

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**I.A. No. 1118 of 2023 in
Company Appeal (AT) (Insolvency) No. 976 of 2022**

IN THE MATTER OF:

Rajeev Srivastva

...Appellant

Versus

Ahluwalia Contracts (India) Ltd. & Ors.

...Respondents

Present:

For Appellant: Mr. P. Nagesh, Sr. Advocate with Mr. Ankur Goel and Mr. Saket Singh, Advocates.

For Respondents: Mr. Anil K. Airi, Sr. Advocate with Mr. Mudit Ruhella, Mr. Mritunjay K. Singh and Mr. Jagjeet Singh, Advocates for R-1.

Ms. Anju Jain and Ms. Hitesh Sachar, Advocates for R-2&3.

O R D E R

28.04.2023: Heard learned counsel for the Appellant as well as learned counsel for the Respondent. This Appeal has been filed against order dated 07.07.2020 by which the Adjudicating Authority has admitted Section 9 application filed by the Operational Creditor. In this Appeal, when the Appeal was taken, the submission was raised by the Appellant that before filing the Section 9 Application Section 8 notice was not issued, hence, the admission order could not have been passed. A two Member Bench referred two questions to the Larger Bench, which has already been answered on 21.02.2023 holding that in the facts of the present case no notice under Section 8(1) was necessary for filing Section 9 application. After the aforesaid order, this Appeal is now placed before us for hearing.

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2. Learned counsel for the Appellant submits that there was no default of the debt, hence, no order could have been passed for admission. Default ought to take place before Section 9 application can be admitted. He submits that a letter was sent on 07.08.2013 to the Operational Creditor, where the amount to be paid was noted. However, it was mentioned that amount shall be paid as and when the work starts. On 13.08.2013, reply was send by the Corporate Debtor accepting the conditions. It is submitted that the said letter clearly proves that the liability to make payment arose only when work starts.

3. Learned counsel for the Respondent refuting the submission made by the learned counsel for the Appellant submits that in the Reply filed in Section 9 application, only defense taken by the Corporate Debtor was that no notice under Section 8 has been issued, hence, in view of the above no other submission need to be considered.

4. Learned counsel for the Appellant in rejoinder submits that an issue pertaining to question of law can be raised in appeal even if no such issue was raised before.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. In the present case, while noticing the facts of the case in order dated 25.11.2022, we have noted that prior to filing Section 9 application, a Company Petition was filed before the Hon'ble High Court of Orissa in which notices were also issued and subsequently, the Winding up Petition from the

High Court was transferred to NCLT, Cuttack as per the Companies (Transfer of Pending Proceedings) Rules, 2016.

7. The letter on which much reliance is placed by learned counsel for the Appellant is letter dated 07.08.2013 which provides as follows:

“Dear Sh. Bharadwaj Ji,

This refers to my discussion with you on telephone on 03.08.13 and 05.08.13 regarding your claims and the revised rates for the balance work in future. I had met Sh. Sridhar Dwivedi, General Manager (Projects), ACIL on 02.08.13 and we had finally arrived at the following after discussion with you

1. The claims on account of salary, idle equipment, rental and depreciation for the material other than perishable material and the assumed losses were discussed. These claims were settled as agreed for Re. 175 lacs.

2. The outstanding payment against the verified bill shall be same as on records which I understand is approx. Rs.40,26,474.00.

3. It was also agreed that the work can be started with increased rates, over and above the Contract rates, and this increase will compensate for the lost period during which the work remain closed and the construction period assuming that it will take 14 months commencing w.e.f. 01.09.18. We plan to increase give you increase of 14% over and above the Contract rates and the Contract rates and the period will be revised accordingly.

As regards your payments, we would like to say that we will definitely be able to pay your outstanding bill as and when the work starts, however, the other payments will come in installments which we can discuss.

We will start the process of restoring the Contract on receipt of confirmation from your end. This also replies all your letters mentioned in letter dtd. 01.08.13.

With Warm Regards,

*Col.(Retd.)Harendra Singh | Executive Director-
Planning & Coordination”*

8. We also need to notice Reply dated 13.08.2013, which is to the following effect:

“To

M/s Assotech Milan Resorts (P) Ltd

Radisson Blue Hotel

Forest Park Bhubaneswar

August 13, 2013

Kind Attn. Mr. Harendra Singh (Executive Director)

***Sub: Settlement of the claims and rates for the
balance work of Radisson Blue Hotel, BBSR.***

Dear Sir,

We have received your trolling mail dated August 7, 2013 regarding our settlements. The contents are noted and accepted in the interest of our relationship and the project.

There is only one thing which we would like to emphasize here, that the payment should be given to

us of the regular running bill which is amounting to Rs.40,26,474.00 and Rs.1,00,00,000.00 [Rs.1Cr) against compensation however the balance could be given against o PDC for one month.

We hope you will not find anything unjustified. Kindly settle and please release the payment and intimate us the date to start the work. In addition to that, release us the amended BOQ with 14% enhancement in rates as agreed.

Thanking you.

Regards

For Ahluwalia Contracts (I) Ltd.

Ratish Bhardwaj

Executive Director”

9. The letter dated 07.08.2013 clearly contains acknowledgement of the debt by the Corporate Debtor. The submission which has been pressed by the Appellant is that the payment was to be made when the work starts. The said statement at best stated the time from when payment shall start, which was accepted by the Operational Creditor. The fact that payment was to take place from the date work start does not in any manner absolve the liability of the Appellant since acknowledgment was very much there. From the order of the Adjudicating Authority, it is clear that the debt was never disputed.

10. Insofar as the question of Section 8 notice not being issued, on basis of which Appellant contends that there was no default, sufficient to notice that notice was issued to the Corporate Debtor in the winding up petition, subsequently which was transferred. The submission of learned counsel for the Appellant that no default was committed cannot be accepted.

11. We, thus, are of the view that present is a case where debt was proved and default was committed by the Appellant. We do not find any error in the order the Adjudicating Authority admitting Section 9 application. There is no merit in the Appeal, Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

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