

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 80 of 2023
& I.A. No.331 of 2023

[Arising out of the order dated 16.11.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Court-V, New Delhi in CP(IB) No. 263 (ND) of 2021]

IN THE MATTER OF:

R S Infra
Partnership Firm
Through its Partner, Shri Rama Kant Sharma
43/462, Radha Nagar, Vashitabad,
Sikandra, Agra, Uttar Pradesh – 282 007 **...Appellant**

Versus

R P Infraventure Pvt. Ltd
FF-22, First Floor,
Omaxe Square, Jasola Dist. Centre
New Delhi – 110 044 **...Respondent**

Present:

Appellant: Mr. Gaurav Varma, Advocate.

Respondent: Mr. Sumant Batra, Mr. Sanjay Bhatt, Mr. Sarthak
Bhandari, Advocates for R-1/RP
Mr. Ajay Garg, Advocate.

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellant arises out of the Order dated 16.11.2022 (hereinafter referred to as “**Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, Court-V, New Delhi) in CP (IB) No.263 (ND)/2021. By the impugned order, the Adjudicating Authority has dismissed the Section 9 application filed by M/s R S Infra, present Appellant seeking initiation of Corporate Insolvency Resolution Process (“**CIRP**” in short) against the Corporate Debtor-M/s R P Infraventure Pvt. Ltd. Aggrieved by the impugned order, the present appeal has been filed by the Appellant.

2. The Learned Counsel for the Appellant/Operational Creditor submitted that the Agra Development Authority had awarded a contract to HG Infra Engineering Private Limited as the main contractor which in turn further awarded a sub-contract to the Corporate Debtor-M/s R P Infraventure Pvt. Ltd., which is the present Respondent. For further execution of the said sub-contract, the Corporate Debtor had engaged R S Infra, the present Operational Creditor for the purpose of excavation, loading, transportation, unloading of soil and issued a work order dated 01.08.2014. The work assigned to it by the Corporate Debtor had been completed and no

objections on the quality of services rendered was raised by the Corporate Debtor. Payments were made by the Corporate Debtor to the Operational Creditor by way of running account. The Appellant has claimed that the Corporate Debtor had stopped making payments after 18.04.2018. Since an outstanding amount of Rs.1.58 crore had become due from the Corporate Debtor, the latter was requested to discharge their liability. However, the Corporate Debtor failed to liquidate the debt following which a Section 8 demand notice was served upon them on 30.07.2020. However, the Corporate Debtor did not reply to the demand notice or send a notice of dispute. Neither was the outstanding amount received from the Corporate Debtor. Hence, the Operational Creditor thereafter filed a Section 9 application on 09.04.2021 which was erroneously rejected by the Adjudicating Authority on 16.11.2022.

3. Refuting the submission made by the Appellant, it was submitted by the Learned Counsel for the Respondent that no payment was due and payable by the Corporate Debtor. It was pointed out that a Work Order Agreement had been signed between the Corporate Debtor and the Operational Creditor on 01.08.2014 in the context of a work order relating to construction of a road under the Agra Development Authority. In terms of the Clause 17 of the Agreement, payment was to be made to the Operational Creditor within 10 days from corresponding payment having been received by the Corporate Debtor from HG Infra. Since no payment had been received from HG Infra, no payment had become due to the Operational Creditor.

4. Besides asserting that no debt was due and payable to the Operational Creditor, it was also pressed that there was a dispute regarding the quality of work done by the Operational Creditor which had resulted into non-payment by the Agra Development Authority to HG Infra which in turn led to non-payment by HG Infra to the Corporate Debtor. It was further pointed out that because of the poor quality of services rendered by the Operational Creditor, debit notes had been issued by the Corporate Debtor amounting to Rs.1.24 crore as on 31.03.2020. It was, therefore, contended that there was a pre-existing dispute between the parties and hence the Adjudicating Authority had rightly rejected the Section 9 application.

5. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

6. The basic issue which needs consideration is whether operational debt, as claimed by the Operational Creditor, had become due and payable, and if so, whether there has been any default in respect of such payment on the part of the Corporate Debtor and whether the debt has been disputed.

7. Before dwelling on the facts of the present case, a quick glance at the relevant statutory construct of IBC would be useful. Section 8 of the IBC requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding Operational Debt. Section 8(2) lays down that the Corporate Debtor within a period of 10 days of the receipt of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. From

a plain reading of the above provisions, it is clear that the existence of dispute and its communication to the Operational Creditor is therefore statutorily provided for in Section 8. Post issue of demand notice by the Operational Creditor, if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute, he may file an Application under Section 9(1) of the Code.

8. In the present case, Section 8 demand notice was admittedly issued on 30.07.2020 which however the Corporate Debtor did not reply to. It is also an undisputed fact that in the present matter, the Operational Creditor did not receive any payment from the Corporate Debtor after the issue of demand notice, and, thereafter proceeded to file an application under Section 9 of IBC on 20.05.2021. It is however noticed that in response to the Section 9 application, the Corporate Debtor filed reply affidavit thereon.

9. The Adjudicating Authority having considered the matter rejected the Section 9 application. At this stage, it may be useful to reproduce para 13 of the Impugned Order wherein the Adjudicating Authority has dismissed the Section 9 application and held as follows:

“13. We have perused the averments and heard the arguments made by the applicant and the Corporate Debtor. The corporate debtor has raised objection as regards the default and claimed that no default has occurred and no amount is due and payable. Moreover, the corporate debtor has issued a debit note dated 20.07.2020 on grounds of defect in quality of services provided due to which it had to incur major losses and in terms of which an arbitration proceeding as regards the quality of services provided by the applicant due to which the payment has been withheld by

the main contractor, is pending before the Hon'ble Delhi High Court. The Corporate debtor is mainly relying on the argument upon the work order dated 01.08.2016 wherein as per clause 18 it is specifically stated that the payment shall be released by the Respondent Company within 10 (ten) days after receiving corresponding payment from the employer. Another, objection raised by the corporate debtor is with regards to the incomplete demand notice being defective and incomplete. The said objection does not sustain as the applicant has filed the relevant invoices, subsequently, as per the directions of the Bench and cured the defects. Hence, we are of the view that there is a pre-existing dispute as has been contended by the corporate debtor. It is clear that without going into the merits of the dispute, the corporate debtor has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed. In the given facts and circumstances, the applicant has failed to establish default on part of the corporate debtor in payment of operational debt. Therefore, this bench is not inclined to admit the present application. Accordingly, the present application is rejected.”

10. It is the case of the Appellant/Operational Creditor that the work assigned to it by the Corporate Debtor had been completed without any complaints from the Corporate Debtor and payments released till 18.04.2018. Thereafter an outstanding amount of Rs.1.58 crore had become due from the Corporate Debtor which remained unpaid. It is also the contention of the Appellant that the Corporate Debtor had deducted TDS which is an acknowledgment of the debt on the part of the Corporate Debtor. No dispute was ever raised by the Corporate Debtor with regard to their performance of work in spite of receiving a notice under Section 8 of the IBC.

11. Making rival submissions it has been the contention of the Respondent that no payment was due and payable by the Corporate Debtor. It was pointed out that payments to the Operational Creditor was guided in terms of the Work Order Agreement signed between the Corporate Debtor and the Operational Creditor on 01.08.2014 and no due had arisen in terms of Clause 17 of the Agreement. It is also pointed out that the Operational Creditor has included security amount while claiming outstanding dues at a time when security amount is not due and payable as per Clause 16 of the work order agreement as placed at page 81-88 of Appeal Paper Book (“**APB**” in short). The Learned Counsel for the Corporate Debtor has also contended that merely on the basis of TDS deduction, no operational debt liability can be fastened on the Corporate Debtor.

12. For proper appreciation of the facts at hand, we may have a look at Clauses 17 and 18 of the Work order Agreement which is as extracted below:

“17. PAYMENT

Eligible payment will be released to the PRW (Piece Rate Worker) by the Company within 10 (ten) days after receiving corresponding payment from the Employer subject to any statutory and other deductions and monies owed by the PRW to the Company including recoveries if any; cash retention, deduction of monies due to the Company towards any plant, mandatory, materials or services arranged by the Company on behalf of the PRW and damages/costs levied by the Company/ the Employer, if any.

Notwithstanding any other provision contained herein to the contrary or otherwise, no payment shall be made to the PRW unless corresponding payment has been received by the Company from the Employer.

Any Payment by the Company to the PRW shall be 'on Account payment and no payment made by the Company, hereunder shall

be deemed to constitute acceptance by the Company of the Works or any part thereof.

The Company reserves its right to withhold payments due to the PRW, if the PRW has failed to perform in accordance with this Work Order and/or has failed to remedy, rectify the defects, deficiencies to the satisfaction of the Company. The Final Payment shall be subject to the Taking over Certificate for the Works.

18. CLAIMS

Notice for Claims, if any, shall be submitted by the PRW within 14 (Fourteen) days of the date of occurrence of the event in accordance with Clause 3. All claims shall be substantiated with supporting documents along with the statement which shall state the amount due and payable to the PRW under this Work Order.

If the PRW does not submit its claim(s) for whatsoever reason within the above mentioned stipulated time as above, the same shall be deemed to be waived. Notwithstanding any other provision contained herein to the contrary or otherwise, no claims of the PRW shall be admitted (nor deemed to be payable) unless the Employer admits and pays the corresponding claims of the Company.

Notwithstanding any other provision contained herein to the contrary or otherwise, the PRW shall not be paid any idling charges whatsoever under whatever nomenclature called.

Should the Client cancel the Company's Contract in whole or in part for any reason whatsoever, the Company shall have the right likewise to cancel this Work Order and shall only pay the PRW for the actual work done up to the date of cancellation and no compensation whatsoever shall be payable to the PRW in respect of the cancelled portion of this Work Order."

13. A plain reading of the Clause 17 clearly shows that in terms of Clause 17 of the Agreement, payment was to be made to the Operational Creditor only after corresponding payment was received by the Corporate Debtor from HG Infra. There is nothing shown by the Operational Creditor to substantiate that payments had been received by the Corporate Debtor and had therefore become due for payment to them. Further, the Operational Creditor was

required to raise a notice for claims within 14 days of the date of occurrence of event and since no such notice had been raised, it is clear that no payment was claimed by the Operational Creditor in terms of Clause 18 of the Agreement. Further the final payment to the Operational Creditor was subject to a "Taking Over Certificate" for the work which certificate is also not placed on record. We are also inclined to agree with the Corporate Debtor that TDS deduction does not imply acknowledgment of any liability as outstanding qua the Operational Creditor. We therefore hold that the Adjudicating Authority committed no error in relying on these clauses of the Work Order Agreement to come to the conclusion that the Operational Creditor has failed to establish default on part of the Corporate Debtor in payment of the operational debt.

14. This now brings us to the issue of the pre-existing disputes which has been pressed hard by the Learned Counsel for the Corporate Debtor in the context of debit notes issued by them. It was submitted that these debit notes had been duly communicated to the Operational Creditor through WhatsApp message on 20.07.2020 which was prior to issue of demand notice under Section 8. Explaining the genesis of these debit notes it was submitted that the payment from the Agra Development Authority to the main contractor, HG Infra was withheld on account of quality dispute, which dispute had been referred to a sole arbitrator against which an award had been obtained on 09.11.2019 which is under challenge and pending before the Hon'ble Delhi High Court. The quality dispute had arisen, according to the Corporate

Debtor because of the poor services rendered by the Operational Creditor in respect of the same work.

15. It has however been countered by the Learned Counsel for the Appellant that no debit note was ever issued by the Corporate Debtor and that these debit notes were never placed on record. It was clarified that only a WhatsApp communication was sent by the Corporate Debtor in respect of the debit notes. Hence, in the absence of placing on record debit notes issued in compliance of law, the contention of the Corporate Debtor that there was a pre-existing dispute does not stand to reason. It is also been contended that no correspondence/material has been placed on record which shows that the Corporate Debtor had invoked Clause 17 of the work order agreement to deny payment to the Operational Creditor on account of quality of work. It has also been pointed out by the Appellant that the pendency of arbitration proceedings was between the Agra Development Authority and the HG Infra. It does not establish that the pending litigation had any direct correlation with the quality of work done by the Operational Creditor. Further at no point of time, either prior to or after the issue of demand notice, the Corporate Debtor had ever informed the Operational Creditor about the pendency of such litigation or the quality of work done by them. In support of their contention, reliance has been placed on the decision of this Tribunal in the matter of **Aroon Kumar Aggarwal v. M/s ABC Consultants Pvt. Ltd. in CA (AT) (Ins.) No.409 of 2020** wherein it has been held that when the plea of pre-existing dispute is raised in the background of a pending suit or arbitration proceeding, the same should be related to the dispute.

16. On perusal of records, we find that the WhatsApp message of 20.07.2020 relating to debit notes from the Corporate Debtor to the Operational Creditor has been placed at page 133 of APB. That this message was received by them from the Corporate Debtor has not been controverted by the Operational Creditor. Further at page 134 of APB, we find that the Operational Creditor has sent a response to the above WhatsApp message holding the debit note to be false and even threatened the Corporate Debtor of legal action. This shows that they were aware of debit notes before the issue of the Section 8 demand notice. Under such circumstances, the Adjudicating Authority committed no error in concluding that the debit notes issued on grounds of defect in quality of services testifies the existence of a dispute. We must add here that reliance placed by the Learned Counsel for the Appellant on the judgment of this Tribunal in ***KB Polychem (India) Ltd. v. Rapt Industries Pvt. Ltd. in CA (AT) (Ins.) No. 396 of 2020*** to show that debit notes sent by emails are not in order is misplaced since in that case the emails containing the debit notes were internal emails of the Corporate Debtor which were not sent to the Operational Creditor thereby making the facts in that case distinguishable from the present.

17. It is relevant at this juncture to refer to the guiding principles laid down by the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353*** (hereinafter referred to as '***Mobilox***'). Para 56 of the ***Mobilox*** judgment which is extracted as hereunder reads as follows:

“56. Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.”

18. On going through the submissions made by the parties and keeping in mind the provisions of law laid down in the IBC and the **Mobilox** judgment cited supra, it is amply clear that there exists a pre-existing dispute with respect to the quality of services provided by the Operational Creditor to the Corporate Debtor. Present is a case where it cannot be said that defence taken by the Corporate Debtor in their reply affidavit is a moonshine defence unsupported by any evidence. For such disputed operational debt, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. Where operational creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists between the two which is not so borne out given the facts of the present case. It is well settled that in Section 9 proceeding, there is no need to enter into final adjudication with regard to existence of dispute between the parties regarding operational debt.

19. Given this backdrop, we have no reasons to disagree with the findings of the Adjudicating Authority. Considering the overall facts and circumstance of the present case, and in view of the foregoing discussion, we are satisfied

that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant on the ground of pre-existing dispute. There is no merit in the Appeal. Appeal is dismissed. We however make it clear that it will remain open to the Appellant to resort to other remedies that may be available to it under any other law. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi

Date: 18.12.2023

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