

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 1282 of 2019

[Arising out of order dated 31st October, 2019 passed by the Adjudicating Authority, National Company Law Tribunal, Chandigarh Bench, Chandigarh in CP(IB) No. 168/Chd/CHD/2018]

IN THE MATTER OF:

Aashish Mohan Gupta,
H. No. 161, Sector 27-A,
Chandigarh

.. Appellant

Versus

1. Hind Inn and Hotels Ltd.
(Through Its IRP)
Regd. Office at:
Plot No. 15, Industrial Area, Phase-I,
Chandigarh-160 002

2. CTC Projects Private Limited,
Regd. Office at
11, Feroze Gandhi Road,
Lajpat Nagar-III,
New Delhi- 110 024

Correspondence Address:
SCO 818, 1st Floor, Above YES Bank
NAC-9, Manimajra
Chandigarh- 161 101

.. Respondents

Present:

For Appellant: **Mr. Sandeep Bajaj, Ms. Aakanksha Nehra
and Ms. Aditi Pundhir, Advocates**

For Respondents: **Mr. Abhishek Anand and Ms. Honey Satpal,
Advocates for Respondent No. 1**

**Mr. Vivek Malik, Mr. Vivek Sinha and Mr.
Kartikeya Jain, Advocates for Respondent
No. 2.**

J U D G M E N T

(12th February, 2020)

KANTHI NARAHARI, MEMBER (TECHNICAL)

The present Appeal arises out of the order passed by the Adjudicating Authority (National Company Law Tribunal, Chandigarh) in CP(IB) No. 168/CHD/2018

2. The Adjudicating Authority admitted the Application filed by Respondent No. 2 herein under Section 9 of Insolvency and Bankruptcy Code (In short '**IBC**') against Respondent No. 1 herein. The Adjudicating Authority at paragraphs 26 & 27 observed as under:

...

"26. "We have gone through the contents of the application filed in Form No. 5 and find the same to be complete. As discussed above, there is an unpaid operational debt amounting to ₹ 24,74,085/- plus interest @ 18% p.a.. Copy of the work order dated 19.08.2011 is attached as Annexure A1. Moreover, demand notice in Form No. 3 was also sent on 01.03.2018 stating that the amount due from the corporate debtor to the operational creditor is ₹ 37,72,979/- including interest. We have held above that the demand notice in form No. 3 dated 01.03.2018 was properly delivered by the operational creditor and the reply has been examined above and found to be

not acceptable. IRP is not proposed in Part III of Form No. 5.”

27. In view of the satisfaction of the conditions provided for in Section 9(5)(i) of the Code, we admit the petition for initiation of the CIRP process in the case of the Corporate Debtor M/s Hind Inns & Hotels Limited and direct moratorium and appointment of Interim Resolution Professional as below:”

...

FACTS:

3. The facts of the case are that the Operational Creditor i.e., Respondent No. 2 herein was awarded a work on 19.11.2011 by the Respondent No. 1-Corporate Debtor for civil work of construction of Ginjar Hotel at Plot No. 15, Industrial Area, Phase No. 1, Chandigarh. As per the Work Order dated 19.08.2011 (at page 55), the payment terms have been mentioned, in Clause-4 of the Payment Terms, the Retention Money of 5% would be retained from every Running Account Bill and the release of Retention Money as per clause 8 i.e., terms of payment of tender document mentioned therein (page 61). It is the case of the Respondent No. 2- Operational Creditor that the Corporate Debtor, in terms of Work Order, 5% of the amount of every Running Bill was retained as Retention Money which was to be released after completion of Defects Liability Period of one year from the date of award of Completion Certificate and issue of Defect Liability Certificate to be issued by the Corporate Debtor to the Operational Creditor. The

claim of the Operational Creditor –Respondent No. 2 herein is that the Corporate Debtor retained the Retention Money and had not paid the same even after Defects Liability Period i.e., one-year period commenced from 31.03.2014 till 01.04.2015. Failing to pay the said amount, Respondent No. 2 issued a Demand Notice dated 01.03.2018 to the Respondent No. 1 i.e., Corporate Debtor demanding Rs. 24,75,085/- along with 18% interest per annum. In the said Demand Notice it has been specifically mentioned that prior to the issuance of Demand Notice, the Director of the Operational Creditor issued letters dated 10.04.2015, 27.09.2016, 02.03.2017, 24.10.2017 to the Corporate Debtor regarding payment of the amounts. It is also specifically mentioned that if the Corporate Debtor has any existence of dispute or amount unpaid operational debt, the same may be provided within 10 days of the receipt of the Demand Notice. The contention of the Respondent No. 2 is that the Corporate Debtor issued reply dated 17.03.2018 wherein the Corporate Debtor stated that the Demand Notice dated 01.03.2018 was received by them on 09.03.2018. The stand of the Respondent No. 2 – Operational Creditor is that they have not raised any dispute in the reply. The Corporate Debtor took a stand that the bill and Demand Notice is barred by principles of delay and laches and stated that the claim is stale beyond limitation as per Limitation Act.

4. Failing to pay the amounts, even after issuance of Demand Notice, the Operational Creditor filed Application before the

Adjudicating Authority claiming an amount of Rs. 24,74,085/-. In Part-4, it is stated that the right to recover Retention Money first accrued to the Operational Creditor on 01.04.2015.

5. However, it is mentioned that debt fell due from 27.07.2015 when Ginger Hotel sent a mail to the Operational Creditor. The Adjudicating Authority having considered all aspects in the Application, admitted the Application and initiated Corporate Insolvency Resolution Process (in short '**CIRP**') including declaration of Moratorium.

6. Learned Counsel for the Appellant submitted the following grounds:

- i) That the Retention Money does not fall within the definition of Operational Debt as defined in Section 5(21) of IBC).
- ii) Retention Money should have been raised only after successful completion of work.
- iii) The Respondent No. 2 i.e., the Operational Creditor does not fall within the definition of Operation Creditor as defined in Section 5(2) of IBC.
- iv) The default accrued on 01.04.2013 whereas the Application was filed before the Adjudicating Authority i.e., beyond three years and hence the claim is time barred.

- v) There is pre-existence of dispute. In support of the grounds, learned Counsel for the Appellant relied upon the judgment which will be discussed in later part of this judgement.

7. On the other hand, learned Counsel for the Respondent-Operational Creditor submitted that the cause of action for release of retention money commenced on 21.07.2015 and the Application was filed before the Adjudicating Authority on 27th April, 2018 was within a period of three years and contended that it is within the period of limitation. It is submitted that the retention money is towards the services rendered by the Operational Creditor to the Corporate Debtor since as per the payment terms 5% of the amount to be retained and the same shall be paid after completion of the work. Hence 5% of the amount is part of the main payment and it cannot be treated as separate money. It is also submitted that the entire construction work was completed to the satisfaction of the Corporate Debtor on 21.03.2014 which is evident from the fact that the Corporate Debtor, after being satisfied of the work done by the Operational Creditor issued a virtual Completion Certificate on 04.04.2014 which states that the defect liability period for the work would commence from 31.03.2014 till 01.04.2015. Therefore, it is submitted that there is no existence of disputes raised by the Corporate Debtor. He further submits that even in the reply to the Demand Notice, only a technical point was raised and no dispute with regard to non-completion of work

was raised. Learned Counsel also relied upon judgments of the Hon'ble Supreme Court and this Tribunal which will be dealt in this judgment.

8. Heard the learned Counsel for both the parties and perused the records and documents filed in their support.

NOW we deal with the issues/grounds.

9. It is an admitted fact that the Corporate Debtor, i.e., Respondent No. 1 issued Work Order dated 19.08.2011 to the Respondent No. 2 i.e., Operational Creditor and in the Payment Term of Clause -4, a provision is made with regard to the Retention Money i.e., 5% from every R.A. bill and it has been mentioned that the release of retention money will be as per tender document.

10. We have perused the contract for the construction of Civil Works. According to the parties, it is an admitted document. As per Clause 6.28.1 certificate of completion need to be issued by the Employer i.e., Corporate Debtor after completion of work or the contract as the case may be. At clause 6.29.1 Defects Liability Period has been mentioned. Clause 6.29.1 a) the Defect Liability Period shall be 12 calendar months after completion of work as certified under Clause 6.28. Any defects in material or workmanship observed, in the entire work during the execution of work within Defect Liability Period, the same shall be notified in writing by the Employer to the Contractor and shall be rectified by him at his own cost within the time as specified by the Employer. According to the learned Counsel for the Respondent No. 2, the Defect Liability Period has been

notified/mentioned by the Corporate Debtor and which commences from 31.03.2014 till 01.04.2015 i.e., one-year period. The terms of payment have been mentioned in Clause-8 of the Work-cum-Tender Document. As per the said clause, release of retention money to the Contractor will be after preparation of Final Bill and acceptance of the same by the Contractor and after expiry of Defect Liability Period, specified in the contract, reckoning from the date on which the Employer shall have issued a Certificate of Completion comprising the whole work. The retention money shall be released after all failures viz, defect, imperfections, shrinkages are cured/rectified to the satisfaction of the Employer.

11. Further, the Corporate Debtor i.e., Respondent No. 1 issued Virtual Completion Certificate dated 04.04.2014 (at page 105 of the Paper Book), which is reproduced herein:

“Hind Inns & Hotels

Regd. Office: 15, Industrial Area-1,
Chandigarh

Date: April, 4th, 2014

VIRTUAL COMPLETION CERTIFICATE.

M/s CTC Projects Pvt. Ltd.

*Sub: Issue of Virtual Completion certificate towards
SITC of Civil Works of Our Hotel Project at Hind
Inns & Hotels Ltd.*

Dear Sir,

*This has in reference to our Work Order Dated-Aug, 19th,
2011*

The above said work is certified to be virtually completed as on March, 31st, 2014 subject to the rectification of defects if any, as pointed out by engineering/operations Department.

The defect Liability period for the subject work shall commence on March, 31st 2014 and will cover the entire period of One year up to April, 1st 2015. We will retain 5% of the final contract value as retention amount in your final bill and will release the same at the end of the defects liability period or on the submission of a Performance bank guarantee for the same which has to be valid for the defect liability period.

Thanking you,

Yours faithfully,

For Hind Inns & Hotels Ltd.

Sd/-

Authorised Signatory.”

As per the said Virtual Completion Certificate, the Corporate Debtor accepted that the work completed as on 31.03.2104 subject to the rectification of defects, if any, as pointed out by the Engineering/ Operation Department. Further it is mentioned that the Defect Liability Period for the subject work was commenced from 31.03.2014 and covered the entire period of one year i.e. upto 01.04.2015. It is also stated that 5% of the final contract value will be retained as retention amount in the Final Bill of the Operational Creditor and the same will be released at the end of the Defect Liability period or on the submission of Performance Bank Guarantee for the same which has to be valid for the Defect Liability Period.

12. According to Virtual Completion Certificate, Defect Liability Period commenced from 31.03.2014 till 01.04.2015. The Operational Creditor, after completion of the Defect Liability Period, addressed a letter dated 10.04.2015 to the Corporate Debtor seeking release of retention money and balance payment for civil works. Letter dated 10.4.2015 (page-107) specifically mentioned that the Defect Liability Period of 12 months has expired successfully and hence requested the Corporate Debtor to release retention money of Rs. 24,74,088/- and also requested to release balance amount against final bill of Rs. 1,60,195/-.

13. The view of this Tribunal, the Defect Liability Period had been completed on 01.04.2015 and the Operational Creditor had requested vide their letter dated 10.04.2015 to release the retention money. Prior to April, 2015, the Corporate Debtor had not raised any dispute with regard to quality or incompleteness of the work even after their letter dated 10.04.2015.

The Corporate Debtor, vide e-mail dated 13.07.2015 (at page 119 of Paper Book) addressed to the Operational Creditor regarding water accumulation observed by them in -1 parking site. The said e-mail is reproduced hereunder:

“Dear Mr. Gupta,

*This is to update that Water accumulation is observed
in -1 marking first basement. Please get the slope*

*redone, so that water could flow towards the drain line
or towards-2 basement through ramp area.*

Attached photo for your reference.

Ward regards,”

14. Vide E-mail dated 14.07.2015 (page-118), the Operational creditor categorically replied to the above e-mail by specifically stating as under:

...

“Dear Sir,

We would like to submit that we have completed and handed over your property in September, 2013. We have completed the above work as per the site instructions/details of drawings issued from time to time. Earlier we have attended on your problems and rectified to your satisfaction. We have also completed our Defect Liability Period successfully in March, 2015. As on today, this is to be treated as maintenance issue and shall be taken care by the owner itself.”

..

15. In our view the e-mail of the Corporate Debtor dated 13.07.2015 was rightly replied by the Operational Creditor and stated that the issue which was raised by the Corporate Debtor in their e-mail dated 13.07.2015(Page-119) is only a maintenance issue and shall be taken care by the owner itself. Further the Corporate Debtor in their e-mail

dated 21.07.2015 (Page- 117) addressed to the Operational Creditor which is reproduced as under:

....

“Dear Mr. Gupta,

As we spoke- We very much appreciate that you have attended all our concerns and rectified the same as and when required. Keeping the same into consideration, kindly please ask someone from your office to attend this issue as a Special Case request, which shall be of great help.

Regards,”

...

FINDINGS:

16. From the reading of above e-mail of the Corporate Debtor addressed to the Operational Creditor, this Tribunal is of the considered opinion that the Corporate Debtor had accepted that all the works have attended by the Operational Creditor and further requested the Operational Creditor to attend to the work as a Special case request. From the reading of the e-mail, we are of the view that the request made by the Corporate Debtor is not part of the original work and it is a Special Request made to the Operational Creditor to do the work.

17. We do not find any record or document to establish that there exists any dispute nor raised any dispute by the Corporate Debtor, hence, we conclude that there is no pre-existing of dispute. The

Operational Creditor had awarded the work and the retention money cannot be treated as separate money. The retention money is a part of main bill which was retained by the Corporate Debtor as per the terms of the Work Order and the same shall be released after completion of the work and issuance of the Completion Certificate. Further the Defect Liability Period completed on 01.04.2015 and thereafter the Operational Creditor had requested the Corporate Debtor to release money. We are of the view that it is not barred by limitation. Learned Adjudicating Authority rightly observed and held that the debt fell due from 27.07.2015 when the mail was sent by Ginjar Hotel of the Corporate Debtor stating that the Operational Creditor had attended to all the concerns and rectified the same. The other submission of the learned Counsel for the Appellant that debt does not fall within the definition of Section 5(21) of IBC is concerned, the Operational Creditor had rendered services and there is no dispute with regard to the said services and we cannot accept that the said claims will not fall under the definition of Operational Debt. For the Beneficial reference Section 5(21) of IBC is reproduced.

...

“5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”

18. The stand of the learned Counsel for the Appellant is that the Respondent No. 2 herein does not fall within the definition of Operational Creditor as defined in Section 5(2) of IBC. For the beneficial reference the said Section is reproduced herein:

...

“5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred”

...

19. We are of the view that the Respondent No. 1 being a Corporate Debtor is due and payable retention money which is part of the main Bill thereby the Operational Creditor is well within the definition of Section 5(20) IBC.

20. As per Section 8(1) IBC, an Operational Creditor may, on the occurrence of a default deliver a Demand Notice of unpaid operational debt copy of an invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as may be prescribed.

21. Sub-Section 2(a) of Section 8 of the IBC, if there is existence of dispute or record of the pendency of the suit or arbitration proceeding filed before the receipt of such notice or invoice, the same shall bring to the notice of the Operational Creditor within a period of 10 days from the receipt of the Demand Notice.

22. In the present case, the Demand Notice dated 01.03.2018 was received by the Corporate Debtor on 09.03.2018. However, they fail to bring to the notice of the Operational Creditor with regard to existence of dispute in their reply or even shown existence of dispute prior to the issuance of Demand Notice.

23. Therefore, we are of the view that the Respondent No. 1 had not raised any dispute which is existing prior to the issuance of Demand Notice. Further Section 3(2) of IBC define default. As per said Section, the default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the Debtor or Corporate Debtor as the case may be. The debt has been defined in Section 3(11) means a liability or obligation in respect of a claim which is due from any person and includes a Financial Debt and Operational Debt. In view of the definition of debt and default, the retention money, which is part of the main bill, comes under the definition of debt and default.

24. Having dealt with the facts and legal position as discussed above, now we deal with the precedents/judgments relied upon by the learned Counsel for both the parties.

25. Learned Counsel for the Appellant relied upon the Judgement of the Hon'ble Supreme Court in the matter of **"B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta & Associates"** [2018 SCC Online 1921] on the ground that the claim of the Respondent No. 2 herein was

barred by limitation and the Hon'ble Supreme Court held at paragraph-48 that the Limitation Act is applicable to Applications filed under Sections 7 & 9 of IBC from the inception of the Code. Article 137 of the Limitation Act gets attracted. The right to sue therefore accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the Application, the Application would be barred under Article 137 of the Limitation Act over and except in those cases where in the facts of the case, Section 5 of the Limitation may be filed to condone the delay in filing such Application. Learned Counsel for the Appellant relied upon above decision contending that the right to accrue to the Respondent No. 2 occurred on 01.04.2015 and if the limitation of three years is taken, the Application under Section 9 IBC was to be filed on or before 01.04.2018. However, Respondent No. 2 filed Application under Section 9 on 27.04.2018 which is barred by limitation. Further learned Counsel for the Appellant relied upon judgment of the Hon'ble Supreme Court in the matter of "**Jignesh Shah and Another Vs. Union of India and Another**" reported in 2019 SCC Online SC 1254 at paragraph-12, the Hon'ble Supreme Court also held at paragraph 12 as under:

..

"12. On the facts of this case, it is clear that the winding petition was filed beyond three years in August 2012, which is when, even according to IL&FS, default in repayment had occurred, it is barred by time."

..

26. The Hon'ble Supreme in the very same paragraph held:

“.. with the introduction of Section 238 A into the Code, the provision of Limitation Act applies to Application made under the Code.”

..

Further, the learned Counsel referred judgment of the Hon'ble Supreme Court in the matter of “**Vashdeo R. Bhojwani Vs. Abhyudaya Cooperative Bank Limited and Anr.**” reported in (2019) 9 SCC 158. The learned Counsel referred to the judgment of the Hon'ble Supreme Court in the case of “**Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited - 2018 1 SCC Online SC 353**” In paragraph- 51 it is held:

“51. 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.”

27. Relying upon above judgment, learned Counsel submits that the Adjudicating Authority is to see at this stage is whether there is a plausible contention which requires further investigation and the dispute is not a patently feeble legal argument or assertion of fact on unsupported by evidence. The Hon'ble Supreme Court in the above decision clearly held that the Adjudicating Authority must reject the

Application filed under Section 9(5)(2)(d) of IBC after notice of dispute has been received by the Operational Creditor or there is a record of dispute in the Information Utility. In the present case, the Adjudicating Authority held that the Corporate Debtor had not established that the Corporate Debtor had raised any dispute prior to the issuance of Demand Notice and therefore, it was concluded that there is no dispute. However, with regard to the Judgment relied upon by the learned Counsel for the Appellant on the point of limitation that the Application filed by the Respondent No. 2 is barred by limitation is concerned, this Tribunal is of the view that the Application filed by the Respondent No. 2 is within limitation period, taking into consideration that the e-mail dated 21.07.2015 addressed by the Corporate Debtor to the Operational Creditor wherein it is clearly stated that, "As we spoke- we very much appreciate that you have attended all our concerns and rectified the same as and when required. Keeping the same into consideration, kindly please ask someone from your office to attend this issue as a Special case request, we shall be great help." Further from the perusal of Form-5, Column-2 of Part-IV, the Operational Creditor has stated that the right to recover the retention money is accrued to the Operational Creditor on 01.04.2013. However, the debt due from 27.07.2015 i.e., when Ginjar Hotel sent an e-mail to the Operational Creditor. Therefore, we are of the view that the Application filed by the Respondent No. 2 herein is not time barred. Therefore, the judgment relied upon by the learned Counsel for the Appellant will not be of any assistance.

28. Learned Counsel for the Respondent also relied upon judgment of this Tribunal in the matter of “**Sudhir Sales & Services Ltd. Vs. D-Art Furniture Systems Pvt Ltd.**” – Company Appeal (AT)(Insolvency) No. 327 of 2018. In paragraphs 25 it is held-

“In “Innoventive Industries Ltd.(Supra)”, the Hon’ble Supreme Court held that pre-existing dispute is the dispute raised before demand notice or invoices was received by the ‘Corporate Debtor’. Any subsequent dispute raised while replying to the demand notice under Section 8(1) cannot be taken into consideration to hold that there is a pre-existing dispute.”

Further, at paragraph-26, this Hon’ble Tribunal held:

“In “Mobilox Innovations Pvt. Ltd.(Supra)”, the Hon’ble Supreme Court held that a dispute truly exists in fact and is not spurious, hypothetical or illusory. Here there is no such dispute was pre-existing apart from that a hypothetical or illusory dispute which has been raised by the ‘Corporate Debtor’ while replying to the demand notice served under Section 8(1) by the ‘Operational Creditor’”

Learned Counsel for the Respondent also relied upon Judgements of this Tribunal on the same point. Since we rely upon the above Judgements and in view of settled legal position, we find those are not necessary.

CONCLUSION:

29. We have dealt with the issues and grounds raised by the Appellant and held that the Respondent No. 2 falls under the category of Operational Creditor and the 'debt' is an Operational Debt as per law, which is due and payable. We have also dealt with the issues of limitation and pre-existence of dispute, if any, and hold that there is no pre-existence of dispute and Application is not barred by limitation. Further, we hold that the retention money is a part of main bill which, admittedly an Operational Debt. In view of the aforesaid reasons, we do not find any illegality in the order passed by the learned Adjudicating Authority, in admitting the application under Section 9 of IBC.

30. For the foregoing reasons, we conclude that the Appeal is devoid of merits and liable to be dismissed. Accordingly, the Appeal is dismissed. No orders as to cost.

[Justice Venugopal M.]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

Ahc