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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 703 of 2018

(Arising out of Order dated 19th September, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, New Delhi in Company Petition No. IB-644 (ND)/2018**)**

IN THE MATTER OF:

Ahluwalia Contracts (India) Limited ...Appellant

Vs.

Raheja Developers Limited ...Respondent

Present: For Appellant: - Mr. Shashank Garg, Mr. Tariq Khan and Mr. Debojyoti Sengupta, Advocates.

For Respondent:- Mr. Jayant Mehta, Mr. Saurabh Kalia, Mr. Sajal Jain and Ms. Saloni Purohit, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant- 'Ahluwalia Contracts (India) Limited' filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) against 'Raheja Developers Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, New Delhi, by impugned order dated 19th September, 2018 after discussing the case on merit, rejected the application on the ground that the claim of the Appellant falls within the ambit of 'disputed claim'.

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2. The Adjudicating Authority also observed that the arbitration proceedings in respect of the same cause of action has been initiated.

3. Learned counsel appearing on behalf of the Appellant submitted that as on the date of issuance of demand notice under Section 8(1), no arbitration proceeding was initiated or pending. The arbitration proceeding has been filed by the Respondent- 'Corporate Debtor' after receipt of demand notice under Section 8(1) of the 'I&B Code' on 28th April, 2018.

4. It was submitted that the notice invoking arbitration sent by the Respondent to the Appellant was issued on 24th May, 2018. The Appellant through its counsel, sent a letter dated 1st June, 2018 to the Ld. Sole Arbitrator with a copy to the Respondent stating that the appointment of the Sole Arbitrator made by the Management Review Committee of the Respondent was not acceptable to the Appellant.

5. It was submitted that pursuant to the agreement dated 6th December, 2010 and R.A. Bill No. 36 was issued on 18th March, 2016 in respect to civil work certified by the Respondent. Another R.A. Bill No. 20 for plumbing work executed by the Appellant was raised and certified by the Respondent.

6. The Appellant sent an e-mail on 11th August, 2017 to Respondent requesting the Respondent to provide the pending WCT certificates for

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the years 2014-15 and 2015-16. Reminders were given on 16th August, 2017.

7. Further, the case of the Appellant is that it sent another e-mail to the Respondent on 21st August, 2017 for the outstanding payment of Rs. 6,51,11,525/- towards actual work executed by the Appellant. The Respondent by letter dated 28th August, 2017, alleged that there is a delay in execution of the works asserting that the claims of the Appellant raised vide the e-mail dated 21st August, 2017 were baseless and unsubstantiated.

8. According to the Appellant, subsequently the Appellant raised R.A. Bill No. 21 on 25th October, 2017 for plumbing work executed by the Appellant and certified by the Respondent. Another R.A. Bill No. 22 for 'plumbing work' was executed by the Appellant which was also certified by the Respondent on 23rd February, 2018.

9. On 5th March, 2018, an e-mail was again sent by Appellant for pending WCT certificates for the period from 2014-15 onwards, followed by e-mail dated 22nd March, 2018 requesting the 'Corporate Debtor' to release long pending dues of Rs. 5.50 Crores and drawing attention of the Respondent of non-compliance of statutory requirements.

10. It is only on failure of payment, demand notice under Section 8(1) was issued by the Appellant on 28th April, 2018.

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11. Referring to the aforesaid facts, it was submitted that there is no pre-existing dispute with regard to the work done by the Appellant for which R.A. Bill No. 36 dated 18th March, 2016, R.A. Bill No. 20 dated 28th February, 2017 and R.A. Bill No. 21 dated 25th October, 2017 and R.A. Bill No. 22 dated 23rd February, 2018, were raised which have been certified by the Respondent without any objection which suggest that the work performed by the Appellant are to the satisfaction of the Respondent.

12. Learned counsel for the Appellant submitted that the amounts claimed by the Appellant as shown in the application under Section 9 were derived from the Respondent's own admission in "Comparative Statement of Payment Status between ACIL and RDL" dated 28th August, 2017 which bears its seal and is duly signed. Therefore, according to the Appellant, Respondent cannot dispute the amounts.

13. Learned counsel appearing on behalf of the Respondent-('Corporate Debtor') submitted that the Appellant failed to complete the work by February, 2017 and thereafter, abandoned the work. The work was subsequently completed and rectified by the Respondent, as a result of which the Respondent had to incur Rs. 4,60,00,000/- approx. Therefore, the Appellant is not only liable to pay the said amount to the Respondent but also liable to pay interest @5% towards 'liquidated damages' in terms of the 'General Conditions of the Contract'.

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14. From bare perusal of the impugned order dated 19th September, 2018, it will be evident that the Adjudicating Authority have noticed the aforesaid disputed fact to come to the conclusion and hold that the claim amount raised by the Appellant is a disputed claim.

15. In an application under Section 9, it is always open to the 'Corporate Debtor' to point out pre-existence of dispute. It is to be shown that the dispute was raised prior to the issuance of demand notice under Section 8(1).

16. In ***"Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353"***, the Hon'ble Supreme Court held that the 'existence of the dispute' and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be and observed:

> *"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set*

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out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). ***Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.*** *……."*

17. In the said case, the Hon'ble Supreme Court held as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which is as follows:

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"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 one 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

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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."

18. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any 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', the application under Section 9 cannot be rejected and is required to be admitted.

19. In ***"Innoventive Industries Ltd. v. ICICI Bank and Anr.– (2018) 1 SCC 407"***, the Hon'ble Supreme Court while explaining the provisions of Sections 7 or 9 observed and held:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and

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payable, which includes non-payment of even part thereof or an instalment amount. ***For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4).*** *The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and*

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an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

xxx xxx xxx

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), ***the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing- i.e. before such notice or invoice was received by the corporate debtor****. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."*

20. From the aforesaid findings, it is clear that ***'claim' means a right to payment even if it is disputed***. Therefore, merely the 'Corporate Debtor' has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute, in absence

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of any evidence to suggest that dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.

21. In the present case, it is not in dispute that the arbitration proceeding was initiated by the Respondent vide notice dated 24th May, 2018 i.e. after about one month from the date of issuance of demand notice under Section 8(1) which was issued on 28th April, 2018. Therefore, the 'Corporate Debtor' cannot rely on arbitration proceeding to suggest a pre-existing dispute. There is nothing on the record to suggest that the 'Corporate Debtor' raised any pre-existing dispute relating to quality of work performed by Appellant. The ground of delay in execution of work cannot be noticed to deny admission of application under Section 9, the 'Corporate Debtor' having allowed the Appellant to execute the work and certified all the bills.

22. The Adjudicating Authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of disputed claim. Merely disputing a claim cannot be a ground, as held by Hon'ble Supreme Court in ***"Innoventive Industries Ltd. v. ICICI Bank and Anr."*** wherein it is observed that *"claim means a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4)."*

23. The Adjudicating Authority also failed to appreciate that the arbitration proceeding was initiated on 24th May, 2018 i.e. much after the

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issuance of the demand notice under Section 8(1) on 28th April, 2018 thereby wrongly held that an arbitration proceeding is pending.

24. From the record as we find that the Respondent has defaulted to pay more than Rs. 1 Lakh and in absence of any pre-existing dispute, and the record being complete, we hold that the application under Section 9 preferred by the Appellant was fit to be admitted.

25. For the reasons aforesaid, we set aside the impugned judgment dated 19th September, 2018 and remit the case to the Adjudicating Authority for admitting the application under Section 9 after notice to the 'Corporate Debtor' to enable the 'Corporate Debtor' to settle the matter prior to the admission.

The appeal is allowed with aforesaid observations and directions. No costs.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member(Judicial)

(Kanthi Narahari)
Member(Technical)

NEW DELHI
23rd July, 2019
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