

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 188 of 2020

[Arising out of order dated 13th December, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Amaravati Bench, Hyderabad, in TCP No. 82/9/AMR/2019 [CP (IB) No. 123/9/HDB/2018]

IN THE MATTER OF:

Srinivasa Reddy Velagala,

Director, K.P.R. Chemicals Limited,
R/o Biccavolu (Village & Mandal),
East Godavari District- 533 342
Andhra Pradesh

Corporate Debtor/
... **Appellant**

Vs.

Sravanthi Infratech Pvt. Ltd.

Thro. Its Vice President/Authorized Representative,
Reg. Office at LG Floor, Rider House,
136, Sector-44
Gurgaon- 122 002
Haryana

Operational Creditor/
.. **Respondent**

Present:

For Appellant: Mr. Bommineni Vivekananda and Mr. Kameshvedual, Advocates

For Respondent: Mr. Sanchit Kumar Sahijpal, Advocate

J U D G M E N T

(1st February, 2021)

KANTHI NARAHARI, MEMBER (TECHNICAL)

The present appeal preferred challenging the order of the Adjudicating Authority (National Company Law Tribunal, Amaravati

Bench, Hyderabad, in TCP No. 82/9/AMR/2019 [CP (IB) No. 123/9/HDB/2018) whereby the Adjudicating Authority admitted the Application filed by the Respondent herein and initiated Corporate Insolvency Resolution Process (in short '**CIRP**') by appointing Interim Resolution Professional.

BRIEF FACTS:

2. Learned Counsel for the Appellant mainly raises two grounds stating that the Application filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short '**IBC**') by the Respondent herein (Operational Creditor) was barred by limitation as prescribed under Article 137 of Limitation Act 1963. Second ground raised by the Appellant is that the contract was frustrated by efflux of time. Since the Respondent failed to establish the above grounds he prays the Bench to allow the Appeal by dismissing Section 9 Application. The learned Counsel corroborated his arguments on legal and factual issues.

3. Learned Counsel for the Respondent submitted that the Application filed under Section 9 of IBC by them before the Adjudicating Authority does not barred by limitation on the ground that the contract, which they entered with the Appellant is still subsisting. He further submitted that there is no such provision that the contract would frustrate by efflux of time. He submitted that there is continuous correspondence between the Respondent and the

Appellant and the Appellant even did not reply to the correspondences and even to the Demand Notice. He further submitted that the claim of the Respondent admittedly an operational debt the same is due and payable. He further submitted that the Appeal does not have any merit and prayed the Bench to dismiss the same.

Factual Matrix of the case: -

4. Heard learned Counsel for the respective parties, perused the pleadings, documents submitted in their support. The learned Adjudicating Authority framed issues – viz, (a) whether the Company Petition is maintainable, (b) whether they owed an operational debt to the Respondent and, (c) whether the Company Petition is barred by limitation. Learned Adjudicating Authority dealt with the issues and found that the Application filed by the Respondent herein is not barred by limitation as contemplated under Article 137 of the Limitation Act and held that the debt owed by the Appellant herein is an operational debt. With the aforesaid findings, the Application filed by the Respondent herein under Section 9 of IBC was admitted.

5. The Appellant herein invited International Competitive Bids by publishing advertisement in newspaper on 13.12.2010 for setting up a 225 MW gas based combined cycle Power Station at Bikkavolu, East Godvari District, Andhra Pradesh. The Respondent being the lowest bidder, was awarded the contract for execution of the aforementioned

project and a Letter of Award (LOA) was accordingly granted on 24.12.2010 for an amount of Rs. 827 Crores.

6. The said contract comprises of four EPC (Engineering Procurement and Construction) for offshore and onshore equipment supply for a value of Rs. 687 Crores, Civil & Construction works amounting to Rs. 80 Crores, Engineering Custom clearance, erection testing and commissioning service at a cost of Rs. 57 crores and transportation services for offshore equipment contract for Rs. 3 crores. It is an admitted fact that the contract was signed by the Appellant and the Respondent on 09.02.2011. It is also an admitted fact that the Appellant paid an amount of Rs. 50.15 Crores in instalments.

7. The grievance of the Respondent is that the Appellant did not pay 10% of total contract amounting Rs. 82.7 Crores. Respondent submitted that out of Rs. 82.7 Crores, they received only Rs. 50.15 Crores and the balance amount was not paid by the Appellant. He further submitted that the Appellant did not honour the terms and conditions of the contract. It is further submitted that the Appellant engaged various vendors/suppliers and given them various subcontracts to meet the time line of the EPC contract. Due to non-payment of the amount by the Appellant herein, various sub-contractors have raised litigations against the Respondent herein which led the Respondent to suffer huge loss and damage.

8. From the aforesaid facts we have seen that except the grievance raised by the Appellant herein with regard to limitation contending that the claim of the Respondent herein does not fall under the category of Operational debt and the contract was frustrated by efflux of time. The other factual aspects are admitted. Therefore, we deal with the same.

9. The EPC contract was supposed to be completed in 14 months. It is seen from the pleadings that the work was suspended by the Respondent vide communication dated 30.07.2011 for the reason that the Appellant did not fulfil the contract obligation. It is also on record that the Letter of Award signed on 24.12.2010 and the payments were released to the extent of Rs. 50.15 Crores and the second instalment of 10% of the contract had to be released on finalisation and submission of un-price of such order goods. It is submitted that the Respondent issued notice on 15.02.2011. The Respondent submitted that they had suspended work by communicating letter dated 30.07.2011 to the Appellant herein. A copy of the letter dated 30.07.2011 is enclosed in Volume-III of the Appeal Paper Book at page 574 as Annexure-A/9. Respondent addressed the said letter to the Appellant whereby it is stated as under;

“To

*KPR Chemicals Private Limited
S. No. 24/2, Nallamilli Road,
Biccavolu- 533343*

Kind Attn: Mr. Rajshekhar Reddy (ED)

Subject: Notice for suspension of the contract.

Dear Sir,

This is in reference to the our letter dated 15.02.2011 regarding initial advance payment, even after five months of continuous follow up with you, the balance payment of Rs. 32.55 crores have not been received against initial advance.

Thus the 100% advance has not been received by SIPL and the contractual obligation as per clause 5.1 of the contract has not fulfilled by M/s KPR chemicals Limited.

Therefore Sravnathi Infratech Private Limited hereby notifies to you that all the EPC activities for the KPR chemicals Ltd. (225 MW combined cycle power project) will be under suspension till the all the contractual obligation are fulfilled by you.

Kindly acknowledge the receipt of this notice.

Thanking you,

Yours sincerely

For Sravanthi Infratech Private Limited”

Wherefrom it is evident that the balance payment of Rs. 32.55 Crores was not paid by the Appellant. For the aforesaid reason the work on

the project site was suspended till the contractual obligations are fulfilled. Respondent further submitted that there is no reply from the Appellant to this letter.

10. Learned Counsel for the Appellant vehemently contended that by addressing a letter dated 30.07.2011 to the Appellant, the Respondent themselves frustrated the contract. On the other hand, the learned Counsel for the Respondent contended that there is no such clause in EPC Contract with regard to frustration of contract. However, there are clauses enumerated under the agreement dated 09.02.2011. Article 14 of the Contract dated 09.02.2011 provides for termination of the contract. A copy of the EPC Contract is enclosed at Annexure-A/4(page-116, Vol. I). Clause 14.1 deals with the termination for Owner's convenience. According to the said clause,

“14.1 Termination for Owner's Convenience.

Owner may for its convenience terminate any part of the Supplies or any or all remaining Supplies hereunder at any time upon at least 30(Thirty) days' prior written notice to Supplier specifying the part of the Supplies to be terminated and the effective date of termination. Upon receipt of such notice, Supplier shall promptly initiate steps to stop provision of such terminated Supplies. In the event of a partial termination, Supplier shall continue to produce the part of the Supplies not terminated. In case of a termination of part of the Supplier's Work, Owner shall authorize a Scope Change Order making reasonable adjustments to one or more of the

Schedule Unit(s). Completion date, Scheduled Facility Completion Date, the Contract Price, the Contract Schedule, the Performance Guarantees and any other affected provisions of this Agreement, as applicable. In the event of termination by Owner under this Article 14.1, Owner shall pay to Supplier (or Supplier may retain) such amounts as are required pursuant to Article 4.4 hereof. In case of a termination of all or remaining part of the Supplier's Work, the Owner shall provide at least 30 days' prior written notice to Supplier providing details of the reasons for such termination and the effective date of termination. Owner will authorize a Scope Change Order making reasonable adjustments to the Contract Price as applicable."

11. Further, Clause 14.2 deals with termination upon non-payment by Owner.

"14.2 Termination Upon Non-Payment by Owner. *If Owner fails to pay to Supplier any payment as required hereunder and such failure continues for 25 days after written notice thereof has been given to Owner by Supplier, then Supplier shall give ten days' prior written notice thereof to Owner and the Financing Parties, and thereafter may stop all performance of Supplier's obligations hereunder until Supplier receives payment of all amounts then due plus reasonable suspension and resumption expenses. Owner shall be responsible for reimbursement of all costs incurred by Supplier as a result of the stoppage of Supplier's work. If Supplier's performance hereunder is suspended by Supplier*

pursuant to this Article 14.2, Owner will authorise a Scope Change Order making an equitable adjustment to the Scheduled Unit(s) Completion Date, Scheduled Facility Completion Date and the Contract Schedule and required reasonable adjustments to one or more of the Contract Price, the Terms of Payment and any relevant terms and conditions of this Agreement, as appropriate. If such suspension continues uninterrupted for at least four months, or if two or more suspensions exist for an aggregate of at least four months, Supplier may terminate this Agreement; provided that Supplier shall give the Financing Parties a further 60 days prior written notice, and opportunity to cure, before terminating this Agreement. In the event of such a termination by Supplier, Owner shall pay to Supplier (or Supplier may retain) such amounts as are required pursuant to Article 4.4. hereof.

12. Learned Counsel for the Respondent submitted that the Appellant could have invoked Article 14.1 for termination of contract since the said clause provides for termination for Owners Convenience. Before invoking the said clause, the Owner can issue a prior 30 days' Notice to the Supplier specifying the part of the supplies to be terminated and effective date of termination. According to this Clause, the Owner either terminate the whole contract or terminate the part of the supplies. While doing so, the Owner shall pay to the Supplier such amount as are required pursuant to Article 4.4 thereof. The learned Counsel also submitted that the Respondent can also terminate the

contract invoking clause 14.2 of Article 14 if Owner fails to pay Supplier any payment as required thereunder and such failure continues for 25 days' after written notice thereof has been given to Owner by Supplier, then the Supplier shall give 10 days' prior written notice thereof to Owner and the Financing Parties and thereafter may stop all performances of Supplier's obligation therein until Supplier receives payment of all amounts then due plus reasonable suspension and resumption expenses. However, the Respondent did not invoke this clause for terminating the contract despite several challenges and financial constraints faced by them from their Suppliers/Vendors.

13. As stated supra, the Respondent by letter dated 30.07.2011 suspended the work for non-receipt of payment. In view of non-receipt of payment from the Appellant, the Respondent could not pay to the Vendors/Suppliers, those who have supplied goods and rendered services to the project of the Appellant due to non-availability of fund.

14. Apart from the above, we have also perused a letter dated 05.01.2012 addressed by the Appellant-Company to the Chief Engineer, IRP Division, Central Electricity Authority, Sewa Bhawan, R K Bhawan, New Delhi [page-54, Annexure-D(Colly)] to the Reply of the Respondent. The Appellant has admitted:

..

“The project is in advance stage of development, all the major clearances for the project has been received by the project company and construction is in full swing.”

..

Further the status of the project was given in the said letter and requested the Central Electricity Authority to allocate 1.2 mmscmd of gas for 225 MW CCPP so that the project can be commissioned on schedule.

15. Further, the Respondent issued a Demand Notice dated 02.07.2018 to the Appellant under Section 8(1) of IBC (in Form-3 under Rule – 5 of the IBC Application to Adjudicating Authority) Rules, 2016. The Appellant did not reply to this Notice nor raised any existence of dispute prior to the issuance of this Notice.

16. In answer to the plea of barred by limitation i.e., as per the amendment to the IBC incorporating Section 238A to the IBC applicability of the limitation to the Applications filed under IBC. It is seen from the correspondences between the parties and from the perusal of the clauses/articles as enumerated under the EPC contract that the contract has not been terminated by either parties and the contract still subsists. Therefore, the Adjudicating Authority rightly held that there is no termination of contract and the issue raised with regard to barred by limitation cannot be accepted. Therefore, we hold

that the Application filed by the Respondent under Section 9 of IBC before the Adjudicating Authority is not barred by limitation.

17. Further the issue is whether the claim of the Respondent is an Operational Debt. The Operational Debt is defined under sub-section 21 of Section 5 of IBC which reads as under:

..

“5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”

..

18. Admittedly, the claim of the Respondent is an operational debt. Therefore, the arguments of the Appellant that the claims of the Respondent is not an operational debt does not hold any field.

19. Efflux of time:

The other issue with regard to frustration of contract by efflux of time is concerned, we hold that the EPC contract between the Appellant and Respondent still subsists and there is no such clause in the contract regarding frustration or termination by efflux of time, we hold that there is no merit in this point and accordingly, we negate this point issue also.

20. Learned Counsel for the Appellant relied upon a judgment in the matter of ***KLA Construction Technologies Pvt. Ltd. V. CKG Realty Pvt. Ltd.***, rendered in CA(AT)(Ins.) No. 67/2018. In this judgment this Tribunal was of the view that if the machinery or equipment was not moved to the construction site would be a debatable issue which can be agitated before the Civil Court. However, in the facts of the present case, the Appellant did not raise any existence of dispute prior to the issuance of Demand Notice and there is no termination of contract as held by us. Therefore, this judgment is not applicable to the facts of the present case.

21. Learned Counsel for the Appellant also relied upon the decision of Hon'ble Apex Court in ***B.K. Educational Services Pvt. Ltd. Vs. Paras Gupta & Associate***, AIR 2018 SC 5601 and ***Vashdeo R. Bhojwani Vs. Abhudaya Co-operative Bank Ltd.*** (2019) 9 SCC 158 citing that the period of limitation for Applications seeking initiation of CIRP under Sections 7 & 9 of IBC is covered under Article 137 of the Limitation Act and therefore three years period to be taken into consideration from the date when default occurs for the purpose of limitation. It is reiterated that when we already held that there is no termination of contract from either of the parties, therefore, the contract still subsists and the claim is within limitation.

CONCLUSION:

22. From the perusal of the facts it is evident that the default has arisen out of EPC Contract, which itself is a continuing contract. Even from the Demand Notice dated 02.07.2018 in particulars of operational debt at column-1, the Respondent had clearly stated that the debt fell due on 24.12.2010 and the last payment made to the Respondent was on 25.02.2011 through RTGS. It is also mentioned that the debt continues to fall even today as the EPC contract between the Appellant and Respondent never terminated by either parties.

23. We hold that the Adjudicating Authority had rightly admitted the Application of the Respondent which in our considered opinion does not require any interference in the instant Appeal.

24. From the facts and legal position, as explained above, the Appeal is devoid of any merit and liable to dismissed. Accordingly, the Appeal is dismissed. No order as to costs.

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

**(Kanthi Narahari)
Member(Technical)**

Pronounced by one Member of the Bench in terms of Rule 92(1) of the NCLAT Rules, 2016.

**(Kanthi Narahari)
Member(Technical)**

New Delhi

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