THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH,
NEW DELHI

Company Petition No. IB- 644 (ND)/2018

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

Ahluwalia Constructions (India) Limited

.....Operational Creditor/ Applicant

Versus

Raheja Developers Limited .... Corporate Debtor/ Respondent

Judgment Delivered on: 19.09 .2018

Coram:

CHIEF JUSTICE (RETD.) SHRI M.M.KUMAR, HON'BLE PRESIDENT

SMT. DEEPA KRISHAN, HON'BLE MEMBER (T)

For Applicant: Mr. Shashank Garg and Mr. Debojyoti Sengupta, Advocates.

For Respondent: Mr.Saurabh Kalia and Mr. Sachin Nagendira, Advocates.

ORDER

M.M. Kumar, President

1. This is an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 (for brevity 'the Rules') by an operational creditor (for brevity 'the Applicant') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of the 'Respondent' company/corporate debtor.

2. The Applicant, Ahluwalia Constructions (India) Limited, claimed to be the Operational Creditor, is a company registered under the Companies Act, 1956 having its registered office at A-177, Okhla Industrial Area, Phase-1, New Delhi- 110020.

3. The Respondent Company, M/S Raheja Developers Limited (for brevity 'the Respondent') against whom initiation of Corporate Insolvency Resolution Process has been prayed for, is a company incorporated on 27.11.1990 under the Companies Act, 1956 having its registered office at 406 "Rectangle One", 4th Floor, D-4, District Centre, Saket, and New Delhi 110017. The amount claimed to be in default is Rs. 3,37,29,906/- and date of default is mentioned below: -

Amount claimed to be in default	Date of default
Rs. 1,38,67,709	08.04.2016

Rs. 35,93,214	21.03.2017
Rs. 47,17,163	15.11.2017
Rs. 8,84,744	16.03.2018
Rs. 1,06,67,076	19.03.2018

4. Brief facts of the case are that the applicant had entered into an agreement with the 'Respondent' on 06.12.2010 for the construction of six towers and non-tower area comprising of 336 dwelling units at Raheja Sampada, Secctor 92-95, Gurgaon, Haryana. The total contract value was Rs. 37, 62, 86,984/- with 16.12.2012 as the scheduled date of completion. Subsequently, on 11.02.2013 another agreement was entered into between the 'Applicant' and 'Respondent' for plumbing work at the project. The total contract value for the second agreement was Rs. 7, 50 00,000/- with the scheduled date of completion as 31.10.2013.

5. It is stated in the application that since the very beginning, the progress of work on the project suffered due to several impediments which were not attributable to the 'Applicant'. However, in spite of all odds and hindrances, the 'Applicant' executed the work by mobilizing its full resources as per the directions received from the 'Respondent', and completed the original scope of work awarded on 05.11.2014 excluding the final finish of the part rate items

such as final coat of internal paints, etc. which were kept on hold as per instructions received from the 'Respondent'.

6. It is further contended that amounts payable by the Respondent to the Applicant towards work completed by it have remained unpaid. Even the retention money deducted from R.A. Bills remained outstanding although the Applicant was entitled to receive 50% of the same refunded on virtual completion of work and the balance 50% on the expiry of the defect liability period which expired on 05.11.2015.

7. It is further contended that the Respondent was unable to obtain the Occupancy Certificate (O.C) from the concerned authorities on account of various deficiencies at its own end, and consequently did not allow the Applicant to leave the site of the Project even after lapse of the defect liability period. Moreover, the Applicant was asked by the Respondent to undertake the hard landscape works of external area by enhancing the scope of work as earlier awarded on 05.02.2016 as the same was necessary for obtaining the O.C of the project from the concerned authorities. The Respondent finally obtained the O.C. in November 2016 and the process of handing over of the flats commenced in January 2017.

8. It is also the case of the applicant that due to the reasons not attributable to the Applicant, the entire work which was scheduled to be completed by 16.12.2012

has been prolonged indefinitely, which is still underway. It has been erroneously and illegally linked to handing over of the flats directly to the customers which is beyond the contractual scope of the Applicant. This has not only caused uncertainty with regard to the total time frame for completion of work on the project but has also enhanced the cost incurred by the Applicant to maintain the site establishment.

9. The Applicant is aggrieved as the outstanding payments due to it from the Respondent towards work completed by the Operational Creditor, as against the Certified R.A. Bill No. 36 for Civil Work and Certified R.A. Bill No. 22 for plumbing Work as well as several statutory dues towards Works Contract Tax, Service Tax payable in respect of certified bills and G.S.T payable in respect of R.A. Bill No. 21 & 22 for plumbing work, amounting to a total o Rs. 3,37,29,906/- has not been released to the Applicant by the Respondent.

10. The Applicant has claimed that it had sent two emails dated 11.08.2017 and 16.08.2017 to the Respondent requesting it to provide the pending Works Contract Tax (W.C.T.) certificates for the years 2014-15 and 2015-16. However, no response was received from it to the said emails. Thereafter, the Applicant sent another email dated 21.08.2017 to the Respondent requesting for the outstanding payment of an amount of Rs. 6, 51,11,525/- as on date towards actual work executed by the Respondent, to be released immediately.

11. In response the Respondent sent a letter dated 28.08.2017 to the Applicant wherein the Respondent alleged that delay in execution of works was on account of the Applicant and asserted that the claims of the Applicant raised vide email dated 21.08.2017 were baseless and unsubstantiated by facts and site records. Subsequently, the Applicant sent an email dated 05.03.2018 to the Respondent providing the details of the pending WCT certificates for the period from 2014-15 till date. Detail of the statutory dues were also provided to the Respondent and the Respondent was requested to clear all outstanding dues along with statutory dues as detailed in the said email within 2 weeks. On 22.03.2018 the Applicant sent another email to the Respondent requesting for release of long pending payments towards work executed by the Applicant as well as drawing the attention of the Respondent to the non-compliance of various statutory requirements. However, no response was received form the Corporate Debtor.

12. As the Respondent failed to make the payment, the Applicant issued Notice to the Respondent on 28.04.2018 at its latest and present registered office in Form 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Applicant in its demand notice has submitted that the total amount claimed

to be in default is Rs. 3,37,29,906/-. The Respondent sent his reply on 12.05.2018 to this notice (Annexure-N).

13. The Respondent Company has filed its reply before us on 30.07.2018 raising objections in respect of outstanding payments to the Applicant. The Respondent in its reply has submitted that the allegations made in the application are wrong. It is also submitted that the alleged Applicant on 06.12.2010 was awarded a contract by the Respondent for civil work and the construction work was to be completed within 24 months from the date of LOI viz. 06.12.2010. They have also submitted that the last date of work completion being 06.12.2012, the alleged Applicant failed to perform and could not complete the work in terms of the contract even till February, 2017 and thereafter abandoned the work abruptly. They have also submitted that the said work got completed by the Respondent by spending an amount of approximately to Rs. 4,60,00,000/- (Rupees Four Crores and Sixty Lakhs Only) was spent towards rectification and completion of work, maintenance of office staff etc for the said project.

14. The Respondent has further submitted that the Applicant was also liable to pay 5% of the contract value as liquidated damages in terms of the contract. The aforesaid delay in completion of work to be compensated. The purchasers of flats were paid compensation @ Rs. 7/- per sq. ft. as per their respective

agreements. The total amount paid is approximately Rs. 10 Crores to purchasers as compensation for delay which is stated to be due to the Applicant careless attitude towards completion of work. They alleged that the Applicant did not complete construction of even a single flat and in fact, none of the units constructed by the Applicant could be termed habitable in all respects.

15. The Respondent has further argued that the Applicant was also awarded another contract dated 11.02.2013 for plumbing work which has also not been completed and the alleged Applicant had used poor quality products in spite of regular complaints by them in this regard. It is also submitted that the Respondent had also provided the lists of deficiencies to the alleged Applicant but to no avail.

16. The Respondent have alleged that in view of the poor quality of products used by the Applicant, it had to make several alternative arrangements for the repairs of the same despite the fact that the same were in Defect Liability Period (DLP) and the same was in fact the responsibility of the Applicant, which resulted in huge financial loss to it. Therefore, the Respondent deducted amounts from the account of the alleged Applicant in terms of Clause 46.2 of the General Conditions of Contract for the said purpose, and that the Respondent had to invest more of its own money to complete and/or rectify the works given to the Applicant. The Respondent raised several debit notes upon the Applicant while

clearly explaining the reason of the said debit. Copies of some of the debit notes raised by the Respondent upon the Applicant have been annexed with the reply. It is alleged that the goods and services provided by the Applicant were of poor quality and this resulted in causing huge financial losses and reputational loss to the Respondent for which the Applicant is solely liable. It is also the case of the Respondent that in terms of the work order, they were authorized to deduct the required amounts and forfeit the security amount to compensate for the damages suffered due to substandard work and poor performance and services rendered by the Applicant. It is asserted that the contracts entered with the Applicant have arbitration clauses which have been invoked by them on 12.05.2018 in respect of contracts dated 06.12.2010 and 11.02.2013.

17. The Respondent has further averred that both the contracts were allied and associated with each other, which is why a common notice invoking arbitration proceedings was sent to the operational creditor. A copy of the notice invoking arbitration dated 12.05.2018 sent by the Respondent to the Applicant is on record. On the said date, the management review committee of the Respondent Company also sent a letter to former Hon'ble Chief Justice of the Himachal Pradesh High Court, Hon'ble Justice (Retd.) Mr. Vinod Kumar Gupta

appointing him as the sole arbitrator in terms of Clause 28.3 of the contract dated 06.12.2010.

18. It is alleged that the time agreed for the completion of awarded works was the essence of the Contracts as mentioned in Clause 36 of the General Conditions of Contract. Further they have submitted that they were entitled to recover liquidated damages at 0.50% of the Contract price for each week of delay on part thereof, subject to maximum of 5% of the Contract price as per Clause 43.1 of general Conditions of Contract.

19. Heard the parties and perused the case record.

20. The short question of law which arises for consideration is *'whether the operational creditor could seek initiation of CIR process under Section 9 of the Code against the corporate debtor if the arbitration proceeding have been initiated and are pending'.*

21. The aforesaid issue is no longer *res-integra* as Hon'ble Supreme Court in its various judgements rendered on Section 9 of the Code has authoritatively held that CIR Process cannot be initiated if the arbitration proceeding is pending.

22. The law on this question is incorporated in the provision of Section 8(2) (a) and the same read as under:

"8. .....

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any , and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred."

23. The Supreme Court in the case of Mobilox Innovative Pvt. Ltd. v. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 while interpreting Section 8(2)(a) of the Code came to the conclusion that the existence of the dispute is not necessarily represented by the filing of a suit or Arbitration because the word 'and' was

incorrectly used in Section 8(2)(a) IBC. The aforesaid word 'and' has now been substituted by the word 'or' by the Insolvency and Bankruptcy 2nd Amendment Act 2018 with effect from 06.06.2018. This view of the Supreme Court is evident from the following para 29 which is set out below in extenso:

It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". ***If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach***

either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for upto three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended.

We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.(Emphasis added)

24. When the aforesaid principle laid down in the para 29 by the Supreme Court are applied to the facts of the case in hand it becomes evident that notice of demand was sent on 28.04.2018 and intimation was sent by the Corporate Debtor with regard to existence of dispute on 12.05.2018. In fact on 12.05.2018 a notice was issued by the Corporate Debtor invoking the Arbitration Clause. It is in the context of aforesaid facts and circumstances that we are to find out whether there was 'existence of

dispute' or pendency of arbitration proceedings or suit. The answer to the aforesaid question has to be in affirmative that there was 'existence of dispute' which was carried sounded in Arbitration Proceedings. In the aforesaid para the Supreme Court seems to laid down that it is not necessary for a dispute to have arisen within 10 days and it could even arise afterward or even before the triggering of Insolvency Process. Therefore, the period of 10 days provided for reporting the 'existence of dispute' or arbitration proceeding's or civil suit are not mandatory.

25. In the present matter the Applicant did receive a notice of dispute existing between the parties in which the Respondent stated clearly that there is a dispute regarding amount claimed by the Applicant in its demand notice issued under Section 8 of the Code. In support of its contention, the Respondent has clearly mentioned details of various debit notes issued by Respondent since 2017 and that there are certain other claims of the Respondent as per the terms of the contract.

26. Arbitration proceedings on the same cause have already been initiated by the 'Respondent' and are still pending between the parties. The amount claimed by the 'Applicant' is under consideration in the arbitration proceedings.

27. Non-receipt of notice of dispute or non-receipt of payment of debt is a pre-requisite to file an application under Section 9 of the Code and in the present matter the Respondent has already issued notice of existing dispute and initiated Arbitration proceedings with service to the 'Applicant'.

28. The Respondent has also informed us that the Applicant has participated in the Arbitration proceedings and has requested for change of Arbitrator. A copy of the order passed by the Arbitrator dated 18.06.2018 fixing the time lines has also been filed. The matter is pending for 22.09.2018.

29. The expression 'Dispute' has been defined under the Code in Section 5 (6), which envisages that:

> *"(6) 'dispute' includes a suit or arbitration proceedings relating to- the existence of the amount of debt; the quality of goods or service; or the breach of a representation or warranty."*

30. It is now settled that the definition of dispute is inclusive and illustrative and not exhaustive. Dispute has been given wide meaning so as to cover all disputes on debt, default etc. and not limited to only pending suit or a record of a pending arbitration.

31. In the factual background as discussed above, there is an arbitration pending between the parties. Even otherwise the dispute existed much prior to the issuance of notice under Section 8 of the Code as there are

various debit notes issued by the 'Respondent' in the year 2017 in respect of bills raised by 'Applicant' to the 'Respondent'. The claim of dispute suggests the need of elaborate investigation. It is reiterated that existence of dispute in the present case cannot be ruled out on that count too.

32. It has also been brought to our notice that the Applicant itself has filed an amended petition under Section 11 read with Section 14 of the Arbitration and Conciliation Act, 1996 as per Order dated 03.07.2018 passed by Sh. Rakesh Kumar, Joint Registrar (Judicial), High Court of Delhi in I.A. No. 8380/2018 on 10.07.2018. In this petition, It has been prayed before the High Court that the Hon'ble Court may graciously be pleased to terminate the mandate of the erstwhile Arbitrator to hear and adjudicate the disputes between the Petitioner and the Respondent arising out of the Civil Works Contract dated 06.12.2010 and the Plumbing Works Contract dated 11.02.2013. Thus, it is apparent that the Applicant has submitted itself to the Arbitration proceedings before the Hon'ble High Court of Delhi during the pendency of the present application before us under the Insolvency and Bankruptcy Code.

33. As discussed above the Respondent has raised a dispute with sufficient particulars. Hence, the amount of claim raised by the Applicant clearly falls within the ambit of disputed claim. Section 9 (5) (ii) (d) of the Code

provides that adjudicating authority shall reject the application if notice of dispute has been received by the Applicant or there is a record of dispute in the information utility.

34. It is seen that both parties have invoked arbitration proceedings in respect of the same cause of action. This is in addition to the pre-existing dispute by way of debit notes issued by the Respondent in 2017. Therefore the application does not warrant admission and is liable to be dismissed. Accordingly it is dismissed.

35. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Applicant before any other forum shall not be prejudiced on account of dismissal of instant application.

36. Serve copy of the order to the parties. A copy of this order be also sent to ROC NCT New Delhi for information and uploading its website with the correct status of Corporate Debtor.

-Sd-

(Deepa Krishan)

Member (T)

-Sd-

(M.M. KUMAR)

President

Vidya