

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 67 of 2018

IN THE MATTER OF:

KLA Construction Technologies Pvt. Ltd.

...Appellant

Vs

CKG Realty Pvt. Ltd.

....Respondent

Present:

**For Appellant: Mr. Swaroop George and Mrs. Omana George,
Advocates.**

For Respondent:

ORDER

26.02.2018: Appellant M/s KLA Construction Technologies Pvt. Ltd. is aggrieved of dismissal of its application under Section 9 of Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code'), in terms of the impugned order dated 2nd February, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bench-III, New Delhi. The impugned order has been assailed in this appeal on the grounds enumerated in the memo of appeal.

2. Heard Learned Counsel for the Appellant. It appears that the Appellant, in its capacity as Operational Creditor, filed application under Section 9 of I&B Code against respondent M/s CKG Realty Pvt. Ltd. - Corporate Debtor. The case set up before the Adjudicating Authority for triggering the 'Corporate Insolvency Resolution Process' was that the respondent had committed default in sum of Rs.11 Lakh giving rise to claim on account of non-payment of an advance payment in relation to the contract inter-se the parties for the construction of CKG Expresswalk at Rudrapur with the structural works for a contract of Rs.74135813.32. According to the Appellant a sum of Rs.11 Lakh was to be paid as mobilization advance in terms of the agreement executed inter-se the parties prior to commencement of actual work to enable the Appellant to mobilize machinery and equipment at the construction site for execution of the construction work. Subsequently, the Appellant put up the demand for a sum

of Rs.21 lakh as an advance, inclusive of Rs.11 lakh, in terms of Minutes of Meeting held between the parties. Respondent – Corporate Debtor is said to have acceded to the same. However, no payment was made prompting the Appellant to issue demand notice dated 12th September, 2017 under Section 8 of I&B Code. Despite service of such notice, the Appellant’s claim was not satisfied by the respondent. No notice of dispute emanated from the Corporate Debtor. In the given circumstances, Appellant – Operational Creditor filed application aforesaid for triggering the ‘Corporate Insolvency Resolution Process’ against the Corporate Debtor.

3. Respondent, to the notice served upon him, filed reply pleading that the Corporate Debtor was obliged to pay the mobilization advance subject to completion of mobilization process by the Operational Creditor. However, the Operational Creditor did not complete such process despite of requests and the mobilization advance was withheld by the Corporate Debtor. Respondent further pleaded that the Operational Creditor had in fact initiated demobilization procedure. It was further pleaded that non commencement of work by the Operational Creditor at the project site had resulted in huge losses entitling the Respondent – Corporate Debtor to claim costs and damages from the Operational Creditor in terms of contract executed between them.

4. On consideration of the pleadings and documents filed by the parties, the Learned Adjudicating Authority found that the parties had entered into an agreement primarily in relation to civil construction works by virtue whereof the Operational Creditor was, to execute concrete work at site. Total value of the contract was Rs.74135813.32 excluding the taxes. The agreement provided for payment of Rs.11 lakh as token advance to the Operational Creditor to start the work. According to the Corporate Debtor it had engaged dewatering agency. However, the site was not ready for carrying out PCC work as there was water logging which was not fully tackled. Consequently, mobilization of machinery

and equipment did not take place for commencement of work under the agreement and the advance was withheld. Learned Adjudicating Authority declined to go into the question whether the site was properly setup and whether mobilization of equipment was done by the Operational Creditor, as the same fell beyond the domain of its jurisdiction under Section 9 of the 'I&B Code'. It was of the opinion that the construction work was a composite contract involving supply of material as well as rendering works at the site and since neither of the two had commenced to sustain claim of advance payment, it noted that there was a contradiction in regard to the claim in as much as a sum of Rs.2880837.30 had been claimed in terms of the bill dated 4th September, 2017 whereas in terms of the notice under Section 8 of 'I&B Code' such amount had not been claimed. The learned Adjudicating Authority being of the view that non-payment of advance could not give rise to a claim as an operational debt unless he established that there was a debt due and payment arising out of provision of goods or by rendering of services, dismissed the application.

5. After hearing learned counsel for the Appellant for a while this Appellate Tribunal is of the considered opinion that the claim set up by the Appellant does not fall within the definition of operational debt, default in respect whereof would justify triggering of 'Corporate Insolvency Resolution Process' in terms of Section 9 of 'I&B Code'. What emerges from record is that there is a plausible dispute between the parties in regard to execution of contract involving supply of material as well as rendering of works at the site. The mere fact that the Operational Creditor was entitled to mobilization advance prior to commencement of actual work in the wake of Corporate Debtors plea that no machinery or equipment was moved to the construction site raised a debatable issue which could be agitated before the Civil Court. This is apart from the fact that the claim set up by the Appellant in the final bill dated 4th September, 2017 and the notice under Section 8 of 'I&B Code' is at variance. This Appellate Tribunal is of the opinion that there is no legal infirmity in the impugned order.

The appeal is accordingly dismissed. The Appellant shall, however, be at liberty to seek appropriate remedy before the competent forum for alleged breach of contract.

(Justice Bansi Lal Bhat)
Member (Judicial)

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