

**NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH**

IB No. (IB)-167(ND)/2017

In the matter of

M/s. Simplex Infrastructures Ltd.

..... Petitioner

V/s

M/s. Agrante Infra Ltd.

..... Respondent

SECTION: U/s 9 of IBC, 2016

Order delivered on 10.08.2017

Coram:

SMT. INA MALHOTRA, HON'BLE MEMBER (J)

SH. S. K. MOHAPATRA, HON'BLE MEMBER (T)

For the Petitioner (s): Mr. Krishna Vijay Singh, Advocate
Mr. Amit Raina, Advocate

For the Respondent (s): Mr. Rajan Chourasia, Advocate
Mr. Babit Singh Jamwal, Advocate
Mr. Venkat Poonia, Advocate

Order

PER SMT. INA MALHOTRA, MEMBER (J)

1. The present petition has been filed under Section 9 of the Insolvency Bankruptcy Code, 2016 herein after referred to as the "Code". As per averments, the petitioner having been awarded a work contract from the Respondent/Corporate Debtor, had raised running bills in the course of executing the work order. They have now filed the present petition as Financial Creditors on account of the outstanding debt to be recovered from the Corporate Debtor.

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2. As per averments made in the petition, the Financial Creditor had executed piling work at the Corporate Debtor's project carried out under the name and style 'Beethoven's 8' in Sector 107 Gurgaon. In terms of the said work order, the Corporate debtor was under an obligation to release 70% of the payment within 7 days of approval of the RA bill statement and the balance 30% within 12 days thereafter. The Financial Creditor carried out the work and raised 8 running bills. It is submitted by them that though 7 of the 8 bills were duly checked and certified, the Corporate Debtor started defaulting in payment after the 4th running bill, and therefore wilfully did not check the work done statement of the 8th RA Bill. On account of defaults in payment, the Financial Creditor was constrained to stop the work. It is stated that a sum of Rs. 1,59,46,372/- was the outstanding amount for the work already executed and duly approved. In spite of several reminders and mails, more specifically those sent on 22.09.14 and 29.10.2014, the Corporate debtor failed to liquidate its liability. After several persistent reminders followed up by a letter dated 09.12.2014, the parties met wherein the Corporate Debtor expressed its financial difficulties, but promised to pay an amount compromised at Rs. 1.5 crores in 6 monthly instalments of Rs.25 Lakhs each. It is further submitted by the Financial Creditor that the 1st. instalment was paid by the Corporate Debtor in January 2015, but thereafter no further amount was received.

3. The Financial Creditor has also raised an invoice of Rs. 61,76,541/- towards interest on delayed payments in addition to non-deposit of Rs. 21.67 lakhs with the Government on account of the WCT deducted at source. On 05.07.2016, they sent a legal notice under Sections 433 and 434 of the Companies Act. This notice was duly replied to by the Corporate Debtor raising false disputes. It is submitted that it was for the first time a dispute was raised in a bid to create a sham defence attempting to delay or defeat the Financial Creditors entitlement. The Financial Creditor subsequently issued a demand notice under Section 8 of the Code before initiating the present proceedings.

4. On issuance of notice by the Tribunal, the respondents put in appearance and raised various objections. Their contention was that proceedings have not been instituted by a duly authorised person as the proper Board Resolution was not on record. Objection was taken to the Resolution on record being pre-notification of the Act, though it duly authorized its employee to institute legal proceedings and sign and verify pleadings amongst other acts. In view of the said objection, the petitioner undertook to file the specific Board Resolution. The same has been filed, ratifying the acts of their duly constituted attorney in initiating the Insolvency Proceedings for and on their behalf against the Corporate Debtor. The Financial Creditor has also filed the affidavit deposing that no notice of dispute has been received from the Corporate Debtor in response to their Section 8 notice as required under Section 9 (3) (b) of the Code. Further, in compliance of Section 9 (3) (c) certified copies of the Bank Statement and their Banker's Certificate was also filed.

5. In the reply filed by the Corporate Debtor before the Tribunal, it is submitted that the Financial Creditor had failed to adhere to the timeline for executing the work order and had abandoned the site without completing the job assigned. As per the terms of the Letter of Intent, the Financial Creditor was to provide the Pile Integrity Text Report of 1758 piles. This was essential for execution of further work. The Financial Creditor failed to get the Pile Integrity Test conducted even for the 1636 piles installed at the project, which is as per the terms of the contract relied upon by the Financial Creditor and therefore the final Bill could not be settled. It is argued that in the light of this dispute which was also raised in the reply sent to the notice under Section 433 of the Companies Act, the Financial Creditor is not entitled to initiate any Resolution proceedings. It is also the case that more than 70% remittance amounting to Rs. 5 crores has already been made to the Financial Creditor and only a fractional amount of the contract remains unpaid since the work has not been completed. Ld. Counsel for the Corporate Debtor has argued that on the contrary they have to recover money from the Financial Creditor for the incomplete work, as

over and above payments made to them, a huge amount was also spent on the material which was exclusively provided by them.

6. In rejoinder to the arguments, Ld. Counsel for the Financial Creditor has submitted that the testing of the piling work could not be carried out on account of the Corporate Debtor's own default as the same was dependant on work to be executed by others which was not done on account of the Corporate Debtor's inability to pay other contractors.

7. Keeping in mind the rival submissions made on behalf of the parties, we find that though the running bills up to 4th RA were partially paid, the Corporate Debtor had approved and certified the work done up to the 7th RA. It is submitted on account of paucity of funds, the Corporate Debtor deliberately did not certify the work done under the 8th RA. There are various reminders vide emails sent by the Financial Creditor to the Corporate Debtor calling upon them to clear the dues, which were not replied to. Even subsequent to the payment of Rs. 25 lakhs in January 2015, there were reminders sent on 08.04.2015 and 30.10.15. Letters also refer to completion of piling work on 23.07.2014 and load testing completed on 28.01.2015 for which the report was submitted on 30.01.2015. Further testing of the pile was on account of the Corporate Debtor's own default and they cannot be allowed to take advantage of it. On account of failure to receive payments, the Financial Creditor was forced to stop further work. Admittedly none of the aforesaid mails have been replied to by the Corporate Debtor, neither is there any mail sent by them disputing the quality of the work, inadequacy in the job done, or failure to get the Pile Integrity Report.

8. The Corporate Debtor paid a sum of Rs. 25 lakhs in January, 2015 to reduce the outstanding liability. It is noticed that till the issuance of the notice under Section 433 of the Companies Act, there was not even a whisper of dispute raised by the Corporate Debtor to substantiate their arguments that the work was incomplete or that they had sent any communication that the testing of the piling should be carried out. The

Financial Creditor on the other hand has relied upon his various mails and the invoices raised from time-to-time.

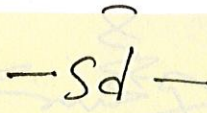
9. The submission of the Ld. Counsel for the Financial Creditor that prior to the notice under Section 433 of the Companies Act 1956, no dispute was raised remains un rebutted. Under such circumstances, the arguments of the Financial Creditor merit consideration that the alleged disputes were baseless, vexatious and frivolous, set up only with an intention of putting up a sham defence in courts.

10. In view of the facts on record, this Bench is satisfied that the alleged dispute is a mere eyewash and an attempt to derail the Financial Creditor's entitlement to initiate the present proceedings.

11. As the Financial Creditor has not proposed the name of any Resolution Professional matter is referred to the IBBI to propose a suitable name. To come up on 24th August, 2017. Registry to take immediate steps to communicate the order to IBBI.

12. Petition therefore stands Admitted. A moratorium in term of Section 14 of the Code comes into immediate effect.

13. Copy of this order be served on both the parties.


(S. K. Mohapatra)
Member (T)


(Ina Malhotra)
Member (J)