NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) (Insolvency) No. 542 of 2020

(Arising out of judgement and order dated 30th January, 2020 passed in IB-49(ND)2019 by National Company Law Tribunal, New Delhi)

IN THE MATTER OF:

M/s Kuntal Construction Pvt. Ltd.
Shop No.27, 1st Floor, CSC V
Sector 14 Extension, Rohini
New Delhi-110085 ….Appellant

Versus

M/s Bharat Hotels Ltd.
Barakhamba Lane,
New Delhi …Respondent

For Appellant: Mr. BP Singh Dhakray and Mr. Shakti Singh Dhakray, Advocates.
For Respondent: Ms. Purnima Maheswari, Advocate.

J U D G M E N T
(4th September, 2020)

Mr. Balvinder Singh, Member (Technical)

1. The present appeal has been preferred by M/s Kuntal Construction Pvt. Ltd. (hereinafter referred to as 'Operational Creditor') U/S 61 of the Insolvency & Bankruptcy Code 2016 (hereinafter referred as 'I&B Code') challenging the impugned order dated 30th January 2020 passed in IB-49(ND)2019 by the National Company Law Tribunal, New Delhi Bench (hereinafter referred to as 'Adjudicating Authority') u/s 9 of I&B Code, for the initiation of Corporate Insolvency Resolution Process against M/s

Bharat Hotels Ltd. (hereinafter referred to as 'Corporate Debtor') for the outstanding of amount of Rs. 14,89,966.

2. The brief facts of the case are that the Appellant is engaged in the business of civil works, carrying out structural work for all types of building and water & sewerage treatment plants renovation works besides other civil construction and has catered to a vast and diverse clientele all over India. The Corporate debtor approached the Operational Creditor for availing its services and work orders dated 04.10.2011 and 14.10.2013 were issued for Rs. 47,50,000/- and Rs. 2,07,00,000/- respectively. The averments were made by the operational creditor that it raised invoices and maintained a running account with the corporate debtor. Partial payments were received from the corporate debtor from time to time and post adjustment operational creditor is claiming that there is an outstanding liability of Rs. 14,89,967/- including retention amount of Rs. 6,74,247/- from the corporate debtor.

3. The Operational Creditor contended that the main issue arrived from the mutual settlement letter dated 07.10.2015. Below 5 bills, which are subject matter of settlement letter dated 07.10.2015 indicating Rs. 1,21,73,545 are as under: -

Final Certified Bill	**Number of Certified Bills**	**Certified Amount in Rs.**
07-01-2014	Ist Bill	45,02,414=00
10-03-2014	IInd Bill	25,13,435=00
23-05-2014	IIIrd Bill	10,34,365=00
27-06-2014	IVth Bill	22,29,145=00

31-08-2015	Vth Bill	18,94,186=00
	Total	1,21,73,545=00

It is noteworthy, that the Corporate Debtor has paid Rs. 18,67,489/- after 07-10-2015, by four transections as per the terms and conditions of settlement letter dated 07-10-2015 but stopped from clearing the balance certified outstanding of Rs. 14,89,964/- without any reasons.

4. It is submitted that operational creditor on 28-11-2018 issued demand notice U/S 8 of I&B Code against the Corporate Debtor raising the outstanding dues of Rs. 14,89,967 including retention amount of Rs. 6,74,247 due from Corporate Debtor and on 24.12.2018, the operational creditor filled the petition before the Adjudicating Authority for initiation of CIRP.

5. It is further submitted on behalf of the operational creditor that after hearing both the parties the Adjudicating Authority passed the interim order dated 30.04.2019 after recording the submission stated in the reply of the corporate debtor to pay the retention amount, which is as under: -

ORDER

"Though, there is no agreement over the reconciliation of the accounts, the parties are granted one day more to reconcile the same. Without prejudice to the rights and contentions raised by the corporate debtor in their reply, they are ready and willing to pay the retention amount. To come up for arguments and final disposal on 3rd May 2019"

The above Interim Order was not considered while delivering the final impugned Order dated 31.01.2020.

7. It is argued by the counsel for operational creditor that the impugned order dated 30.01.2020 passed by the Adjudicating Authority dismissing the

petition of the operational creditor without considering the merits of the case. The impugned order has discussed the letter dated 07.10.2015 relating to full and final settlement but has not adjudicated two issues involved in the mutual settlement letter dated 07.10.2015, hence the operational creditor is highly prejudiced and aggrieved. There are two issues arising out of the said settlement letter dated 07-10-2015 which are as under: -

i. "….last payment against 5th and final bill for STP work and accepted for a full and final value for Rs. 1,21,73,542/- exclusive of VAT, Service Tax, as applicable **(subject to the receiving of final payment against CURRENT BILL) …."**

ii. "….We further confirm that we will not raise any claim at any time ion future against the company for all the works carried out by us at "Hotel the Lalit, New Delhi-1" **EXCEPT RETENTION MONEY AMOUNT (IF DEDUCED)…."**

8. It is also submitted by the operational creditor that the impugned order passed by Adjudicating Authority on 30.01.2020 has not been communicated or served upon the operational creditor, but the same was observed and downloaded from the web page of NCLT, Delhi on 02.03.2020. Thus there has been a delay of 13 days caused in filling the present appeal. For this an application U/S 5 of the Limitation Act seeking condonation of delay under I.A No. 1388 of 2020 is filled before this Appellate Tribunal.

9. The Respondent filled its reply and contended that the operational creditor has not disclosed any patent illegality/perversity/misconduct to set aside the Impugned Judgment wherein the Adjudicating Authority held in Para 8:

> *"In view of the aforesaid facts, this bench has observed that there is an existence of a prior dispute. Whether full and final settlement of the claim was made or not or whether the Respondent was entitled to adjust the retention amount are disputed question of facts. The Corporate Debtor, prima facie has been able to corroborate the* ***existence of a prior dispute which the petitioner has withheld.*** *The factum of the retention amount being adjusted was also within the knowledge of the petitioner and therefore amounts to a prior dispute"*

10. It is further stated that the expression 'dispute' has been defined under Section 5(6) of I&B Code and includes the existence of the amount of debt. Further, under Section 8(1) of the I&B Code adequate room has been provided for the Adjudicating Authority to ascertain the existence of the dispute and under section 9(5)(d) of the I&B Code in case of notice/record of dispute, the Adjudicating Authority has the power to reject the application of the operational creditor. The Insolvency Resolution Process is not a civil recovery forum and if any alleged amount is payable to the Appellant the same needs to be tried in Arbitration/Civil Court as per the clauses of Work Order/Contract subject to limitation.

11. It is also stated on behalf of the corporate debtor that the operational creditor has not come to this Appellate Tribunal with clean hands in as much as the Appellant has not stated the facts as pleaded or argued by it before the Adjudicating Authority. The Appellant has concealed the facts that it had neither disclosed nor filed the copy of full and final settlement letter dated 07.10.2015 written by them in the application before the Adjudicating Authority as well as the facts that the corporate debtor has duly sent Reply/Notice of dispute in terms of Section 8(2) (a) of I&B Code dated 05.12.2018 to the operational creditor.

12. It is further argued on behalf of the corporate debtor that the operational creditor is estopped to plead otherwise as there has been no claim/outstanding liability of Rs. 14,89,967/- as alleged. The emails written by the operational creditor only states about the retention amounts. The operational creditor was fully informed about the retention money amounting to Rs. 6,74,247/- being adjusted against the "defects liability" of the operational creditor in terms of clause 4 of the Work Order. All other bills have been paid including 5th and final bill after adjusting mobilization, recoveries, etc.

13. It is also stated by the counsel for the corporate debtor that the Adjudicating Authority has gone through the correspondence and in Para 5 of the Judgment held that there is intimation of the retention money i.e. Rs. 6,74,247/- to the operational creditor and communication of 23.01.2016 of the operational creditor herein states about Operational Creditor having its knowledge. In Para 6 of the Judgment the Adjudicating Authority has considered the full and final settlement letter dated 07.10.2015 under which the operational creditor chose not to take recourse to Arbitration, if any claims/disputes were pending in terms of the Arbitration Clause stipulated in the Work Order, or any other legal proceedings.

14. It is further contended on behalf of the corporate debtor that the interim order dated 30.04.2019 would reflect that the alleged running of the operational creditor was never reconciled and the parties were not in agreement over the accounts. The operational creditor (without prejudice) to put quietus offered to pay the retention amount which was not accepted by the operational creditor. Adjudicating Authority is not bound by the same while passing Final order/Judgment.

15. It is submitted by the counsel for the operational creditor that there is no rule/practice for Judgments to be officially communicated in NCLT. After a matter is reserved for pronouncement the same is shown in the cause list the day it is to be pronounced, of which the Counsel's keep a track. The operational creditor is silent as to how it got the information of the Judgment being pronounced as well as no proof of its being downloaded on 02.03.2020 (day of expiry of the limitation) has been filed. The operational creditor filled the present appeal for the first time on/after 13.03.2020 and there is no sufficient cause shown to explain the alleged delay of 13 days.

16. Having heard to both the parties the Adjudicating Authority have passed the order which is reproduced below:

> *"7. It is noted that pursuant to the final settlement in terms of letter dated 07.10.2015, no further correspondence was made agitating the same or reminding the Corporate Debtor that the agreed amount was not remitted.*
>
> *8. In view of the aforesaid facts, this bench has observed that there is an existence of a prior dispute. Whether full and final settlement of the claim was made or not or whether the respondent was entitled to adjust the retention amount are disputed question of facts. The Corporate Debtor, prima facie has been able to corroborate the existence of a prior dispute which the petitioner had withheld. The factum of the retention amount being adjusted was also within the knowledge of the petitioner and therefore amounts to a prior dispute.*
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> *The right to recover the retention money or any further outstanding liability being a contentious issue cannot be decided by this Bench in a Resolution petition.*

9. In view of pre existing dispute resolution cannot be permitted. Prayer for initiating CIRP of the Respondent stands rejected. File be consigned to Record Room."

18. We have heard the learned counsel for the parties and perused the record. The email correspondences clearly showed that the operational creditor was intimated about the retention money being adjusted on account of defects in the Work Order. It is clearly laid down by the Hon'ble Supreme Court "IBC is not intended to be substitute to a recovery forum and whenever there is existence of real dispute, the IBC provisions cannot be invoked."

19. The definition of the word dispute provided under the code was well elaborated and explained by Hon'ble Supreme, in the case of re. **Mobilox Innovation Pvt. Ltd. vs. Kirusa Software Pvt. Ltd** in the following words:

That vide Para 40 of the judgment – "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 S.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."

The intent of Legislature is very vital for interpreting any law, which can be well deduced from the words of Section 8(2)(a) of I&B Code 'existence of a dispute if any'. It can be easily inferred that dispute shall not be limited to instances specified in the definition as provided under Section 5(6), as it has far arms, apart from pending Suit or Arbitration as provided Under Section 5(6) of IBC. The IBC is not a substitute for a recovery forum.

Section 9 of the IBC makes it very clear for the Adjudicating Authority to admit the application "if no notice of dispute is received by the Operational Creditor and there is no record of the dispute in the information utility." Whereas, on the other hand, Section 9 also states that the Adjudicating Authority reject the application so filed "if the Operational Creditor has received a notice of a dispute from the Corporate Debtor".

20. From the above we can conclude that since there was a dispute existing prior to the issuance of Section 8 notice, the insolvency provisions cannot be invoked. The email communication of the Operational creditor dated 23.01.2016 states about operational creditor having knowledge of retention money being adjusted. Whether the corporate debtor was entitled to adjust the retention amount are disputed question of law and fact and shall be decided by the appropriate forum.

21. We also want to clarify that no one can take recourse that they have not been communicated the Judgment. It should be the duty of the counsel to keep a track after the matter is reserved for pronouncement. This is not a valid ground for requesting the condonation of delay. There should be a sufficient cause for the delay and no one can claim condonation as a matter of right. However, as we proceeded with the matter and heard both the parties in full length, the delay is impliedly condoned in this case.

22. We find no merit so as to interfere in the impugned order dated 30.01.2020 passed by the Adjudicating Authority in C.P. IB-49(ND)2019. Hence the appeal is dismissed. No order as to cost.

[Justice Venugopal M.]
Member (Judicial)

[Mr. Balvinder Singh]
Member (Technical)

New Delhi
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