

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 613 of 2020

(Arising out of Impugned Order Dated 05.05.2020 passed by Hon'ble National Company Law Tribunal, Chennai Bench in IBA/834/2019)

In the matter of:

Nirmal K Dhiran (Proprietor of NKV Home Depot)
Address: 86 A, Poonamallee High Road
Velappanchavadi, Chennai-600077

Represented by:

CS K. Gaurav Kumar/CS Alpa Jain
Practicing Company Secretaries

Address for Communication:

New No. 151, Old No. 68, First Floor,
T.T.K Road, Alwarpet, Chennai-600018
Tamil Nadu, India
Phone No.: 091 98844 64319/80728 15701
E-mail id: gauravkumarjain@hotmail.com

....Appellant

Vs.

Landmark Housing Projects Chennai Pvt. Ltd.
Address: No. 27 Saravana Street,
T. Nagar, Chennai-600017,
Tamil Nadu, India

....Respondent

Present:

For Appellant: Mr. Gaurav Kumar, for Advocate.

JUDGMENT

(17th August, 2020)

Per: Shreesha Merla Member (Technical)

Aggrieved by the order dated 05.05.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Chennai Bench-I, Chennai. Nirmal

K Dhiran (Proprietor of NKV Home Depot), the Operational Creditor in the original Application IBA/834/2019 preferred this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016. The Ld. Adjudicating Authority has dismissed the Application under Section 9 observing that there was a pre-existing dispute between the Parties prior to the issuance of Demand Notice and that contentions raised by the Corporate Debtor is a plausible contention which required further investigation.

2. For reasons cited in the Affidavit, delay in filing the Appeal is condoned. The instant Appeal is being disposed of at the 'Admission Stage' itself. Hence, No Notice was issued to the Respondent.

3. Succinctly put, the facts in brief are, that the Operational Creditor was supplying NKV Gypsum to the Corporate Debtor from 29.05.2017 onwards and had raised invoices based on the supplies made. It is averred that out of the total invoices amounting to Rs. 50,16,306/-, the Corporate Debtor paid only 35,58,130/- and there was principal outstanding debt of Rs. 14,58,176/- together with outstanding interest of Rs. 1,46,776.85/-, for which the Operational Creditor preferred Application under Section 9. It is also averred that the Corporate Debtor had given two cheques amounting to Rs. 4,00,000/- and 2,00,000/- which when deposited on 20.11.2018 and 29.11.2018 were dishonored, subsequent to which, the Corporate Debtor had paid these amounts through RTGS. It is stated that the materials were continued to be supplied till 30.11.2018 and that the Corporate Debtor never raised any dispute regarding the quality or quantity and had accepted the said supplies, but only raised this

'dispute' after the Operational Creditor started following up on the balance payments.

4. The Learned Counsel for the Appellant submitted that the Ld. Adjudicating Authority has wrongly relied on the e-mail sent by the Corporate Debtor which is an erroneous finding as the Appellant was never given any work order for any kind of 'Services', thereby the reference made about the work order in the e-mail is false and the same was also highlighted by the Appellant in their e-mail dated 17.12.2018; that the Appellant had received only purchase order for the Gypsum supplied and there was no other work done by the Appellant for the Corporate Debtor other than supply of Gypsum; the work with respect to usage of Gypsum was undertaken by the Appellant by some other contractors for which the Operational Creditor cannot be made liable; the supplies were made as per site conditions and there was no advance payment given by the Corporate Debtor; that in the total bills of more than 50 in number, two supplies were of expired materials which were immediately replaced and a credit note was also given to that effect and that the Corporate Debtor is falsely giving the impression that all the other supplies given were also expired material.

5. The Learned Counsel appearing for the Appellant further contended that the Corporate Debtor had given cheques which were dishonored and to resolve the issue, a meeting was held between both the parties and the minutes of the meeting dated 16.11.2018, shown in the e-mail depicts that 800 bags of Gypsum were supplied on 23.11.2018 and 400 bags were supplied on 30.11.2018 respectively for which the Corporate Debtor did not make any payment.

6. The Learned Counsel for the Appellant vehemently contended that there is no evidence that the Corporate Debtor had suffered any loss or that he had reproduced the entire quantity of Gypsum and that these e-mails were created only to show existence of a dispute to avoid payments of the Balance of amounts.

7. The material on record shows the e-mails dated 29.11.2018 and also the minutes of meeting held on 16.11.2018 which refer to a pre-existing dispute with respect to quality of the Gypsum supplied. It is relevant to mention that Form-3 is dated 29.03.2019 whereas all the e-mails complaining about the quality of Gypsum were prior to the said Demand Notice. In the Counter Affidavit filed by the Corporate Debtor, before the Ld. Adjudicating Authority, it was specifically pleaded giving the details of the relevant invoices, that the Gypsum bags manufactured in the year September, 2017 were delivered on 23.11.2018, despite the fact that the shelf life of the said product was having a warranty of only a maximum of period of one year and that the same was duly intimated to the Operational Creditor. The internal communication, i.e. an e-mail dated 21.11.2018 directs the employees to find an alternative vendor to complete the work and not to allow the Operational Creditor inside the site as they were responsible for creating huge losses.

8. At this juncture, we find it fit to place reliance on the Principle laid down by the Hon'ble Supreme Court in '**Mobilox Innovations Private Limited vs. KIRUSA Software Pvt. Ltd.**' reported in **2018 (1) SCC 353** in which the Hon'ble Supreme Court has held as follows:

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an Operational Creditor, as defined, may, on occurrence of a default (i.e. on non-payment of a debt, any part thereof has become due and payable and has not been repaid.), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8 (1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the Operational Creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that existence of the dispute and/or the suit or arbitration proceeding must be pre-existing, it must exist before the receipt of the demand notice or invoice, as the case may be”.

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- i. Whether there is an “operation debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- ii. Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*

iii. *Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operation debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act”.

9. As subject matter of the case relates to ‘Existence of a Dispute’, we are of the view that the case has to be decided on the touchstone of what the Hon’ble Supreme Court has observed in **Mobilox Innovations Private Limited vs. KIRUSA Software Pvt. Ltd.(Supra)**.

10. At the outset, we address ourselves to the e-mail communication between both the Parties to assess if there was any pre-existing dispute. The e-mail dated 29.11.2018 which is an internal communication of the Corporate Debtor reads as follows:

Anand

From: Uday <uday@ourlandmarks.com>
Sent: 29 November 2018 13:30
To: Theboral; Nirmal Dhiran NKV
Cc: Muthukumar; narayanan@ourlandmarks.com; dhina.logan@gmail.com; vijay@ourlandmarks.com; Shylaja; Gopal; Sridhar@ourlandmarks.com; Shanmugam
Subject: Re: Geethanjali-Uday Villas-Grange-Gypsum Work Schedule-NKV Home Depot.Reg
Follow Up Flag: Follow up
Flag Status: Completed

Dear All,
 Please find alternate vendor to complete the work
 not allow NKV inside the site since they made huge loss to our company.
 Send mail stating that all the work orders are cancelled and we will with held his balance payments.
 With warm regards
 Uday
 Sent from my iPad

On 29-Nov-2018, at 11:35 AM, Theboral <theboral@ourlandmarks.com> wrote:

Dear sir,

Status of NKV Gypsum plastering work for your information.

Project	Material status	Work status
Uday Villas	NIL	Not Supplied, Expecting today (29-11-2018)
Grange	400 bag supplied on 24-11-2018	Labour- 4 nos, started snag works
Geethanjali	400 bag supplied on 23-11-2018	Not started; Expecting labours by today (29-11-2018)

<image001.jpg>

From: Theboral [mailto:theboral@ourlandmarks.com]
Sent: 16 November 2018 16:25
To: 'NKV HOME DEPOT'; 'sales2@nkvhomedepot.com'; 'nirmaldhiran@gmail.com'
Cc: 'Muthukumar'; 'narayanan@ourlandmarks.com'; 'dhina.logan@gmail.com'; 'vijay@ourlandmarks.com'; 'Shylaja'; 'Gopal'; 'Sridhar@ourlandmarks.com'; 'Shanmugam'; 'Udayakumar'
Subject: Geethanjali-Uday Villas-Grange-Gypsum Work Schedule-NKV Home Depot.Reg

Dear All,

NKV Home

With reference to the discussion had with Mr.Nirmal (NKV Home depot) at Landmark Office, It has been agreed that the following work will be completed for the sites as per schedule below:

SI No	Project	Work	Target date	Bags Requirement	Contractor
1	Uday Villas	Flat A102 & B101	25-11-2018	400 Bags	Mohan - 9840961385
		Flat B402	Start-20-11-2018 Complete- 26-11-2018		
2	Grange	Villa 9,10&20 snag work	24-11-2018	250 Bag	Patel interior- Jawahar (9884555791)
		Villa 22 & 23	30-11-2018	500 Bag	
		Villa 24 to Villa 28-(5 villas)	Start-01-12-2018 Complete-30-12-2018	1000 Bag	
3	Geethanjali	ABC - Snag & pending works	Start-19-11-2018 Complete- 30-11-2018	560 bags	Nasim Ahmed Choudary - (95001 04046)
		Pending Flats - A403, B 403 , B 404, C 404,	Start-19-11-2018 Complete- 15-12-2018	840 bags	
		DEF Block - 44 flats	Start-19-11-2018 Complete- 30-12-2018	9600 bags	

Kindly adhere to the above schedule and ensure to complete the same.

<image001.jpg>

NKV Home

11. It is the case of the Appellant that the supplies were terminated as the cheques had bounced and also because there was a clear outstanding of Rs. 14,58,176/-. It is an admitted fact that all the dishonored cheques were paid through RTGS to the Account of the Corporate Debtor.

12. Admittedly on 16.11.2018, there was a meeting held between both the parties and the e-mail dated 15.12.2018 refers to the pending works which could not be completed on account of insufficient supply of Gypsum bags and states that work orders henceforth would be terminated. The e-mail dated 17.12.2018 reads as follows:

“On Mon, Dec 17, 2018 at 2:24 PM Uday <uday@ourlandmarks.com> wrote:

Read as committed

On 17-Dec-2018, at 2:05 PM, Uday uday@ourlandmarks.com wrote:

Dear Sir,

We have long more than 25 lacks because of you. Since as Committee you are not done your work.

So we have all the right to terminate.

You have taken our money not rendered your job.

Regards

Uday

Sent from my iPad

On 15-Dec-2018, at 5:45 PM. Sridhar <sridhar@ourlandmarks.com> wrote:

Dear Sir,

As per our MOM held at 16th November 2018, you have not completed below following works as per the commitment.”

13. It is also relevant to reproduce the e-mails dated 17.12.2018 for better understanding of the case as follows:

Anand

From: NKV HOME DEPOT <nkvhomedepot@gmail.com>
 Sent: 17 December 2018 22:41
 To: Uday
 Cc: Theboral; Shanmugam
 Subject: Re: Uday villas- wall punning work.Reg

Follow Up Flag: Follow up
 Flag Status: Completed

Dear sir

We have supplied you two trucks of material which was rejected without testing and returned without using immediately. We have proof of the same.

Regards

Nirmal K Dhiran

On 17-Dec-2018, at 19:04, Uday <uday@ourlandmarks.com> wrote:

Dear sir,
 We have all the proof that you supplied expired materials we need to do rework on the same.
 We have all the evidence that you cheated us. Hence we are not able pay any more.
 Regards
 Uday

Sent from my iPad

On 17-Dec-2018, at 2:57 PM, NKV HOME DEPOT <nkvhomedepot@gmail.com> wrote:

Dear Sir,

We are not washing our hands. Kindly clear the outstanding of **Rs.14,58,176.00**. Most of the bills are almost 8 months old. You had asked for financial support when you had difficulty in arranging funds. Now that you have arranged the funds, please pay the bills immediately with out any further delay as you have consumed all the materials.

Regards

Nirmal K Dhiran

NKV Home Depot.
 86 A, Poonamallee High Road,
 Near K V N Marriage Hall,
 Velapanchavdi,
 Chennai - 600 077
 India

NK Dhiran

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(Emphasis Supplied)

Tel : + 91 98400 47503
Website : www.nkvhomedepot.com



On Mon, Dec 17, 2018 at 2:08 PM Uday <uday@ourlandmarks.com> wrote:

Dear Sir,

We don't know the contractors we know only you and if you want to wash your hand
The quality of materials what you used is expired and the records are made time to time. Kindly
return our money which you have taken.

Regards

Uday

Sent from my iPad

On 15-Dec-2018, at 5:50 PM, Theboral <theboral@ourlandmarks.com> wrote:

Sir,

As per minutes dated 16-11-2018, it is committed that Uday villas - Wall punning work to be
completed fully . But it is not yet completed as per the commitment. Hence penalty of Rs.
10000/- per day will be applicable.

<image001.jpg>

14. The Appellant in his Written Submissions specified that no advance payment was made by the Corporate Debtor though the terms and conditions require the Corporate Debtor to pay the advance on delivering schedule as per site condition. The question as to whether 50 percent advance was paid or not is not material in the present case, as the material was being supplied by the Operational Creditor since the year 2017 and it was never raised even subsequent to the supply of the material. Though it is the contention of the Learned Counsel appearing for the Appellant that only two supplies were expired materials, the fact remains that outdated material was supplied and the Corporate Debtor which had questioned the quality and also the delayed supply of the subject material by the Operational Creditor and further specifically pleaded in their Counter Affidavit that the maximum coverage should be 20-22 sq. ft. per bag of the 25 kg by the labour appointed by the Appellant had done only 10-15 sq. ft. per bag of the 25 Kg and hence consumption was more than double than that of the regular quantity; that on 15.07.2017 and 28.08.2017 they had ordered for 1200 and 4,400 bags by NKV Gypsum fine plaster to be delivered within 30 days but that the Operational Creditor had taken more than one year to supply the same. The contention of the Learned Counsel appearing for the Appellant that Corporate Debtor had received material after 30.11.2018 and made payment on 07.12.2018 and therefore it cannot be stated that there is no dispute, is unsustainable in the light of the fact that e-mails dated 15.12.2018 and 17.12.2018 raising the dispute are subsequent to this

transaction. It is pertinent to mention that all the disputes were raised prior to the date of the Demand Notice which is 29.03.2019.

15. The Hon'ble Supreme Court in the matter of **Transmission Corporation of Andhra Pradesh Limited vs. Equipment Conductors and Cables Limited, (2019) 12 SCC 697** has observed as follows:

“37. It is now important to construe Section 8 of the Code. The operational creditors are those creditors to whom an operational debt is owed, and an operational debt, in turn, means a claim in respect of the provision of goods or services, including employment, or a debt in respect of repayment of dues arising under any law for the time being in force and payable to the Government or to a local authority. This has to be contrasted with financial debts that may be owed to financial creditors, which was the subject matter of the judgment delivered by this Court on 31-8-2017 in Innoventive Industries Ltd. v. ICICI Bank (Civil Appeals Nos. 8337-38 of 2017). In this judgment, we had held that the adjudicating authority under Section 7 of the Code has to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor within 14 days. The corporate debtor is entitled to point out to the adjudicating authority that a default has not occurred; in the sense that a debt, which may also include a disputed claim, is not due i.e. it is not payable in law or in fact. This Court then went on to state: (SCC p. 440, paras 29-30)

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice

mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing - i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

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42. This being the case, is it not open to the adjudicating authority to then go into whether a dispute does or does not exist?

43. It is important to notice that Section 255 read with the Eleventh Schedule of the Code has amended Section 271 of the Companies Act, 2013 so that a company being unable to pay its debts is no longer a ground for winding up a company. The old law contained in Madhusudan has, therefore, disappeared with the disappearance of this ground in Section 271 of the Companies Act.

44. We have already noticed that in the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined "dispute" as

meaning a "bona fide suit or arbitration proceedings...". In its present avatar, Section 5(6) excludes the expression "bona fide" which is of significance. Therefore, it is difficult to import the expression "bona fide" into Section 8(2)(a) in order to judge whether a dispute exists or not.

45. The expression "existence" has been understood as follows:

"Shorter Oxford English Dictionary gives the following meaning of the word "existence":

(a) Reality, as opp. to appearance.

(b) The fact or state of existing; actual possession of being.

Continued being as a living creature, life, esp. under adverse conditions. Something that exists; an entity, a being. All that exists. (P. 894, Oxford English Dictionary)"

xx xx xx

51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or

illusory, the adjudicating authority has to reject the application.”

16. The aforesaid ratio squarely applies to the facts of this case as we hold that the afore-noted e-mail communication dated 29.11.2018, 15.12.2018 and 17.12.2018 read together with the Minutes of the Meeting held on 16.11.2018, which is prior to the issuance of the Demand Notice dated 29.03.2019, establishes that there is plausible contention which requires further investigation and that the ‘Dispute’ is not patently feeble, legal argument or an assertion of fact unsupported by evidence. We hold that the dispute truly exists in fact and is not spurious, hypothetical or illusory. The IBC proceedings are ‘summary’ in nature and this is not a substitute for debt enforcement Procedure. We do not find any illegality or infirmity in the order of the Ld. Adjudicating Authority.

In the given circumstances, the Ld. Adjudicating Authority was right in declining to initiate ‘CIRP’ against the Corporate Debtor. Hence, this Appeal fails and is accordingly dismissed. No order as to costs.

[Justice Venugopal M.]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Technical)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi
Basant B.