Deduction at Source (TDS) to be deducted as per Rules; and
- f) Service Tax to be paid extra as applicable.

(e) The details of the Purchase Orders Invoices, Debit Notes and RA bills alongwith Invoice nos. as raised by Respondent No. 1 have been taken due note of by the Adjudicating Authority in Para 1 (iii) of the impugned order.

(f) The present Respondent No. 1 filed an application before the Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**'IBC'** in short) seeking to initiate CIRP against the Corporate Debtor on Company Appeal (AT) (Insolvency) No. 298 of 2022

27.08.2019. This was preceded by Statutory Demand Notice under Section 8 of IBC sent by Respondent No. 1 to the Corporate Debtor on 03.06.2019 claiming Rs. 56,38,850/-(Rupees fifty six lakh thirty eight thousand eight hundred fifty only) as operational debt. The Corporate Debtor replied to the Demand Notice on 10.06.2019 mentioning that more than 50% of work not having been completed and there being defects in the execution of work, payment for entire work cannot be demanded.

(g) The Adjudicating Authority vide impugned order dated 28.02.2022 came to the conclusion that there being clear indication of an operational debt due from the Corporate Debtor and the Corporate Debtor having defaulted in making payment of the debt due and further in the absence of any pre-existing dispute relating to the said debt, admitted the Section 9 application filed by Respondent No. 1 and ordered initiation of CIRP.

(h) Aggrieved by the above order of the Adjudicating Authority, the Corporate Debtor/Appellant has preferred this Appeal praying for termination of CIRP process initiated against the Corporate Debtor.

3. The Learned Counsel for Appellant while introducing his arguments submitted that in the present case before admitting the Section 9 application, the Adjudicating Authority ought to have first satisfied himself that an operational debt was actually in existence, and that the said debt had become Company Appeal (AT) (Insolvency) No. 298 of 2022

due and payable. Stating that examination by the Adjudicating Authority on the dispute aspect of the debt is only of secondary importance, Learned Counsel for the Appellant in support of his contention referred to the judgement of Hon'ble Supreme Court in the matter of **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353** (hereinafter referred to as '**Mobilox**') Elaborating further that the scope of work order was not limited to mere supply of UPVC profile of doors and windows alongwith toughened glasses but also for installation of the same, he argued that as the Respondent No. 1 had not carried out the installation work in its entirety, therefore, the payment terms were not triggered. In the absence of installation of goods, the payment demanded by the Respondent No. 1 under Section 8 Notice was therefore neither due nor payable. The Learned Counsel for Appellant has contended that without ascertaining the debt being due and payable, the Corporate Debtor has been wrongly subjected to the rigors of CIRP.

4. It has been further submitted that against bills for Rs. 1,18,61,393/- (Rupees one crore eighteen lakhs sixty one thousand three hundred ninety three only) raised by the Respondent No. 1, the Appellant has already paid a sum of Rs. 92,62,856/- (Rupees ninety two lakhs sixty two thousand eight hundred fifty six only) which roughly accounts for 80% of the invoice amount which corresponds with the payment terms. The remaining 20% amount of Rs. 23,72,279/- (Rupees twenty three lakhs seventy two thousand two hundred seventy nine only) was withheld because installation work was not completed

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and that the amount so withheld was in consonance with the terms of payment which provided for 15% payment to be made after installation and 5% payment after 06 months of installation. Further stating that the amount payable to the Respondent No. 1 is only Rs. 2,26,258/- (Rupees two lakhs twenty six thousand two hundred fifty eight only), it has also been added that this amount however has neither been accepted nor demanded by Respondent No. 1 from the Corporate Debtor/Appellant towards final settlement and hence not paid. It has also been argued that the Adjudicating Authority should not have relied upon the contents of an unsigned Memorandum of Understanding ('**MoU**' in short) as admission of debt. Though it had been sent to the Respondent No.1 by the Corporate Debtor, it was an outside court settlement without prejudice to the rights of parties.

5. The Learned Counsel for Appellant vehemently objected to the outstanding amount of Rs. 56,38,550/- (Rupees fifty six lakhs thirty eight thousand five hundred fifty only) claimed by the Respondent No. 1 as bogus, sham and illegal. It was pointed out that the Respondent No. 1 by his own admission had completed installation only in 49 flats of Tower-A and 20 flats in Tower-D as reflected at paras 8 and 12 at pages 3 and 4 of his reply and hence the amount claimed in the Section 8 demand notice as operational debt had not become due. It has been further pointed out that in respect of Tower-F, though the Respondent No.1 has claimed that installation has been carried out in two flats, no invoice has been raised. It has been also pointed out that Respondent No.1

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having admitted that the installation work could be carried out and completed only wherever openings for installation of UPVC doors and windows were ready indicates that installation work was not fully completed. Moreover, it has been argued that the work order was in respect of a composite contract and the installation amount is payable only after complete installation at the respective towers and not flat-wise installation. Hence payment was not triggered and therefore no debt was either due or payable. It has also been claimed that the Corporate Debtor/Appellant had to engage third party to complete the installation work as the same could not be completed by the Respondent No.1. The Learned Counsel for Appellant has also contended that the Respondent No. 1 had charged price over and above what was specified in the work order.

6. Submission has also been made that the claim of Respondent No.1 that only Rs. 83,93,717/- (Rupees eighty three lakhs ninety three thousand seven hundred seventeen only) has been paid by the Corporate Debtor is false and baseless as it does not take into account part payment made towards WCT and TDS amounting Rs. 3,77,407/- (Rupees three lakhs seventy seven thousand four hundred seven only). Explaining that further payments could not be made because of non-reconciliation of accounts and submission of final invoices, reliance has also been placed on judgment of this Tribunal in **Amitabh Roy Vs. Master Development Management(India)Pvt. Ltd. in Company Appeal (AT)(Ins.) No. 274 of 2022** that default in WCT and TDS payment cannot be a ground for invoking Section 9 of IBC.

7. Refuting the submissions of the Appellant, the Learned Counsel for Respondent No.1 has claimed that against total invoices raised amounting Rs. 1,18,61,078/- (Rupees One crore eighteen lakhs sixty one thousand seventy eight only), a total of Rs. 94,88,862/- (Rupees ninety four lakhs eighty eight thousand eight hundred sixty two only) being 80% of the work order amount had become due and payable as material had already been delivered on site as per payment terms. As against this, payment received was Rs. 83,93,717/- (Rupees eighty three lakhs ninety three thousand seven hundred seventeen only) only which accounts for only 70% of invoices raised. It has therefore been claimed that payment of Rs. 10,95,145/- (Rupees ten lakhs ninety five thousand one hundred forty five only) was due and payable and continues to remain unpaid. It has been further claimed that out of the withheld amount of Rs. 23,72,215/- (Rupees twenty three lakhs seventy two thousand two hundred fifteen only), payment had become due and payable for Rs. 14,64,843/- (Rupees fourteen lakhs sixty four thousand eight hundred forty three only) since 92 out of 149 flats had already been completed in Tower - A (66 units) and Tower-D (26 units) as per admission made by Corporate Debtor/Appellant at pg. 140-142 of Appeal Paper Book. It has been admitted that installation in respect of 2 flats in Tower-F has been completed though invoice could not be raised. The total amount claimed to be in debt and default is Rs. 56,38,850/- (Rupees fifty six lakhs thirty eight thousand eight hundred fifty only) including interest upto 31.05.2019.

8. Learned Counsel for Respondent No.1 has also stated that the claim of Corporate Debtor/Appellant that payment of Rs. 92,62,856/- (Rupees ninety two lakhs sixty two thousand eight hundred fifty six only) has been made is incorrect as substantiated by bank statement at pages 62-81 in Reply Paper Book of Respondent No. 1 indicating receipt of only Rs. 83,93,717/- (Rupees eighty three lakhs ninety three thousand seven hundred seventeen only) thus leaving an outstanding amount of Rs. 8,69,139/- (Rupees eight lakhs sixty nine thousand one hundred thirty nine only). Further, it has been pointed that payments which were made to a third party have been wrongly shown in the ledger statement of Respondent No.1 and therefore these amounts need to be discounted. Further deductions of Rs. 3,77,407/- (Rupees three lakhs seventy seven thousand four hundred and seven only) made towards WCT and TDS by the Appellant/Corporate Debtor have not actually been deposited. Pointing out a few other instances where higher payments have been claimed while actually lesser amount has been remitted by Corporate Debtor/Appellant, it has been submitted that these are cases of intentional misrepresentation.

9. As regards the issue of exorbitant rate having been charged by the Respondent No. 1, this has been rebutted as a frivolous ground since no such dispute was raised prior to issue of demand notice. Pointing out that the Corporate Debtor/Appellant has failed to adduce any documentary evidence to substantiate the existence of any dispute prior to issue of demand notice, the Learned Counsel for the Respondent No.1 relied on the ratio of the **Mobilox** Company Appeal (AT) (Insolvency) No. 298 of 2022

judgment (supra) that dispute raised should not be an assertion of fact unsupported by evidence or a feeble legal argument.

10. The Learned Counsel for the Respondent No.1 has further contended that the Corporate Debtor/Appellant has clearly admitted that it owes an amount of Rs. 2,26,258/- (Rupees two lakhs twenty six thousand two hundred fifty eight only) to the Respondent No.1 and the said amount remains unpaid and being more than the minimum threshold of Rs. 1 lakh, default has been triggered. In support of his contention, he referred to the judgment of the Hon'ble Apex Court in **M/s Innoventive Industries Ltd. Vs. ICICI Bank & Anr (2018)1 SCC 407** that default is defined in Section3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount.

11. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

12. The short point for our consideration is whether payment to the Operational Creditor/Respondent No. 1 as per work order is triggered in the present case giving rise to an operational debt, and if so, whether a default has been committed by the Corporate Debtor/Appellant in respect of payment of such operational debt having already become due and payable and whether the said operational debt exceeds an amount of Rs. 1 lakh and is an undisputed Company Appeal (AT) (Insolvency) No. 298 of 2022

debt. This examination would be in consonance with the test which has been laid down by the Hon'ble Supreme Court in **Mobilox judgment(supra)** for the Adjudicating Authority while examining an application under Section 9, the relevant excerpts of which are as follows:-

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an “operational debt” as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case

may be, depending upon the factors mentioned in Section 9(5) of the Act.”

13. It is an admitted fact that three separate work orders were issued on 10.06.2016, 05.05.2017 and 16.08.2017 for supply and installation of UPVC profile of doors and windows including toughened glasses on payment terms as at para 2(d) above. Based on the said purchase orders, the Respondent No.1 raised invoices from 22.09.2015 till 28.12.2018 which have been duly recorded by Adjudicating Authority at para 1(iii) of the impugned order. Without going into the intricacies of minutely examining the account statements, the ledger accounts relied upon by the appellant (at pages 143-146 of the Appeal Paper Book) and also by the Respondent No. 1 in his written submissions before the NCLT (at pages 178-181 of the Appeal Paper Book) has also been considered by us alongwith other material records. It is further noted that while the Corporate Debtor/Appellant has claimed that bills raised against these invoices amounts to Rs. 1,18,61,393/- (Rupees one crore eighteen lakhs sixty one thousand three hundred ninety three only) the Respondent No.1 has claimed an amount of Rs. 1,18,61,078/- (Rupees one crore eighteen lakhs sixty one thousand seventy eight only). The variance between the two figures being nominal, we choose to ignore the difference. We, however, find that while Corporate Debtor/Appellant has claimed to have paid Rs. 92,62,856/- (Rupees ninety two lakhs sixty two thousand eight hundred fifty six only), the Respondent No. 1 has claimed to

have received only Rs. 83,93,717/- (Rupees eighty three lakhs ninety three thousand seven hundred seventeen only). It is pertinent to note that the Corporate Debtor/Appellant has admittedly held back an amount of Rs. 23,72,215/- (Rupees twenty three lakhs seventy two thousand two hundred fifteen only) on the ground that 15% payment was to be released after installation and 5% amount as defect liability to be released after 6 months. Again, by their own admission, we note that the Corporate Debtor/Appellant has submitted at page 141 of the Appeal Paper Book that the Respondent No.1 completed installation in 92 out of 149 flats which accounts for 62% completion of installation work. It logically follows that Respondent No.1 was entitled to receive 62% payment from out of the retained amount, on pro-rata basis for the completed installations. If that be the case, then payment to the tune of Rs 14.70 lakhs had become due and payable as per payment terms and for which invoices had also been raised. The contention of the Appellant that payment was to be made only after full installation was completed in the respective towers and not on flat-wise completion cannot be acceded to for the following reasons. Firstly, it fails to explain why composite payment was not insisted upon tower-wise for the 80% amount for material delivery and RA bills were accepted. Secondly, from a plain reading of the payment terms, we do not find any embargo having been placed on the Operational creditor from claiming flat-wise payments as long as the installation was complete.

14. Furthermore, we are in agreement with the assertion made by the Learned Counsel for Respondent No. 1 that Corporate Debtor/Appellant has in any case admitted that it owes an operational debt amounting Rs. 2,26,258/- (Rupees two lakhs twenty six thousand two hundred fifty eight only) to Respondent No.1 which is yet to be paid. The explanation given by Corporate Debtor/Appellant for not releasing this payment to Respondent No. 1 is that this amount has not been demanded by them and that they have not agreed to accept this amount as a final payment. To our mind, this is a lame excuse to posit a justification to cover grounds for not having paid an admitted debt that had become due and payable. Moreover, when the operational debt had already arisen and become due, and invoice was also raised, in such circumstances, merely placing of conditions prior to release of payment, does not alter the colour and character of the operational debt and does not detract from its having become due and payable. The above findings clearly establish that the first two conditions laid down in the **Mobilox judgment supra** of operational debt exceeding Rs. 1 lakh and having become due and payable but not yet paid is squarely met.

15. This now brings us to the third aspect as to whether there is existence of dispute between the parties. Records reveal that no disputes were raised prior to the issuance of statutory demand notice on 03.06.2019 under Section 8 of the IBC. There is no exchange of correspondence raising any dispute prior to issue of demand notice. We note that three grounds have been raised but all post issue of demand notice. One ground is that there are defects in the work

executed which was contained in the reply to the demand notice sent on 10.06.2019. However, it is a cryptic letter and does not flesh out any details and therefore lacks sufficient gravitas. The second ground as cited in the same reply dated 10.06.2019 is that 50% work is not completed but again no supporting documents are available on record to show exchange of any sustained correspondence with the Operational creditor having taken place in this regard prior to issue of demand notice. The other ground raised is that of exorbitant rates being charged by the Operational creditor but that too has also been raised post issue of demand notice. There is nothing on record to suggest that the Corporate Debtor/Appellant raised any such dispute before receipt of invoices or at any period prior to the issue of demand notice. Thus even on the third test laid down by **Mobilox judgment supra** we find that there is nothing credible to substantiate the pre-existence of dispute.

16. At this stage we would also like to refer to the judgment of the Hon'ble Apex Court in **“Vidarbha Industries Power Limited Vs. Axis Bank Limited in Civil Appeal No. 4633 of 2021 MANU/SC/0874/2022”** explaining the provisions of Sections 7 and 9 of the IBC as the precepts laid down therein are also attracted in this case. The Hon'ble Supreme Court in the above matter observed and held:

“76. The fact that Legislature used ‘may’ in Section 7(5)(a) of the IBC but a different word, that is, ‘shall’ in the otherwise almost identical provision of Section 9(5)(a) shows that ‘may’ and

'shall' in the two provisions are intended to convey a different meaning. It is apparent that Legislature intended Section 9(5)(a) of the IBC to be mandatory and Section 7(5)(a) of the IBC to be discretionary. An application of an Operational Creditor for initiation of CIRP Under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the Rules and Regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.

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78. *The Legislature has consciously differentiated between Financial Creditors and Operational Creditors, as there is an innate difference between Financial Creditors, in the business of investment and financing, and Operational Creditors in the business of supply of goods and services. Financial credit is usually secured and of much longer duration. Such credits, which are often long term credits, on which the operation of the Corporate Debtor depends, cannot be equated to operational*

debts which are usually unsecured, of a shorter duration and of lesser amount. The financial strength and nature of business of a Financial Creditor cannot be compared with that of an Operational Creditor, engaged in supply of goods and services. The impact of the non-payment of admitted dues could be far more serious on an Operational Creditor than on a financial creditor.

79. As observed above, the financial strength and nature of business of Financial Creditors and Operational Creditors being different, as also the tenor and terms of agreements/contracts with financial creditors and operational creditors, the provisions in the IBC relating to commencement of CIRP at the behest of an Operational Creditor, whose dues are undisputed, are rigid and inflexible. If dues are admitted as against the Operational Creditor, the Corporate Debtor must pay the same. If it does not, CIRP must be commenced.....”

17. From the aforesaid discussion and analysis of facts and circumstances, we are of the considered opinion that the Corporate Debtor/Appellant has defaulted in the payment of operational debt, of an amount exceeding Rs 1 lakh, which amount had clearly become due and payable, and further in the absence of any pre-existing dispute, we find that no error has been committed by the Adjudicating Authority in admitting the application under Section 9 of IBC and initiating CIRP. We find no merit in this Appeal. Appeal is dismissed. No Costs.

A clutch of homebuyers in Aarcity Regency Park have filed I.A. No. 2585/2022 in Company Appeal (AT)(Ins.) No. 298 of 2022 and prayed that IRP be directed to not interfere with peaceful possession and enjoyment of property by the home buyers and that funds collected from them for maintenance should not be utilized for construction. The main appeal petition having been dismissed, we are of the considered view that this Tribunal need not pass any orders on the I.A.. With this, I.A. No. 2585 of 2022 stands disposed of, the applicant is at liberty to file an appropriate application before the Adjudicating Authority in the pending Company petition.

(Justice Ashok Bhushan)
Chairperson

(Justice M. Satyanarayana Murthy)
Member(Judicial)

(Barun Mitra)
Member(Technical)

Place: New Delhi

Date: 20.09.2022

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