

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 2381 of 2024

08.08.2025

Present: JUSTICE N. SESHASAYEE, MEMBER (JUDICIAL)

MR. ARUN BAROKA, MEMBER (TECHNICAL)

SUDHA ELECTRICAL

...Appellant

Through it Proprietor Yogendra Chaudhary

Vs

...Respondent

LEENA POWER-TECH ENGINEERS PVT. LTD.

(Arising out of Impugned Order dated 25.10.2024 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-V, Mumbai) in C.P. (I.B) No. 515/MB/2023)

For Appellant: Mr. Chandra Shekhar Yadav & Mr. Astitva Srivastava, Advocates for Appellant.

For Respondent: Mr. Arvind Nayar, Sr. Adv. With Sinha Shrey Nikhilesh, Mr. Parth Davar, Mr. Naman Kapoor, Diskha Dadu, Ms. Swastik Verma, Ms Nayan Dubey & Ms. Faraaz Khan, Advocates for Respondent.

JUDGEMENT

Per Justice N. Seshasayee, Member (Judicial)

This Appeal is preferred by an Operational Creditor whose petition to initiate a CIRP Proceedings under Section 9 IBC was dismissed on the ground that there

subsists, (a) a pre-existing dispute between the parties vis-à-vis a debt which the appellant claims that the respondent had defaulted to pay despite a demand; and (b) the CIRP is not maintainable under Secc.10A of IBC.

FACTS

2.1 The material facts which led up to the institution of this appeal are as below:

(a) The appellant is engaged in the business of supplying and erecting and testing and commissioning of electrical equipments, transformers, gensets control panel, laying of cables, etc.

(b) Be that as it may, certain Rahul Cables Pvt. Ltd. had obtained certain Government contract involving laying of 220 Kv copper cables and 132 Kv cables and work associated therewith in Navi Mumbai, Pune and Andhra Pradesh. It (Rahul Cable) had awarded sub-contract to the respondent/corporate debtor herein. According to the corporate debtor, it engaged the appellant for performing its contracted work.

(c) According to the respondent/corporate debtor, on 18.09.2019, 23.12.2019 and 15.01.2020, it had placed three separate work orders with the appellant. Except for the nature of work to be done thereunder, the terms of the three work orders are identical. The appellant contends that no work order of the kind which the respondent pleads has never been

issued to him. In other words, its contention is that the contract between the parties was oral.

(d) According to the appellant – Operational Creditor, it had performed the work required to be performed by it, and raised 5 invoices dated 09.01.2020, 23.01.2020, 13.02.2020, 28.02.2020 and 13.03.2020 for a combined total value of Rs.4,98,28,613.71.

(e) On 24.06.2020, the respondent had made part payment of Rs.76,00,975/- and also paid Rs.4,22,277/- towards GST. As on 31.03.2022, according to the appellant, the respondent is liable to pay an outstanding balance of Rs.4,18,05,361/-. And, the respondent had confirmed the same on 01.04.2022. As on 09.01.2023, inclusive of interest at 24% p.a. the respondents are liable to pay sum of Rs.6,73,42,138/-.

(f) Since the debt due to the Operational Creditor was not paid, it issued a demand Notice dated 09.01.2023 as required under Sec. 8 of IBC. The notice, though was duly served, did not evoke any response or reply from the respondent. Wasting no time the appellant invoked Sec.9 IBC.

(g) In Part IV of Form 1, the appellant has indicated that the debt became due for repayment on the respective dates of invoices.

2.2 Notice was served on the respondent and it appeared to contest the petition with its reply. Its defences are twofold:

- a) that the initiation of action is barred under Section 10A of the IBC and hence the very invocation of sec.9 IBC is not maintainable. In terms of clause 5 of the work order (something which the appellant disputes), the respondent is required to pay only 20% of the invoice value within 90 days of the invoice. If so reckoned, the respondent will have 90 days time to pay the paid 20% from the respective dates of the invoices. Accordingly, the time for payment of 20% on each of the five invoices would arise only after 25.03.2020, the date from which Sec.10A embargo in invoking IBC would intervene.
- b) In terms of clause 5(2) of the work Order, 70% of the balance (after the initial payment of 20% of the invoice value) is required to be paid only after a completion certificate along with testing and commissioning report, duly signed by the authorized person of M/s. Rahul Cables (as contemplated in clause 3 of the work order) is made available along with few documents indicated in clause 5. The appellant has not produced any completion certificate as mandated in Clause 5(2) read with Clause 3(vi) of the work order. Hence, the 70% of the invoice was not paid. So far as the balance 10% is concerned, the appellant is entitled to be paid only after a period of 12 months from the date of testing and commissioning. Therefore, till such time the appellant establishes its right to be paid as per the terms of payment, the respondent is entitled to withhold it. And, the appellant has not produced any material to show that it has done the work as contemplated in the work order nor produced any of the documents that

it is required to produce as contemplated in clause 5 read with 3 of the work Order. On the other hand, the respondent has raised a dispute that the work has not been done even prior to the institution of CIRP under sec.9 of IBC. In essence neither is there a debt as contemplated in the IBC nor the claim of the appellant is dispute-free. The appellant has grossly suppressed the material facts and consequently the very institution of petition under Sec.9 IBC is not maintainable.

- c) Admitting that it has made a part payment of Rs.76,00,975/- the respondent would explain that it merely represents the 20% of the invoice value as required to be paid. And the GST of Rs.4,22,277/- is also paid as it is statutorily required to be paid on the 20% of the amount.

2.3. The Adjudicating Authority upheld the defences taken by the respondent and refused to admit the CIRP. This Order is now under challenge.

THE ARGUMENTS:

3. Taking this Tribunal extensively through the few documents including the GST returns etc., the learned counsel for the appellant argued that:

- a) in Part IV of Form I, the appellant has indicated in unequivocal terms that the date of default to pay the debt commenced from the date of the invoice. In terms of Sec. 10A IBC which the Parliament thought it fit to introduce during the Covid-days, only in cases where the default has arisen on or

after 25th March, 2020 (the day on which the Government clammed lockdown) across the country, initiation of a CIRP proceeding is barred. However, in the instant case, the invoices are issued between 09.01.2020 and 13.03.2020 and they are well before 25.03.2020 from which date alone the bar under Section 10A would come to play.

- b) So far as the alleged pre-existing dispute is concerned, the respondent has not denied any one of the 5 invoices issued by the appellant between 09.01.2020 and 13.03.2020. Instead it proceeded to confirm it on 01.04.2022. Indeed, acknowledging the debt, the respondent had even a made part payment on 24.06.2020 and also deposited Rs.4,22,277/- towards GST. And most significantly, the respondent has not even chosen to reply the statutory notice issued on it under Sec.8 IBC denying the claim of the appellant.
- c) The CIRP was laid on 21.02.2023. During the pendency of the same, on 18.04.2023, the respondent had paid Rs.25.0 lakhs, which is corroborated by the e-mail of the bank. Indeed, there has been WhatsApp chats between the appellant and the representative of the respondent preceding this payment, and is made available on record as Annexure 4. This factum was overlooked by the Adjudicating Authority.
- d) The respondent contends that the appellant transacted business with the former based on certain work Orders, but they were never given to the latter. The transaction was based on an Oral agreement, and work Orders

produced by the respondent are unilateral documents which do not bind the appellant.

When the debt is not challenged, and when the respondent defaults in paying it despite a demand, it exposes the respondent to the perils of IBC. The issue of existence of a pre-existing dispute is a hurriedly invented exit route but it is unsupportable on facts.

4. The response of the respondent's counsel was candid and along predictable lines. He argued:

- a) The contract which the respondent had entered into with the appellant involves both supply of goods and services associated with erection, commissioning and testing of electrical cables. It was entered into as part of the contract which M/s Rahul Cables was awarded by the Government. To deny these work orders itself is denied. Indeed, in the copies of the work Orders produced by the appellant in its paper-book (all photocopies), the signature of the appellant's representative is seen.
- b) The terms of the work Orders are unambiguous. The appellant is required to supply goods and services, erect and commission and them and they have to be tested, and certificates of the due commissioning and testing must be obtained from the agent of the contractor, and produce the same for claiming the value of the invoices raised for the purpose. It is here the appellant chose to turn the other way.

c) So far as the right to claim the amount which the appellant claims as debt, in terms of the work Order, it would arise only after 90 days of the date of the invoice. And the earliest of invoice is dated 09.01.2020, and if 90 days is added to it, the right to claim the invoice amount would arise only in April, 2020. And the last of the invoice is dated 13.03.2020, a few days prior to lockdown due to Covid commenced which eventually necessitated the introduction of Sec.10A of the IBC, but the 90 days from there would expire only about mid-June, 2020, which fell within the period covered by Sec.10A.

d) It is true, some amounts as stated by the appellant were paid, but they do not indicate that the respondent has admitted the entire liability. It is still waiting for the certificate duly signed by the authorized agent of the respondent vis-à-vis the commissioning and testing etc. While it is not disputed that no reply was issued to the notice under Sec.8 IBC, yet it cannot constitute an admission of debt, and the appellant is still under an obligation to establish that there existed an undisputed debt or the default in paying it within the meaning of Sec.3(11) and 3(12) of IBC.

5. In his reply to the submission of the counsel for the appellant, the learned counsel for the appellant submitted that the signatures of the representative of the appellant in the copies of the work orders as seen in the appellant's paper-

book is intended to authenticate the document as per procedure, and it should not be construed as an admission of having received the work orders in question.

Discussion & Decision

6. Two factors that may provide a cause for a creditor to set in motion a CIRP either under Sec.7 or under Sec.9 IBC are existence of a debt within the meaning of Sec.3(11) and the default of the debtor to pay it as defined in Sec.3(12) of the Code.

7.1 In the present case, there is no dispute that the appellant has not issued any of the five invoices. It also goes as an admitted fact that on 24.06.2020 (when Covid Wave I was in full swing), that the respondent had paid Rs. Rs.76,00,975/- towards part payment of the invoice amount besides Rs.4,22,277 towards GST at 18%. This is followed by a payment of Rs.25.0 lakhs on 18.04.2023, some two months after the CIRP was laid. Here, the respondent would argue that whatever amount it had paid only constitutes 20% of the invoice value which the respondent is required to pay as per Clause 5 of the work Order. (This tribunal has verified it and it works out to 20.27%). This implies that the respondent had paid substantial part of the 20% of the invoice amount in June, 2020, and the balance after the institution of petition under Sec.9 IBC. What could be gathered here is that the respondent had admitted that the appellant had performed its contractual obligation, whether wholly or partly, for the respondent would not have paid anything if the appellant had failed to perform its part of the contract at all.

7.2 Secondly, it was argued that the respondent has not challenged the correctness of the invoice value, for it has confirmed it on 01.04.2020, and that it is not disputed. It however, requires to be noted that the respondent contends that payment of the balance amount could be withheld till the appellant produces the certificate of erection, commissioning and testing as stipulated in clause 5 of the work Order. In other words, according to the respondent, mere assertion of the completion of the work by the appellant and raising of invoices will not automatically entitle the latter to claim the invoice-amount, unless the work done by the appellant is certified in the manner contemplated. In that sense, the right to claim the value of the work done is conditioned upon something more – the production of the certificate and few other documents enumerated in clause 5 of the work Order. What if the quality of work at the time of such certification itself is challenged? Will the appellant still be eligible to claim the invoice-amount? That would then become debatable.

8. There is another issue. Even if the correctness of the invoice-amount is presumed to be true, is there a default within the meaning of Sec.3(12) of the Code? Sec 3(12) defines a ‘default’ as, *“non-payment of debt when whole or part or instalment of the amount of debt **has become due and payable** and is not paid by the debtor or the corporate debtor, as the case may be”*. This amplifies the fact that not only should there be an undisputed debt, but such debt must have become due for payment at the time when the default is said to have occurred. In the instant case, even if the existence of debt is presumed, still it requires to be established by the appellant that it had fallen due for payment.

9. Here there are two versions: The respondent claims that the appellant had performed its obligation only based on the work Orders whereas the appellant claims that no work order of the kind was ever given to it. To stretch it further, the appellant's contention is that inasmuch as the contract between the parties was oral, the terms of the work orders vis-à-vis the time for payment as stipulated in Clause 5 thereof would not bind it. Here it may be stated that the first installment of part payment of Rs.76,00,975 was paid on 24.06.2020 which was 90 days after the last invoice dated 13.03.2020. However, it cannot *ipso facto* be concluded for the purposes of working the IBC that the appellant had undertaken the work only pursuant to a written work order. There therefore, is an obvious dispute, and unless this dispute is resolved the time for payment could not be ascertained.

10. IBC is not intended as a recovery mechanism for realization of debts. Only where a company by design or default deny the creditor of their dues, law steps into take control of the affairs of the erring company and arrange to pay off the creditors either through the process of resolution or liquidation. Therefore, in every case where a creditor initiates a CIRP, the burden is on the creditor to satisfy the conscience of the Adjudicating Authority that there exists a debt which the respondent has not disputed at any time prior to the institution of the CIRP, and that the debt is not paid when it fell due for payment despite a demand to pay. It does not even require a debtor to contest the issue, for the statutory burden is on the creditor to establish that its case qualifies for initiating the CIRP against the debtor.

11. If the facts of the present case are spread on this plane, it raises a serious doubt as to whether the time for payment of the entire invoice amount has arisen. The nature of enquiry contemplated by the IBC is summary in character, where the criteria prescribed for invoking it should be kept either beyond debate, or at least must be capable of being ascertained without great degree of forensic scrutiny. Contextually, the law as declared by the Hon'ble Supreme Court in the early days of the IBC in ***Mobilox Innovations Pvt. Ltd., Vs Kirusa Software Pvt. Ltd.*** [(2018) 1 SCC 353] is of considerable value. It says:

“51..... all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not patently feeble legal argument or an assertion of fact unsupported by evidence....”

12. The approach is to keep the allegations of the creditor a constant, and to test the quality of defence offered by the debtor - its character and quality. Here neither the existence of the debt or the time for payment should depend on the proof of another independent fact, and this is the bottom line. In this case however, there has arisen a need to investigate if there was a work order, and if its terms determine the time for repayment. Unless a finding is entered on this issue, it may be difficult to decide whether the respondent has committed a default in payment. The work order whose existence the respondent asserts and the appellant denies deserves a probe, and it is more than a plausible defence.

13. There however, is a jurisdictional limitation on the tribunal in ascertaining the existence of the jurisdictional facts – of debt and default. The extent of

enquiry contemplated under the scheme of the IBC does not require it to be matched to an enquiry which civil courts may engage in – to probe one issue linked to another issue, and enter a finding in one to feed a finding in another based on rule of preponderance of probability.

14. Much was argued that the respondent has not replied to notice under Sec.8 IBC. A failure to reply to Sec.8 IBC *ipso facto* cannot be construed as an admission of debt or the time of payment at all circumstances. It depends on the facts of each case. In the context of the facts of this case, given the fact that the time of first part-payment of Rs.76,00,975/- is made on 24.06.2020, after 90 days from the date of the last invoice (dated 13.03.2020), marginally tilts the scale in favour of the respondent yet not conclusively, for, existence of the work order and whether the appellant had performed its part of the contract based on the terms of the work order have to be probed independently, and as stated earlier, the adjudicating authority cannot decide this basic fact on the thumb rule of preponderance of probability which civil court employs without restriction.

15. To restate the known, the IBC may not be understood as a hungry octopus violently spreading its tentacles to prey on every corporate debtor, though outside the IBC world it is dubbed as a monster mechanism ready to swallow their affairs. While the scheme of the Code is creditor centric, IBC is not unconscious of its impact on the commercial solvency of a going company and its existential stability, the fundamental right to do business and right to

property of the shareholders, besides the reputation of the corporate managers. And, since the working of the IBC divests the right of the Board of the Corporate Debtor to manage its affairs, it is made imperative that the existence of jurisdictional facts - of debt and default must align perfectly with their statutory definition and are kept beyond any controversy. In ***Indus Biotech Pvt. Ltd., Vs Kotak India Venture (Offshore) Fund*** [(2021)6 SCC 436], the Hon'ble Supreme court has held,

“21.... If in every case where there is debt, if default is also assumed and the process becomes automatic, a company which is ably running its administration and discharging its debts in planned manner may also be pushed to corporate insolvency resolution process and get entangled in a proceeding with no point of return....”

It underscores why care should not be spared in initiating a CIRP. The appellant's case fails right here.

16. Turning to the findings of the Adjudicating Authority, we do not propose to interfere with its ultimate conclusion of dismissing the CIRP under Sec.9 IBC, but modifies its line of reasoning: (a) the Adjudicating Authority has presumed the existence of the work Order which the respondent contends, but we consider that it requires further proof and that unless it is ascertained, it would be difficult to hold if the time for payment of the invoice amount has arisen; (b) since the Adjudicating Authority has presumed the existence of work Orders, it ventured to calculate whether the date for payment of each of the invoice-amount after the expiry of 90 days from the date of invoice fell after 25.03.2020 for invoking Sec.10A IBC. Since we propose not to presume the Work Order as the foundation

of the contract between the parties, we have decided not to speculatively apply the 90 days waiting period for payment as contemplated in Clause 5 of the Work Order. We therefore, refrain from entering a finding on the application of Sec.10A of the Code vis-a-vis the facts of the present case.

17. In conclusion, we find that the Order of the Adjudicating Authority does not require to be interfered with and consequently it is dismissed, but without any costs.

[Justice N. Seshasayee]
Member (Judicial)

[Arun Baroka]
Member (Technical)

rs/sk