

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.736 of 2019

[Arising out of Order dated 20.05.2019 passed by National Company Law Tribunal, New Delhi (Court No.IV) in Company Petition No.IB-1207/ND/2018]

IN THE MATTER OF:

Before NCLT

Before NCLAT

M/s. Kline Technical
Consulting LLC
19826 Quarry Stone Lane,
Richmond TX 77407
United State of America
Through its authorised
representative
Mr. Vijay Dev Dabas

Applicant/
Operational Creditor

Appellant

Versus

M/s. Central Electronics
Limited, 781,
Deshbandu Gupta Road,
Karol Bagh,
New Delhi – 05

Respondent/
Corporate Debtor

Respondent

For Appellant: **Shri Alok Tripathi, Advocate**

For Respondents: **Shri Anuj Kumar, Advocate**

J U D G E M E N T

(21st November, 2019)

A.I.S. Cheema, J. :

1. The Appellant – M/s. Kline Technical Consulting LLC (Operational Creditor) filed Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority (National Company Law Tribunal, New Delhi (Court No.IV) in

Company Petition No.IB-1207/ND/2018 against Respondent - M/s. Central Electronics Limited which has been rejected by the Adjudicating Authority. Hence, this Appeal.

2. The Appellant claims that Respondent is Union Government Company and had received a project from Ministry of Science and Technology. For the purpose Respondent entered into a Memorandum of Understanding dated 8th March, 2007 with the Appellant for the purpose of “Source and Acquire Technology for Pilot Demonstration for Public Area Security System to Counter Terrorist Threats in India”. In the Memorandum of Understanding, there was agreement relating to equipment cost and payments to be made towards technology, engineering support and licensing. The Appellant initially assigned the project to M/s. Inspek Technology System, USA with the approval of Respondent. The said Company made only part supply and on request of the Appellant, Respondent placed new purchase order with the Appellant which was executed and invoices were raised. The Appellant claimed Rs.3,57,87,336.66 paisa which includes amount towards engineering contract and supply of equipment from 1st January, 2012 till filing of the Application before the Adjudicating Authority. The Appellant claimed that this amount was in default and liable to be paid with interest @ 18%. The case put up by the Appellant before the Adjudicating Authority was that in spite of the amount becoming due and cleared by the authorities, the same was not paid. The Appellant

claimed that Respondent by a letter dated 05.11.2016 made allegations of non-supply of HVP and other equipment which were contrary to the stand of installation and commissioning of the project, for which part payment was already made to the Operational Creditor. Such allegations were made for the first time in November, 2016 after Technology Development Board recommended for foreclosure of the project and had sought refund of the grant which had been released to the Respondent.

3. The Appellant claimed before the Adjudicating Authority that Notice under Section 8 was sent on 31st May, 2018 for amount referred above but Respondent gave Reply disputing the amount.

4. The Respondent brought to the notice of the Adjudicating Authority that it has throughout the period raised dispute relating to invoices raised and way back in November, 2010, apprehensions were raised regarding discrepancies with regard to documents. The Respondent had also by letter dated 5th November, 2016 raised dispute relating to invoices and the non-supply of goods. Respondent claimed that Respondent had already paid 90% of the amount of the invoice referred in the Application although the Appellant had not supplied 4 items referred in invoice No.KTCHBE 016/2010-004. It is the case of Respondent that Operational Creditor did not supply 4 items as per purchase order but the Appellant colluded with the employees of the Respondent to get released payments of USD 5,42,762.10. When this came to knowledge of the Respondent, enquiry was initiated against its

Officer – Mr. G.C. Tayal and vide Office Order dated 3rd January, 2017, an enquiry ordered against him. Enquiry was also started against one Shri Rajiv Agarwal employee of the Respondent, who was found guilty of causing financial loss to Respondent in collusion with Operational Creditor – Appellant, and said Aggarwal had been dismissed from service.

The Adjudicating Authority noticed these rival cases put up by the parties and observed in para – 28 as follows:-

“28.As per the Reply filed by the Corporate Debtor, it can be inferred & concluded that the dispute raised by the corporate debtor falls well within the definition of dispute as reproduced above. Nowhere in the application any document has been produced to support that the alleged Work Order has been completed to the satisfaction of the Corporate Debtor. The Corporate Debtor has placed various correspondences regarding the non-supply of goods and non-completion of Work Order on record. The claim made by the applicant is untenable without any supportive evidence reflecting the performance of contract and completion of work as per the terms of Work Order.”

(Paragraph numbered as ‘30’ reads as follows:-)

“30. It is further seen that the demand notice in the present case was issued under Section 8(1) of the Code on 31.05.2018. Respondents have placed their earlier correspondences dated 28.01.2015 and 05.11.2016 raising dispute and issues with respect to delivery and performance of contract. It is thus seen that the dispute was brought to the notice of the applicant prior to the issuance of the demand notice dated 31.05.2018 issued under Section 8(1) of the Code.”

The Adjudicating Authority thus having found that there was pre-existing dispute dismissed the Application under Section 9.

5. We have heard Counsel for both sides and gone through the matter. The learned Counsel for the Appellant has argued that non-supply of some goods could not be treated as “existence of dispute”, if the goods have been supplied with regard to which invoice was raised. According to the learned Counsel, there was no true dispute existing till sending of Notice under Section 8. The Section 8 Notice is dated 31st May, 2018.

Now the letter dated 28th January, 2015 (Annexure A-4 at Page 317) (which was part of Reply filed before Adjudicating Authority) does show that the Appellant had already issued legal Notice on 17th December, 2014 and in response, Respondent stated that it was desired that a complete reconsideration needs to be done jointly. The Respondent also sought documents which included manufacturers certificate that goods were in conformity with the purchase order. Respondent called upon the Appellant to submit the documents so that the final settlement may be done. Respondent also sought documentary evidence pertaining to commissioning of the project.

6. More importantly, there is document dated 5th November, 2016 (Page – 318) which was sent by the Respondent to the Appellant. This is a detailed letter sent by the Respondent raising various grievances and

disputes. We will extract only part (so as not to burden this Judgement)

which are as follows:-

“Vide CEL’s letters dated 03.03.2015, you were asked to carry out a complete joint reconciliation of the project deliverables for formal closure of the project. However, despite repeated requests you did not carry out the joint reconciliation.

As informed to you, on various occasions, there were serious complaints in the execution of the above project due to which CEL has not been able to close the project.

The following discrepancies have been noticed, with respect to supply of material, in the said project executed by you at Old Delhi Railway Station:

- a) Undermentioned items, billed towards Invoice No. KTC HBE 016/2010-004 dated 30.09.2010 REV 11/04 were never received.
 - i) Forensic Inspection System, model AXIS-3D, 1 No. (Item No. 1 of PO no. 34606 with Amendment No. 1 dated 16.04.2010) billed for amount US \$ 145,916.80.
 - ii) High Volume Portal, Model HBE Custom, 1 No. (Item No. 4 of PO No. 34606 with amendment 1 dt 16-04-2020) billed for amount US \$ 282,152.20.
 - iii) MmW Detector, Model Sago aPAT, 1 No. (Item No. 8 of PO No. 34606 with amendment 1 dated 16-04-2010) billed for amount US \$ 1500
 - iv) HH Wands Metal and Gamma, Model ICXt Rad Detector, 2 Nos. (Item No. 9 of PO-No. 34606 with amendment 1 dated 16-04-2010) billed for amount US \$ 3000.

Further, no documentary evidence has ever been furnished by you to the effect that the

above equipment were shipped into India at all, from the original equipment manufacturers of these items, as specified in our PO. Various documents such as original copy of Airway Bill, Certificate of Origin, manufacturer's conformity certificate, Insurance policies, Warranty Certificate and Certificate of Proof of Dispatch/Importer copy of Bill of Entry against above invoice were not submitted to the bank or to CEL as per the terms of PO/L.C. No. 4021610IM0000051.

Further, as required under Clause 3.2.6 of the agreement, the above equipment were never brought to or tested at CEL.

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Further from the above it appears that your company personnel/agents have colluded with Sh. G. C Tayal, the then General Manager (SPV & ECD) CEL, to obtain receipt for items which were not actually delivered as per the contract and to get waiver of the documents required to be presented to the bank for payment of the aforementioned items not received in CEL, thus causing wrongful financial loss to the organization.

Before a final decision is taken in the matter, you are now requested to clarify the above issues and provide necessary documents in their support along with copy & list of technologies and licenses supplied against 'Technology Transfer', to enable CEL to take further necessary action in this regard."

[Emphasis supplied]

The above letter – communication of Respondent is more than sufficient to demonstrate not merely pre-existing disputes but pre-existing serious disputes. Considering the pre-existing disputes as appearing from this communication, we do not find any error with the

observations of the Adjudicating Authority reproduced earlier. The Adjudicating Authority rightly rejected the Application filed under Section 9. Respondent has even shown pre-existing document showing action taken against its employees for alleged collusion with the Appellant. Considering these aspects it is surprising that such Appellant should have audacity to continue pressing for proceedings under Section 9 against a Government Company.

7. We find no substance in the appeal and the Appeal is rejected with costs of Rs.2,50,000/- to be paid by the Appellant to the Respondent Company. Respondent may recover these costs by way of execution, or, adjust against dues, if any, it has to pay to the Appellant.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

rs/sk