

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.543 of 2019

IN THE MATTER OF:

M/s. Naik Environmental Engineers Pvt. Ltd.

...Appellant

Versus

M/s. Lucina Land Development Ltd.

...Respondent

For Appellant: Shri Jay Saula, Senior Advocate with Shri Prabhat Kumar Chaurasia, Advocates

For Respondents: Shri Sumesh Dhawan and Ms. Vatsala Kak, Advocates

O R D E R

03.12.2019 Heard learned Senior Counsel for the Appellant – Operational Creditor and Advocate Ms. Vatsala Kak for the Respondent – Corporate Debtor. The Appellant had filed Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) before the Adjudicating Authority (National Company Law Tribunal, New Delhi Court No.IV) having Company Petition No. IB-859/ND/2018. The Application came to be dismissed on the ground of pre-existence of dispute by Impugned Order dated 8th April, 2019. Hence the present Appeal.

2. The matter relates to two purchase Orders of Organic Waste Compositing Machines (OWC). It is the case of the Appellant and it is argued that the Respondent had placed the first purchase order (Page – 85) which was No.3266101167 for the machine worth Rs.10,60,000/- on 4th October, 2016 which was delivered as per the delivery Challan (Page – 232) on 24th

December, 2016. The second invoice related to two machines which order (Page – 82) was placed on 16th November, 2016 having purchase Order No.3266101302. Against such purchase order, the machines were delivered on 6th February, 2017 vide Delivery Challan and bill was raised for Rs.20,14,000/-.

3. The learned Counsel referred to the terms of the purchase order which required that 10% of the order value was to be given as advance and 70% of the order value was to be paid at the time of delivery. The liability to pay another 10% would arise at the time of installation and the last 10% would be attracted when the machine is commissioned. It is stated that although the machines were delivered as against first invoice, payment was made of only Rs.6,92,000/- on 2nd June, 2017 and which amounted to only 65% and apparently 90% which was required to be paid had not been paid. It is stated that when the Respondent – Corporate Debtor did not pay on delivery as per the fixed terms, the question of commissioning on the part of the Appellant would not arise. It is stated that even for commissioning, the site was not ready and so Appellant was not responsible. Learned Senior Counsel submitted that against the supply of the other two machines as per the second purchase order, although they were delivered, nothing was paid and there was debt outstanding against the Corporate Debtor which was due and had not been paid. The learned Counsel states that the Respondent received the machines and earlier for long period did not raise any objections and subsequently, some untenable objections were raised. It is stated that the Appellant had earlier sent Notices dated 21.11.2017. On this date, two Notices

(Pages - 93 and 95) were sent with regard to the two different invoices to the Corporate Debtor. It is stated that subsequently, the Operational Creditor sent two Notices under Section 8 on 19th December, 2017 which are available on record, but they were sent to the office address of the Corporate Debtor. To these Notices, the Respondent sent Reply dated 30th January, 2018 (Page – 105) and for the first time, disputes were raised by the Respondent about incomplete machines and non-supply of parts of the machinery as relating to the second invoice and doubt was raised with regard to the first invoice if it was entire machine. The learned Counsel submitted that after such Reply received from the Corporate Debtor, the Appellant had filed Section 9 Petition before the Adjudicating Authority at Mumbai but the same was later on, withdrawn with liberty as it transpired that Notices should have been sent to the registered office address of the Corporate Debtor and the Application should have been filed in Delhi as registered office is at Delhi.

4. It is stated that thereafter, another Notice under Section 8 was sent on 16th April, 2018 relating to both the invoices (Page – 107) and thereafter, Section 9 Application was filed which has now been rejected by the Adjudicating Authority.

5. Learned Counsel submitted that the Adjudicating Authority has not appropriately appreciated that in any case with regard to the first invoice against liability to pay 90% of the value, only 65% had been paid and apparently dues of more than Rs.1,00,000/- were there. Even regarding the second invoice, the learned Senior Counsel submits that the disputes raised by the Corporate Debtor with regard to non-supply of parts of the machine

are not real. It is stated that the machines were received without protest or demur. It is argued that in any case on the basis of first invoice itself, the Section 9 Application was required to be admitted.

6. Against this, learned Counsel for the Respondent – Corporate Debtor submits that there were various disputes already existing between parties before the first Section 8 Notice dated 19th December, 2017 was sent. The learned Counsel referred to e-mail dated 19th November, 2017 (Page – 233) which was sent by the Corporate Debtor to the Operational Creditor and which reads as follows:-

“On Sun, Nov 19, 2017 at 2:37 PM, Shantanu D Hamdapurkar <shantanu.hamdapurkar@indiabulls.com>:
Wrote:

Dear Mr Naik/Massud

With reference to organic waste compositing machines (OWC) delivered by you at Panvel project, we would like to inform you that commissioning /handover of the machines is pending from your side.

Warranty of all 3 machines will start only after satisfactory working and handover to us. You are also liable to guide our operational team on proper use of your machines which must follow the hand over.

We except your revert by tomorrow morning as we have inspection schedule by statutory authority in next two days.

Moreover, since Sewage Treatment Plant installed by you is also failed in operation, we believe this OWC needs proper work good guarantee from you.

Please note that if you fail to Commission the machine we will have no choice but to get it Commissioned/replaced through other agency at your cost.”

To this e-mail, the Operational Creditor sent Reply on 20th November, 2017 (Page – 234) and inter alia has stated:-

“You are hereby called upon to make above payment against the invoice raised immediately after which we shall take up commissioning of the plant. We are not at all in agreement with your stand that you would engage another agency to commission our OWCs, if you do the same it will be at your risk and cost. It is pertinent to note that such a reputed company of yours has not paid our dues from the month of April, 2017 and till date you have not informed us that segregated organic garbage is available at your project Greens Panel to do the commissioning of the plant.”

7. The learned Counsel for the Respondent then referred to e-mail dated 6th December, 2017 sent by the Corporate Debtor to the Operational Creditor (Page – 235) which reads as follows:-

“Dear Mr Naik,

The OWC – as you claim if it is fully supplied and ready for use, as of now the supply etc. is done. You can start the operation, test, and then hand over to us. we will pay the money. Site report says, you have not delivered panel and shredder and not tested for use. The working condition of the machine for which it is taken, is not known for you to claim money.

In one machine you delivered, you got paid, other 2 you have not delivered full machine, but you billed for 100%. Billing of 100% is not the proof of machine working. The intension is getting doubt why did you not deliver full machine at a time.”

Further reference is made to e-mail dated 6th December, 2017 which was sent by the Operational Creditor to the Corporate Debtor in which it was mentioned:-

“Please be advised that as per your PO payment terms (PO NO: <tel:0326%20610%201302> 3266101302 dated 16/11/2016), you had to make 80% payment viz

Rs.16,11,200/- against delivery of material. Despite repeated follow up, the same has not yet released even after 5 month of bill acceptance. Whenever we followed up for our payment with you and your team, we were informed that the invoice was being processed and that payment would be released soon.

We are surprised to note that you are now (after 7 months of delivery), frivolously raising non-existent issues on some items not being delivered. In your mail dated 21st November, 2017, you claimed that garbage bins and control panel have not been delivered. Now you have gone a step ahead to claim that the shredder has not been delivered.”

8. The argument on the basis of the above e-mail is that before the first Notice dated 19th December, 2017 sent under Section 8 was received, there was already disputes pending between the parties whether the deliveries were complete and whether or not commissioning should have been done. Delivery Challan dated 22.12.2016 (Page – 232) relating to first Order has endorsement that it was “Subject to Verification”.

9. We have gone through the Impugned Order and heard the parties and considering above e-mails referred to by the learned Counsel for the Respondent, we find that the Adjudicating Authority rightly rejected the Section 9 Application on the basis that there was pre-existing dispute between the parties. It will not be possible for the Adjudicating Authority to separate portions from the composite claim made before the Adjudicating Authority of the outstanding dues, to hold that a particular part is or not to be treated as complete. There are various disputes raised with regard to the deliveries and in the facts of the matter, we are unable to accept the submissions made by the learned Senior Counsel for the Appellant. When there are pre-existing

disputes in a supply, install and commission transaction, it may not be possible for Adjudicating Authority to calculate debt and default on stage-wise basis unless admitted.

10. There is no substance in the Appeal. The Appeal is dismissed. No Orders as to costs.

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

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md