

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency)No. 261 of 2019

[Arising out of Order dated 20th December, 2018 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench in the Company Petition (Insolvency & Bankruptcy) No. 1282 of 2017].

IN THE MATTER OF:

Mr. Battula Anjaneyulu

.....Appellant

Vs.

DBM Geotechnics & Constructions Pvt. Ltd.

.....Respondent

Present :

For Appellant:

Mr. Gautam Ankhad, Mr. Murtaza Kachwala, Mr. Ashdin Chivalwala, Mr. B. Anjaneyulu, Ms. Amrita Sarkar, Ms. Nimita Kaul and Ms. Ekta Bhasin, Advocates

For Respondents:

Mr. Aditya, Advocate

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

1. The present Appeal challenges the impugned order dated 20th December, 2018 passed by the Adjudicating Authority, Mumbai rejecting the petition filed by Appellant under section 9 of the Insolvency and Bankruptcy Code by the Appellant against the Respondent.

....contd./

2. Learned Counsel for the Appellant submitted that the Impugned Order ought to be set aside as it has erroneously held that there were pre-existing disputes between the parties. On the contrary, the facts demonstrate no such pre-existing dispute and the Respondent sought to raise a false bogey only after service of the demand notices dated 10th May, 2017 on them.

3. The case of the Appellant is that the Respondent issued various work orders to the Appellant for carrying out different kinds of work such as marine piling, labour supply, anchor-wall chipping, cage fabrication, etc. The Appellant raised R.A. bills and invoices. Part payments were made from time to time by the Respondent for the work carried out. Out of the total amount of about Rs. 43 crores worth of work done, approximately Rs. 28 crores were paid over a period of time and there remained a pending amount of Rs. 14,62,18,995/-.

4. He further stated that the Respondent from time to time reassured the Appellant that the payments would be released. The Respondent by emails dated 8th May, 2012 and 26th December, 2014 admitted that they are in financial difficulty and that amounts are due and payable to the Appellant. The relevant portion of the emails dated 8th May, 2012 and 25th December, 2014 are quoted below respectively.

E.mail dated 8th May, 2012 :-

“Dear Anjaneyulu,

We really regret the delay in your payment..

We could not pay you last week due to cash flow problem..

But We are trying to pay you this week..”

Email dated 25th December, 2014:

“We are aware with the situation of Agardanda as you have not received the committed payment from DPL. We wish to inform you we trying our best to release the part payment to you”.

5. It is stated that repeated reminders were sent by the Appellant to the Respondent on 8th January, 2013, 8th April, 2013, 18th June, 2013 and 8th July 2013. There was no denial of liability nor did the Respondent raise any dispute on quality or quantity.

6. It is stated that as no payment was forthcoming 13 demand notices (Form 3) were issued to the Respondent on 10th May, 2017. Out of the total 13 demand notices issued, the present petition was filed for 6 demand notices for a total amount of Rs. 14,62,18,995/-. The said demand notices were duly received by the Respondent on 12th May, 2017.

7. It is alleged that as a counter blast, the Respondent after receipt of the demand notices on 12th May, 2017, with the sole intention to defeat and dislodge the legitimate claim of the Appellant, filed Summary Suit No. 297 of 2017 on 17th May, 2017 before the Hon'ble High Court at Bombay and thereafter responded to the demand notices vide their Advocates letter dated 22nd May, 2017 disputing the amounts demanded on false, frivolous and baseless grounds. Vide order dated 10th October, 2017 unconditional leave to defend was granted to the Appellant by the Hon'ble High Court at Bombay.

8. He further stated that the Respondent has acknowledged the work of the Appellant and has issued work completion certificates. The Respondent has made part payments as late as 17th March, 2015 and has deducted TDS @ 1% for the entire amounts billed. The claim is therefore within limitation.

9. According to Learned Counsel, the following facts shows that there is no dispute about the work of the Appellant.

a. Admitted financial difficulties in its emails dated 8th May, 2012 and 25th December, 2014 and that amounts are due and payable to the Appellant (Ground Z);

b. Made part payments from time to time;

- c. Issued work completion certificates (See Ground EE);*
- d. Deducted 1% TDS on the amounts billed by the Appellant (Ground AA);*
- e. Gave additional contracts to the Appellant every year from time to time;*
- f. Has never communicated any grievances contemporaneously until the issuance of the demand notices (Ground CC & KK).*

10. The case of the Respondent is that it awarded the sub-contract mainly for the labour works (for pilling work, deck structure work, etc.) to the Appellant, on back to back basis. The terms of the Principal Contracts, inter alia including specifications, time frames, penalties and liquidated damages were applicable to the Sub Contracts.

11. It is also submitted that the Appellant while executing the works under the Sub-Contracts, consistently failed to maintain the desired progress of the works. The predominant reasons of its failures of the Appellant were (a) inadequate deployment of the resources, (b) unsatisfactory and faulty quality of the resources (i.e. equipment and manpower), (c) deployment of inappropriate and improper methods for execution of the work, and (d) abandoning the Sub Contract works.

12. It is submitted that as a result of the failures by the Appellant, the completion periods of the projects were prolonged, which attracted the imposition of the liquidated damages, termination, forfeiture of security deposits, earnest money, balance payments, invocation of the bank guarantees, blacklisting, banning etc.
13. It is further submitted that the Respondent brought to the notices of the Appellant the adverse actions being taken by the Clients from time to time. The Appellant was therefore fully aware of the imposition of penalty and damages by the Client and liability of the Appellant towards the same.
14. It is also submitted that the termination of the main / principal contact led to automatic terminations of the sub-contact which were back to back to the main contract.
15. Learned counsel for the Respondent submitted that the Respondent called upon the appellant to make good the losses suffered by it for the reasons attributable to the Appellant; the Appellant was not forthcoming for making good the losses despite various request and reminders; therefore, the Respondent contemplated filing a suit before Bombay High Court and thus instructed their solicitors. The various emails including emails dated

03.04.2017, 05.05.2017 and 9.05.2017 exchanged in this regards which are prior to issuance of Demand Notice dated 10.05.2017.

16. Therefore, it is stated, it can be concluded that though the Respondent filed the Summary suit before the Hon'ble Bombay High Court on 16.05.2017, the preparation for the legal suit was commenced much prior to issuance of Demand Notices and the disputes were in existence much prior to the filing of the suit.

17. It is further contended that the Respondent also categorically conveyed in its reply dated 22.05.2017 that the Respondent has already filed the Summary Suit on 16.05.2017 before the Hon'ble Bombay High Court.

18. Learned counsel appearing on behalf of the Respondent referring to the Demand Notice also submitted that the claim is barred by limitation, therefore, no debt is payable. However, we are not deciding such issue as the Suit is pending before the Bombay High Court.

19. From the submission made by the parties, emails and communications, we find that there is a pre-existing dispute about the work which were brought to the notice of the Appellant prior to the Demand Notice dated 10.05.2017. The emails dated 03.04.2017, 05.05.2017 and 09.05.2017

is by the Respondent taking step for award for imposition of penalty for damage and having taken adverse action has also not been disputed. We find, no merit in this appeal. It is accordingly dismissed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)

New Delhi

2nd July, 2019

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