NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.740 of 2019

[Arising out of Order dated 29.05.2019 passed by National Company Law Tribunal, Bengaluru Bench, Bengaluru in Company Petition (IB) No.02/BB/2018 and I.A. No.72 of 2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Simplex Infrastructures Limited Simplex House, No.27, Shakespeare Sarani, Kolkata – 700 017 Represented by its Authorized Signatory Mr. K.L. Baid	Operational Creditor	Appellant
Vs.		
Nitesh Estates Limited Nitesh Timesquare, 7th Floor, No.8, M.G. Road, Bengaluru – 560 001, Represented by its Managing Director Mr. Nitesh Shetty	Corporate Debtor	Respondent

For Appellant: **Mr. Sanjeev Sen, Sr. Advocate with Mr. Samrat Sengupta, Mr. Dabayan Ghosh, Mr. Sayan Roy and Mr. S.C. Das, Advocates**

For Respondent: **Ms. Haripriya Padmana Bhan, Mr. Abir Phukan, Mr. Vaishali Goyal, Mr. Vishal Sinha and Mr. Ashkrit Tiwari, Advocates**

J U D G E M E N T

(23rd June, 2020)

A.I.S. Cheema, J. :

1. The Appellant – original Operational Creditor has filed this Appeal against rejection of its Application filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short). The Appellant Company had filed the Application having CP (IB) No.02/BB/2018 before the National Company Law Tribunal, Bengaluru Bench (Adjudicating Authority) against the Respondent – Corporate Debtor. The Application was heard and rejected.

2. In short, the case of the Appellant is that the Appellant had entered into a Contract Agreement (Annexure A-4 – Page 80) as Contractor with the Respondent – Corporate Debtor being "Employer" for construction of Ritz Carlton Hotel in Bangalore for Respondent and the Agreement was executed on 19th March, 2008. The Appellant claims that the work of the construction of the hotel was completed in 2012 and the hotel is functional since 2013. The Appellant claims that the Final Payment Certificate (Annexure A-6 Pages 90-91) was delivered on 31st October, 2014 and in spite of reminders, the balance due amount of Rs.6,03,55,646/- has not been paid. Demand Notice under Section 8 of IBC dated 28th September, 2017 (Annexure A-8 – Page 94) was sent. The Corporate Debtor sent Reply dated 28th October, 2017 (Annexure A-9 – Page 97) but did not raise any dispute as such. The subsidiary of Respondent, namely Nitesh Residency Hotels Private Limited (NRHPL)

however sent a response dated 2nd December, 2017 (Annexure A-10 – Page 98) although the Notice under Section 8 of IBC was not sent to NRHPL. Appellant then filed Application under Section 9 of IBC (Annexure A-11 – Page 100) on 22.12.2017. Appellant claims that the Adjudicating Authority has wrongly dismissed the Application and thus, the Appeal.

3. The Adjudicating Authority after hearing the parties and considering the case put up by the Respondent – Corporate Debtor, found that there was existence of dispute with regard to the debt and default and that the claim was also barred by latches and limitation.

4. It would be appropriate now to refer to some more details with regard to the case of the Appellant. The Appellant claims that the tender for the construction was floated by the Respondent – Corporate Debtor (Nitesh Estates Limited [NEL – in short]). The Appellant submitted the bids in response to such tender. A Letter of Intent (LOI) however was issued on 29th January, 2008 by NRHPL. NRHPL is stated to be associate company of Respondent which was formed to oversee the construction of the hotels. The Appellant claims that formal Letter of Acceptance (LOA) dated 19th March, 2008 (Page – 118) was executed between the Respondent and the Appellant. It is claimed that in such letter, the "employer" is shown to be the Respondent and not NRHPL. The Appellant claims that the Letter of Intent got subsumed in the Letter of Acceptance. The Appellant claims that in the Conditions of Contract (General

Conditions (Page – 241 @ 287) Clause 14.7, the Appellant was entitled to receive payment within 56 days from the date of receipt of Final Payment Certificate. Appellant claims on 19th March, 2008, the formal contract was also executed between the Appellant and the Respondent. Copy of contract is referred to as Annexure A-4 (Pages 80 - 82). Appellant is accepting that payments were made from time to time by the Respondent as well as NRHPL. The Advocate for Appellant referred to Supplementary Agreement dated 8th February, 2010 to say that parties agreed that certain works will be omitted from the scope of work. The Final Payment Certificate (Annexure A-6) was issued by NRHPL on 31st October, 2014. Vice President of the Respondent – Corporate Debtor issued appreciation letter regarding performance of the Appellant. (The letter has no date).

5. It is further the case of the Appellant that Final Payment Certificate (which is claimed by Respondent as Reconciliation Statement) was issued by Quantity Surveyor appointed by Respondent. The document is referred as Annexure – A-6 (Pages 90 – 91). Appellant claims that considering such Final Payment Certificate, the Appellant sent letter (Page – 822) on 29th November, 2014 asking for release of Rs.6,03,55,646/- as unpaid dues. (Record shows that on 29th November, 2014, such letter was sent to "NRHPL" and not Respondent, for release of balance Rs.6,03,55,646/-. The document is at Page – 822 of the Appeal seeking payment from NRHPL.) Appellant claims that series of letters were sent thereafter to the Respondent for payment and

ultimately, notice under Section 8 was sent to Respondent. The Notice is at Annexure – A-8. Appellant claims that the Respondent sent Reply (Annexure A-9) merely stating that the issues raised by the Appellant need to be discussed and discussion was required for arriving at a mutual settlement amicable to both sides. Thus, according to the Appellant, no dispute as such was raised and the Application should have been admitted. Reference is made also to the Response sent by NRHPL on 2nd December, 2017 (Annexure A-10) and the disputes raised by NRHPL. According to the Appellant, the employer was Respondent and thus, NRHPL was not relevant and case put up with regard to NRHPL should have been ignored. Appellant claims that the Application under Section 9 of IBC was filed on 22.12.2017 and on same date, the Appellant had also invoked arbitration proceedings. The arbitration proceeding was initiated against Respondent and NRHPL, both.

6. The case put up by the Respondent before the Adjudicating Authority and before us in Reply (Diary No.14723) and the arguments raised may now be referred. The Corporate Debtor claims that the fact that the date on which Application under Section 9 was filed, on same date arbitration proceedings were also initiated by Appellant, itself shows that there is existence of dispute which Arbitrator needs to decide. Respondent claims that the dispute is regarding quality of work done by the Appellant which was raised since 2014 and which has been highlighted in 2016. Reference is made to the document at Page – 58 of

the Reply which is e-mail dated 21st January, 2016 sent to the Appellant raising various issues regarding the quality of works. The Respondent claims that Appellant is not Operational Creditor of the Respondent and no service was offered by Appellant to the Respondent and that the services were given to NRHPL which owns and is running Ritz Carlton Hotel at Bangalore. The liability to pay under the contract is that of NRHPL. This can be seen from the documents of contract as well as conduct of parties. NRHPL is necessary party and tripartite arbitration will be proper adjudication. Respondent also claims that the debt is time barred. It is also stated that the document referred to by the Appellant as Final Payment Certificate is not actually Final Payment Certificate but it is only a Reconciliation Statement prepared by the Engineer to which document, NRHPL was party and not the Respondent – Corporate Debtor. For these and other reasons, the Respondent – Corporate Debtor claims that the Appeal should be dismissed.

7. We have heard both the parties. We have gone through the record. Various disputes are being raised with regard to who is the employer whether the Respondent - NEL or its subsidiary - NRHPL. The parties are referring to the various documents executed before the Contract Agreement dated 19th March, 2008 was entered into as well as the Contract Agreement (Page – 80) and documents executed subsequent to such Agreement and making reference as to in which document, NEL – Corporate Debtor is referred as employer and in which document, NRHPL

is referred as employer. There is no dispute that for the works executed, for various factors relating to execution of the contract, NRHPL transacted with the Appellant. Appellant accepts that even payments were made by NRHPL also. With such state of affairs, it cannot be expected, considering the provisions of IBC and the nature of proceedings which exist under Section 9 of IBC, that the Adjudicating Authority should examine in details the various terms and to give a Judgement as such as to who the "employer" actually was. Appellant itself is accepting that NRHPL signed Letter of Intent; in Appendix of Tender "Employer" is NRHPL; Substantial Completion Certificate and Taking Over Certificate dated 07.04.2014 were issued by NRHPL. Admittedly, payments were also made by NRHPL and even Taking Over Certificate was with NRHPL. There are so many other documents also.

8. Various documents on record itself show that the defence of Respondent on this count with regard to who is the employer requires a tripartite adjudication, is not baseless. We have perused Annexure – A-4 (Page – 88). It is titled Contract Agreement dated 19th March, 2008. The index (Annexure – A-4) claims that the Agreement is only of three pages (Pages – 80 – 82). Clearly, there are other documents. The Appeal has referred to only these pages from the Agreement, as the Contract. At Page – 80, in the beginning of the Agreement, the title is "The employer and the Contractor agree as follows:-" Then Serial No.1 states that "In this Agreement words and expression shall have the same meanings as are

respectively assigned to them in the Conditions of Contract hereinafter referred to". Now if Page 127 of the Appeal is seen, the title is

> "Document A
> Conditions of Contract
> 3 - Particular Conditions"

At page – 128, the item is shown as "Employer's name and address" and against this, the name stated is that of "Nitesh Residency Hotels Private Limited" which means, NRHPL is shown as the employer. Thus reading first page of Annexure – A-4 which says that the Words and Expression shall have the same meaning as assigned to them in the Conditions of Contract, if in the Conditions of Contract, the employer is referred as Nitesh Residency Hotels Private Limited, that would be the definition. When definition clause says particular thing, for purpose of interpretation, we would ignore the initial portion of Annexure – A-4, where the Respondent - Nitesh Estates Limited is called the "employer". It is apparent that the document itself says that the employer would be as stated in the conditions of contract and document at Page – 128 says that the employer is NRHPL. We have looked into this as learned Counsel for Appellant wanted us to lift the corporate veil and see. The Respondent is right in saying that it requires tripartite adjudication, considering different documents and conduct of parties. This proceeding being basically summary in nature, we would however leave the aspect to be dealt with in proper forum. For above reasons (and reasons to follow), we just find that the documents on record and the various dealings between

the parties and NRHPL, the Appellant has not clearly established that operational dues are sole responsibility of the Respondent.

9. Reconciliation Statement (Page – 90) which Appellant claims to be "Final Payment Certificate", shows it is dated 31st October, 2014. We have just referred that after this date of 31st October, 2014, the Appellant itself had sent letter on 29th November, 2014 (Page – 822) to NRHPL seeking payment of the balance amount as per Certificate. If the NRHPL was not liable to pay, there was no reason for the Appellant to have made such claim of amounts from NRHPL.

10. The learned Counsel for Respondent argued that all communications regarding defects in works, were sent by NRHPL to the Appellant. During execution of the Agreement, the Appellant communicated only with NRHPL for grievances, discussion and information. It is argued that even the taking over Certificate dated 7th April, 2014 was signed and handed over to the Appellant only by NRHPL. The taking over Certificate was issued subject to completion of balance works which included several defective works. The Reconciliation Statement dated 31st October, 2014 (Page – 90) does not include Debit Note dated 21st August, 2014. The other Debit Notes were also issued by NRHPL. The Reconciliation Statement is not signed by the Respondent – Corporate Debtor, it is argued.

11. According to the Respondent, the Reconciliation Statement is not "Final Payment Certificate" as required in the contract and Respondent is disputing the validity of the same. It is claimed that it is only recommendatory Statement of Reconciliation prepared by the Engineer. It is argued, it is not binding on the Respondent or NRHPL. It is not counter signed by the Corporate Debtor. The Final Payment Certificate as per Clause 14.10 of General Conditions of Contract was to be preceded by a Statement of Completion by the employer. No such Certificate has been issued by NRHPL. NRHPL did not issue Final Statement of Completion and was required to engage services of other party to complete the works.

12. We have gone through this document at Page – 90 (Annexure – A-6). It has been prepared by Davis Langdon KPK (DLKPK) which is an account company (Page – 809) as seen in their letter dated 28th June, 2014. This Company – DLKPK appears to have prepared this document which has signatures of Appellant and NRHPL. The Respondent is claiming that this is not Final Payment Certificate. The document also states that it is only "DLKPK recommendation". Thus, question of limitation also becomes relevant. Appellant claims that project was completed in 2012 and the hotel was taken over in 2013. Take Over Certificate is stated to be dated 07.04.2014 The Application under Section 9 filed on 22.12.2017 would thus be clearly time barred with regard to the debt claimed. If the project was completed in 2012, the amounts payable must be said to have become due. When the works are

completed and the hotel is also taken over and made functional, the time had begun to run. Whether or not this or that formality was completed would not stop the running of time.

13. The Adjudicating Authority has found that there was pre-existing dispute. The Appellant is heavily relying on Annexure – A-6 which Appellant claims to be Final Payment Certificate dated 31st October, 2014 for claiming its dues. The Notice under Section 8 (Page – 94) was sent on 28th September, 2017. The Respondent has pointed out an e-mail dated 21.01.2016 (Annexure - E – Page 58 of the Reply) which shows that the Chief Engineer of Ritz Carlton Hotel had sent communication to the Appellant with regard to the various leakages and seepages found in various rooms and the damage caused to upholstery, paint, furniture, etc. Various room numbers are pointed out which required various treatments. This document clearly shows that the quality of work done was disputed and the dispute was raised in 2016 itself and Appellant was informed that in spite of continuously following up, there was no response. It is quite apparent that there was pre-existing real dispute regarding the quality of work done. When this is so, the Adjudicating Authority is not required to go into further details and we find that the Application under Section 9 was rightly rejected by the Adjudicating Authority.

There is no substance in the Appeal and the Appeal is thus rejected.

No Orders as to costs.

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

[Kanthi Narahari]
Member (Technical

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