# NATIONAL COMPANY LAW APPELLATE TRIBUNAL
# AT CHENNAI
## (APPELLATE JURISDICTION)

**Comp. App. (AT) (CH) (Ins.) No. 333 of 2021**
**(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)**
**(Arising out of the `Impugned Order' dated 27.08.2021 in I.A. No.1027/2019 in CP (IB) No.294/7/HDB/2017, passed by the `Adjudicating Authority', National Company Law Tribunal, Hyderabad Bench, Hyderabad)**

**In the matter of:**

**Sree Ganesh Constructions**
Partnership Firm
(Represented by Managing Partner)
Flat No. 402, Swarnadeep Apartment,
Mayuri Marg, Begumpet,
Hyderabad, Telangana – 500016 ….. Appellant

v.

**IVRCL Limited**
Represented by Mr. Suntanu Sinha
Liquidator
Registered address with IBBI: Floor 4
Duckback House, 41, Shakespeare Sarani,
Kolkata 700017, West Bengal.

Address for Correspondence:
BDO Restructuring Advisory LLP
No. 201 & 202, II floor,
Manbhum Jade Towers
Hyderabad 500 082, Telangana. ….. Respondent

**Present:**

| | | |
|---|---|---|
| For Appellant | : | Mr. Y Suryanarayana, Advocate. |
| For Respondent/Liquidator | : | Mr. Nirav Shah, Advocate<br>Mr. Jash Shah, Advocate. |

## **J U D G M E N T**
## **(Virtual Mode)**

**[Per: Ms. Shreesha Merla, Member (Technical)]:**

**1.** Aggrieved by the `Order' dated 27.08.2021, passed by the `National Company Law Tribunal', Bench-II, Hyderabad in I.A. No. 1027 of 2019 in CP (IB) No. 294/7/HDB/2017, Sree Ganesh Constructions / the `Operational Creditor' preferred this `Appeal'. The `Adjudicating Authority', had dismissed the `Application', filed by the `Appellant' herein, seeking a direction to the `Respondent / Liquidator' of `M/s IVRCL Limited' / the `Corporate Debtor', to pay a sum of Rs.1,36,75,392/-.

**2.** The Learned Counsel for the `Appellant' strenuously contended that vide `Order' dated 23.02.2018, the `Adjudicating Authority', had initiated the `Corporate Insolvency Resolution Process', against the `Corporate Debtor Company', and subsequently on account of the fact that, there were no `Resolution Plans' received, the `Application', seeking Liquidation of the Company, was allowed by the `Adjudicating Authority', vide `Order' dated 26.07.2019.

**3.** It is submitted that the `Corporate Debtor Company', had received an `Order' on 10.09.2015 from the Superintending Engineer, I & CADD, Irrigation Circle, Khammam, Telangana, for an amount of Rs.8,21,42,561/-, pursuant to which the Company entered into an

`Agreement' with the `Appellant' for executing the work as a 'Sub-Contractor', for execution of the project 'Minor Irrigation - Construction of Weir cum DLR Bridge at Khammam District, Telangana'. The time period for execution and completion of the works was from 29.09.2015 to 31.07.2016. However, the work could not be completed on or before 31.07.2016 and therefore an extension was sought upto 31.07.2016.

**4.** The Learned Counsel for the `Appellant' submitted that based on the `Final Quality Check Certificate', dated 30.05.2018, the Employer had raised a `Final Bill', dated 21.09.2018, for an amount of Rs.1,09,66,484.00. The Learned Counsel for the `Appellant' drew our attention to Clause 8 of the sub-contract Agreement, which reads as follows:

> *"8. PAYMENTS:*
>
> *8.1 The Parties agree that the following deductions shall be applicable: IVRCL shall have a margin of following percent (the "IVRCL Margin") against the awarded value of the Contract (inclusive of ITOS deducted by Employer as may be applicable) and shall be entitled to recover the same from the gross value of the work executed by Sub contractor from each bill including final bill*
>
> *i. On main works-50;0 (inclusive of TDS)*
> *ii. On Price Escalation-5% (inclusive of TOS)*
>
> *(a) IVRCL shall deduct taxes, duties and levies as applicable on gross value of the bills certified by the Employer from Sub Contractor's running*

*account hills (the "RA Bills") and in the event of any excess/less being/ levied/ recovered by the Employer from IVRCI, the same shall be adjusted accordingly from Sub Contractor.*
*(b) In the event of the workers welfare Cess @ one (1%) percent being deducted at source by the Employer from the RA Bills of IVRCL, the same shall be deducted by IVRCL from the R.A. Bills of Sub Contractor.*

*8.2 The Parties agree that the payments received from the Employer shall be deposited into an escrow account opened in the name of IVRCL (the "Escrow Account") IVRCL shall intimate the said Escrow Account number to the Employer as its designated account and all the payments from the Employer shall be deposited into the Escrow Account. IVRCL shall give irrevocable standing instructions to the escrow banker to transfer the funds to the designated account of SGC after deducting the pro-rata IVRCL Margin. The charges for operation of the Escrow Account shall be borne by SGC Account reconciliation will be done every month between the parties and account settlement shall be done within 7 days after reconciliation.*

*8.4 IVRCL will release the payments to SGC in the said lines through escrow account only after receipt of corresponding payment from Employer. No interest charges shall be payable for delayed payments for whatsoever reasons."*

**5.** It is submitted that as per the Clauses of this sub-contract Agreement, the `Corporate Debtor Company', was required to transfer the entire amount deposited in the `Escrow Account', by the `Employer', to the `Appellant' herein, after deducting 5% Margin, which shall be recovered by the `Corporate Debtor Company', from the gross value of the work, executed by the `Appellant' from each Bill.

**6.** It is contended that despite several requests made to the `Resolution Professional', and the current `Liquidator', to release 95% of the payments of the `Appellant' on a priority basis, there was no `Response'.

**7.** `Form B', was submitted to the erstwhile `Resolution Professional', on 24.07.2019. The `Corporate Debtor Company', has made the payments to the `Appellant' for all the previous bills but did not release the amounts towards the $12^{th}$ and final bill. The amounts legitimately belonged to the `Appellant' as the said amount pertains to the period after the initiation of `CIRP', and therefore should be treated as `CIRP' expenses.

**8.** It is argued that as the amount is admitted by the `Resolution Professional' and the `Liquidator', it is construed that the Company, had received the money from the `Employer' and the same is due to be transferred to the `Appellant' herein. It is contended that the `Adjudicating Authority', failed to appreciate that the amount claimed by the `Appellant', is an asset of the `Appellant' and the invoices were required to be raised by the `Employer', only after receiving the `Quality Control Check Certificate'. Merely, because the `Quality Check Certificate', was received by the `Appellant' on 30.05.2018 i.e. after the initiation of `Corporate Insolvency Resolution Process', the same cannot be said to be `not payable in Full'.

**9.** The Respondent / Liquidator submitted that the `Adjudicating Authority', was right in dismissing the `Application' as the entire work was done prior to the `CIRP period', and for amounts pending in relation to the same, the `Creditor', is required to file its `Claim' with the `Resolution Professional' or the `Liquidator', as the case may be, and after verification of the same, the `Resolution Professional' or the `Liquidator', can admit or reject the `Claim', as prescribed under the `Code'.

**10.** It is seen from the record that the `Corporate Debtor' Company, was admitted into `CIRP', on 23.02.2018 and the last date for the completion of the `CIRP', was 27.11.2018. However, in the absence of `approval' of any `Resolution Plan', by an `Order' dated 26.07.2019, read with the Corrigendum `Order', dated 31.07.2019, the `Adjudicating Authority', allowed the `Application', seeking liquidation of the `Corporate Debtor' Company.

**11.** It is also seen from the record that the sub-contracting Agreement, entered into by the `Appellant' with the `Corporate Debtor' is dated 10.11.2015 and the works were to be completed by 31.07.2017, subsequent to the granting of the extension. As per the `Terms of

Agreement', admittedly, the `Appellant' is entitled to receive 95% of the amount after the full amount is received by its Employer and the remaining 5%, is to be retained with the `Corporate Debtor'. It is not in dispute that 11 invoices issued by the `Appellant' in favour of the `Corporate Debtor' for payment of the sub-contract work was already paid by the `Corporate Debtor'.

**12.** The main issue raised in I.A. No. 454 of 2020, filed by the `Appellant', before the `Adjudicating Authority', was regarding payment of the *Pending Amount* of the $12^{th}$ Invoice dated 21.09.2018, which was raised subsequent to the `CIRP' initiation date i.e. 23.02.2018. It is the case of the `Resolution Professional' that the work was undertaken by the `Appellant' on 01.05.2017, which was much prior to the initiation of the `CIRP' and the same was brought to the notice of the `Project Head', and the payment was hence kept pending. It is also the case of the `Respondent', that the `GST', was not included in the said amount as the work, was done prior to the GST regime.

**13.** A brief perusal of the comments made by the `DGM' of the `Corporate Debtor', dated 21.09.2018, in relation to the work done prior to the `CIRP period', and the `GST period', evidences that the `work', was indeed done prior to the `CIRP period'.

**14.** The contention of the Learned Counsel for the `Appellant' is that, it is the '*Liability'*, which is to be seen and considered and not the period during which the invoices were raised, is untenable keeping in view of the facts of the attendant case on hand, as it is clear from the `Record' that the `12th Bill', pertained to the work, executed much prior to the `CIRP period'. Hence, the question of `Quality Check Certificate', having been received subsequently on 30.05.2018 and therefore the *'Liability'* arose on that date, is of no relevance.

**15.** The point for consideration in the instant Comp. App (AT) (CH) (INS.) No. 333 of 2021 is, whether the work was executed prior to the initiation of `CIRP'?

**16.** As per the terms of the I & B Code, 2016, for any work done prior to the `CIRP period', and for amounts pending in relation to the same, the `Creditor', is required to file its `Claim', with the `Resolution Professional' or the `Liquidator', as the case may be. In the instant case, the `Appellant', had filed the Form C for `Admission of the Claim', in relation to the pending amount 26.08.2019, one day after the last date for submission of the claim. The Liquidator had sent an email that the claim submitted by the `Appellant', cannot be considered by the Liquidator as it is filed after the expiry of the last date for submission of the `Claim'.

**17.** The `Application' I.A. No. 454 of 2020 pertains to release of the `P*ending Amount'*, and not in relation to the `Admission of the Claim, filed by the `Appellant', for the `Condonation of the Delay'. Therefore, this `Tribunal', is of the considered view that there are no substantial grounds to interfere with the impugned `Order' dated 27.08.2021, whereby and whereunder, the `Adjudicating Authority', had directed the `Liquidator', to admit the Appellant's `Claim' and make the payment as per Section 53 of IBC, 2016.

**18.** For all the foregoing reasons, this `Appeal' is `dismissed' accordingly. No `Order' as to costs. The connected pending `Interlocutory `Applications', if any, are closed.

**[Justice M. Venugopal]**
**Member (Judicial)**

**[Ms. Shreesha Merla]**
**Member (Technical)**

29/03/2023

SA / TM