

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 566 of 2018

[Arising out of Order dated 09th July, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench-III in CP-IB-158/ND/2018]

IN THE MATTER OF:

1. MR. ENGIN NASIROGLU,

Ex-Director & Nominee Shareholder

Fernas Construction India Pvt. Ltd.,

Son of Necat Nasiroglu

Space No. S19, Second Floor, Malhan Falcon,

Plaza, Plot No.4, Pocket-7, Dwarka

New Delhi – 110075.

Also At:

D-Bakir Mahallesi, Nasiroglu Is

Merkezi Sokak EV No. 103, Batman 72050, Turkey

Through its Constituted Attorney –

Mr. Mazlum Dogan

2. FERNAS INSAAT A S

Holding Company

Fernas Construction India Pvt. Ltd.

India Project office at:

Space No. S19, Second Floor, Malhan Falcon Plaza,

Plot No. 4, Pocket-7, Dwarka, New Delhi- 110075.

Also at:

Elci Sokak No. 21 06550Y, Ayranci Ankara, Turkey,

Through its Authorised Representative-

Mr. Mazlum Dogan

...Appellants

Vs

RVR Projects Pvt. Ltd.

9-16-29, CBM Compound,

Vishakhapatnam – 530003.

Also at:

A-1/38, 3rd Floor, Safdurjung Enclave,

New Delhi-110029.

....Respondent

Present:

For Appellants: Mr. Arun Kathpalia, Sr. Advocate with Mr. N. Prashant Kumar Nair and Mr. Samaksh Goyal, Advocates

For Respondent: Mr. Akshay Sharma, Advocate

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by shareholder and Director of 'Fernas Construction India Pvt. Ltd.' (Corporate Debtor) against order dated 09.07.2018 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi Bench-III wherein application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') has been admitted.

2. Learned counsel appearing on behalf of the appellant submitted that the amount due or payable as claimed by the operational creditor being barred by limitation, there is no debt payable in law and therefore the question of default does not arise.

3. According to appellant - 'Fernas Construction India Pvt. Ltd.' (Corporate Debtor) had obtained and undertaken projects worth Rs. 2,400 Crore for companies like ONGC Petro Additions Ltd., Indian Oil Corporation Ltd. extensively working in the Oil & Gas Sector and engaged in constructing Cross Country Pipeline, Refineries, Petrochemicals, Roads and Infrastructure etc.

4. The Corporate Debtor had obtained high value projects from Indian Oil Corporation Ltd. to the tune of Rs. 272 crore at Paradip, Orissa on 15.02.2011 and ONGC Petro Additions Limited to the tune of Rs. 1800 crore at Dahej, Gujarat sometime thereafter within a gap of couple of months.

5. Fernas Turkey had appointed managerial persons from India to run the operations in India. Undertaking the said project and managing all work related to the said project the Appellant had been using data storage and processing system for the entire work being carried out at the two project sites. The Corporate Debtor had engaged around 250 to 350 sub-contractors for the projects.

6. 'Fernas Construction India Pvt. Ltd.' approached the 'RVR Projects Pvt. Ltd.' to avail its services of piling works for integrated utilities and off-site package for a Petrochemical Complex situated at Dahej Gujarat and entrusted to it the first work order for the contract amount of Rs.10,25,10,275/- on 04.08.2011. The 'RVR Projects Pvt. Ltd.' started executing the works and raised invoices.

7. It appears that 'Fernas Construction India Pvt. Ltd.' (Corporate Debtor) released part payment of bills raised. On 09.05.2012 'Fernas Construction India Pvt. Ltd.' (Corporate Debtor) foreclosed the works and by that time a sum of Rs. 4,22,20,877/- for which bill was raised was paid.

8. Case of 'RVR Projects Pvt. Ltd.' is that the 'Fernas Construction India Pvt. Ltd.' issued another work order for an amount of Rs.2,05,02,500/- to the 'RVR Projects Pvt. Ltd.' (Operational Creditor). The said order was also foreclosed midway and by that time total amount of work done was Rs.1,48,00,184/-. The case of 'RVR Projects Pvt. Ltd.' is that the 'Fernas Construction India Pvt. Ltd.' admitted a debt of Rs.1,45,28,508/- for both the above work orders on 17.06.2013 and made some past payment amounting to Rs.42,35,000/- leaving a balance of Rs.1,02,93,508/- remaining unpaid.

9. The demand notice under Section 8 (1) was issued by 'RVR Projects Pvt. Ltd.' (Operational Creditor) to the 'Fernas Construction India Pvt. Ltd.' (Corporate Debtor) on 01.12.2017, which were served on 04.12.2017 and 05.12.2017 by courier and speed post, respectively. Thereafter, having received no reply, the application under Section 9 was filed by 'RVR Projects Pvt. Ltd.', which has been admitted.

10. Learned Senior Counsel appearing on behalf of the appellant while referring to application under Section 9 (Form-5) particularly Part IV & V submitted that the Operational Creditor has accepted that the cause of action had taken place in August 2013 when Corporate debtor defaulted to pay. Therefore, it was submitted that the claim is barred by limitation in

absence of any subsequent cause of action. Reliance has also been placed on decision(s) of Hon'ble Supreme Court which we will discuss at appropriate stage.

11. Learned Counsel appearing on behalf of the respondent - 'RVR Projects Pvt. Ltd.' (Operational Creditor) referred to the communication made between the parties and submitted that there is a continuous cause of action and therefore the claim cannot be said to be barred by limitation.

12. According to him, pursuant to letter dated 17.06.2013 of 'RVR Projects Pvt. Ltd.' (Operational Creditor), the 'Fernas Construction India Pvt. Ltd.' (Corporate Debtor) confirming the balance as on 31.03.2013 and balance credit paying according to books of accounts was shown to be Rs.1,45,28,508/-. 'RVR Projects Pvt. Ltd.' asked to file under the Micro, Small and Medium Enterprises Development Act, 2006 and request its confirmation to Auditor of the Corporate Debtor within 10 days considered the balance as confirmed.

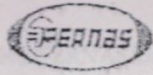
13. 'Fernas Construction India Pvt. Ltd.' (Corporate Debtor) issued a completion certificate on 07.08.2013 wherein actual value of work executed was shown to be Rs.1,48,00,184.00. The certificate was so issued for the purpose of billing by 'RVR Projects Pvt. Ltd.' for forthcoming opportunities.

Another (2nd) job completion certificate was issued on 07.08.2013 wherein actual value of work executed was shown as Rs.4,21,83,810.00.

14. Operational Creditor by registered post on 31.12.2013 intimated the Corporate Debtor about the work done and amount payable showing total amount payable to the operational creditor. It was followed by letter dated 03.02.2013.

15. 'Fernas Construction India Pvt. Ltd.' by letter dated 13.12.2013 while intimated Operational Creditor that it was well within the rights of Corporate Debtor to allocate work to the Operational Creditor - 'RVR Projects Pvt. Ltd.' it said that the same shall be commensurate with their capabilities. It was specifically mentioned that 'Fernas Construction India Pvt. Ltd.' (Corporate Debtor) is in process of reconciliation of all bills along with supporting documents and as soon as reconciliation is complete, the true and correct status of outstanding balance will be communicated to RVR Projects Pvt. Ltd. (Operational Creditor) and recommended to the Management. RVR Projects Pvt. Ltd. was requested to depute the concerned personnel from their accounts department for reconciliation purpose and jointly signing reconciliation statement, as proved from the copy of the letter dated 13.12.2013, as under.

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FERNAS Construction India Pvt. Ltd.



Cyber Terrace, Building No-5, Tower-B 16th Floor, Phase III, DLF Cyber City, Gurgaon, Haryana-122001, India
Web: www.fernas.com.tr, Ph: +91 124 4937900, Fax: +91 124 4937920

Ref. No. FCIPL/OPAL/CONTRACTS/RVR/01

Date: 13.12.2013

To,

M/s RVR Projects Private Limited (RVR)
#9-16-29, C.B.M. Compound,
Visakhapatnam -- 530 003, India

Kind Attn: Mr. Raghu Rayala (Executive Director)

Subject: Piling Works for OPAL Project

Reference: Your Letter No. RVR/HO/FERNAS/Dahej/384/2013 dated 30th November, 2013.

Dear Sir,

Reference is made to your afore-referred letter.

Please note that the subject Work Orders awarded on RVR Projects Private Limited (RVR) were in essence Item Rate Contracts wherein it was not obligatory on part of FERNAS to provide work front to them corresponding to the value of these Work Orders. On the contrary, FERNAS had been well within its rights and in the larger interest of the Project, to progressively allocate work to RVR commensurate with their capabilities.

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In any case, FERNAS is in the process of reconciliation of all the Bills along with supportive documents and as soon as the reconciliation process is completed, the true and correct status of the outstanding balance (if any) will be communicated to RVR and recommended to Management.

Accordingly, RVR is requested to depute concerned personnel from their Accounts Dept. for the reconciliation purpose and jointly signing the reconciliation statement. RVR is further requested to submit their detailed Ledger Statement for this purpose.

Sincerely yours,

For Fernas Construction India Pvt. Ltd.

Bhaskar Dasgupta
13/12/2013
Bhaskar Dasgupta
General Manager - Contracts & Legal

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Registered office:
S-19, Malhan Falcon Plaza,
Plot No-4, Pocket-7, Sector-12
Dwarka, New Delhi

TRUE COPY

A wholly owned Subsidiary of
FERNAS Construction Co. Inc.
UIC Sivilak, No.21, 06550
Yukarıyapracı, Ankara, Turkey

[Signature]
TRUE COPY

16. Thus we find that the Corporate Debtor has taken time for reconciliation and signing the reconciliation statement but not having completed it the demand notice was issued by the Operational Creditor under section 8 (1), which was not denied by the Corporate debtor.

17. In **‘Valliamma Champaka Pillai V/s Sivathanu Pillai and Others (1979) 4 SCC’**, the Hon’ble Supreme Court held that under section 18 of Limitation Act, one of the essential requirements for a valid ‘acknowledgement’ under Section 18, is that the writing concerned must contain an admission of a subsisting liability. A mere admission of past liability is not sufficient to constitute such an ‘acknowledgement’.

18. In **‘J.C. Budhraja V/s Chairman, Orissa Mining Corporation Ltd. and Anr., 2008 2 SCC’**, the Hon’ble Supreme Court observed:-

“It is now well settled that a writing to be an acknowledgement of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and

payment, it amounts to an acknowledgment. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgement. In other words, a writing, to be treated as an acknowledgement of liability should consciously admit his liability to pay or admit his intention to pay the debt.”

19. In the present case we find that the ‘Fernas Construction India Pvt. Ltd.’ (Corporate Debtor) in its job completion certificate has shown the actual value of work executed by the Operational Creditor. In reply to the demand the Corporate debtor intimated the Operational creditor that all the bills along with supporting documents are in process. It has not disputed the claim. On the other hand by letter dated 13.12.2013 accepted that as soon as reconciliation process will be completed the same will be communicated to the ‘RVR Projects Pvt. Ltd.’ (Operational Creditor) and management will be recommended. Corporate Debtor also requested the Operational creditor to depute personnel for reconcile purpose and to sign jointly reconcile statement.

20. Till date the ‘Fernas Construction India Pvt. Ltd.’ (Corporate debtor) has not completed reconciliation of all the bills and not signed reconcile

statement and kept matter pending. The matter having kept open by the Corporate Debtor we hold that there is a continuous cause of action in absence of completion of reconcile statement jointly signed by the parties. Substantial liability having been already accepted by the Corporate Debtor in writing and intention of continuing with relationship in the record, we hold that the Corporate Debtor has treated and acknowledged the liability consciously and admitted liability to pay on reconciliation.

21. In view of aforesaid position of law and the facts we hold that the claim of the Operational Creditor is not barred by limitation, there being continuous cause of action and the Corporate Debtor cannot take plea that there is no debt payable to Operational Creditor in law. We find no merit in this appeal. It is dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

19th December, 2018

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