

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 74 of 2018

[arising out of Order dated 12th January, 2018 by NCLT, Kolkata Bench,
Kolkata in Case No. CP(IB) No. 412/KB/2017]

IN THE MATTER OF:

**Atul Roy,
S/o Late Dr. B.N. Roy,
R/o M34, Old Adityapur,
Jamshedpur – 831013
Jharkhand**

...Appellant

Versus

- 1. M/s. Technofac Contracts Pvt. Ltd.,
C-1/5, 53, Mangla Apartments,
I.P. Extension,
New Delhi – 110 092.**

Also at:

**Flat No. A-1006, 10th Floor,
Rishabh Paradise, Ahinsa Khand-II,
Indirapuram,
Ghaziabad – 201014.**

- 2. Yatri Vihar Hospitality Pvt. Ltd.,
House No. 61, Road No. 8,
Rajendra Nagar,
Patna,
Bihar – 800 016.**

.... Respondents

**For Appellant : Mr. Pandey Neeraj Rai, Mr. Sangeet Rai and
Ms. Rachitta Prinyanka Rai, Advocates**

**For Respondents: Mr. Sanjay R. Hegde, Senior Advocate assisted by
Mr. Shrutank Sailakwal, Mr. Aras Tanvir and Mr.
Pranjal Kishore, Advocates**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The respondent – ‘Technofac Contracts Pvt. Ltd.’ filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘I&B Code’) for initiation of corporate insolvency resolution process against ‘Yatri Vihar Hospitality Pvt. Ltd.’ (Corporate Debtor). The Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata by impugned order dated 12th January, 2018 admitted the application, declared moratorium and called the names for appointment of Insolvency Resolution Professional from the Insolvency and Bankruptcy Board of India. The appellant, one of the shareholder/Director of the ‘Corporate Debtor’ has preferred this appeal mainly on two grounds, namely:

- (i) That no notice under Section 8(1) was served on the ‘Corporate Debtor; and
- (ii) That there is an ‘existence of dispute’ much prior to issuance of Demand Notice under Section 8(1).

2. Both the aforesaid issues were raised by the ‘Corporate Debtor’ before the Adjudicating Authority. However, from the impugned order we find that the Adjudicating Authority rejected the first objection on the ground that the Demand Notice was issued by Speed Post on 25th May, 2017 and was duly served upon the ‘Corporate Debtor’ vide Track Consignment Report as was

placed in the petition. The Adjudicating Authority, however, noticed that the Demand Notice was issued with wrong pin code. In this background, we are not deciding the question whether it was actually served or not.

3. Learned counsel for the appellant referred to paragraphs 16 to 18 of the impugned order dated 12th January, 2018 and submitted that the Adjudicating Authority though noticed that the 'Operational Creditor' was the contractor who left the work and abandoned the work altogether in September, 2014 and the work was sub-standard but in spite of the same admitted the application under Section 9 of the I&B Code.

4. It was submitted that there being an 'existence of dispute', as evident from the date of communication between the parties, the application under Section 9 was fit to be rejected.

5. Learned counsel for the appellant relied on the *emails* which were brought to the notice of the Adjudicating Authority including the *emails* dated 17th October, 2013, 25th March, 2014, 4th August, 2014 and 12th May, 2015 sent by the 'Corporate Debtor' to the 'Operational Creditor' wherein it was brought to the notice of the 'Operational Creditor' (Contractor) that they failed to complete the work in time and the work was sub-standard.

6. It is relevant to state that the 'Corporate Debtor' allotted the work in favour of the 'Operational Creditor' for construction of hotel block. The *email* dated 17th October, 2013 shows that the 'Operational Creditor' has failed to complete the work within the time and notice was issued by the 'Corporate Debtor' that if they do not complete the work within seven days, the Corporate

Debtor shall depute an alternative agency to complete the work as the matter required urgent attention. By subsequent *email* dated 25th March, 2014, the Corporate Debtor intimated the Operational Creditor the progress of the site is very very slow and almost nil. The relevant portion of the said *email* reads as follows :

“We fail to understand that why you are neglecting the site and there is practically no work on the site and then you will say that the work done in the month is less and your overheads are increasing.

We think this is not fair.

You are requested to kindly personally give a commitment which hold and try to finish the job by 15.4.2014 as per your last commitment.”

7. Subsequent *email* dated 4th August, 2014 issued by the Corporate Debtor shows that the ‘Operational Creditor’ having failed to complete the work started imposing a penalty of Rs. 10,000/- per day on the ‘Operational Creditor’ w.e.f. 1st August, 2014.

8. The *email* dated 12th May, 2015 shows that the sub-standard work was performed and the work was not completed, as apparent from the said *email*, which is quoted below:

“Yatri Vihar <yatrivihar@gmail.com>

To : “F.K. Budhouliya” <technofac@yahoo.com>

CC: “Upalghosh Associates, New Delhi” <uga@ugarch.com>

Dear Sir,

We have reached the stage where we have started fixing the wooden flooring and carpets on the floor wherever required.

We find that the IPS on the floors done by you have been done very badly and is coming out from different places with the result that the floor is not suitable for fixing of wooden flooring and carpets.

The floor has to be redone.

We are getting the flooring removed and redone at your cost.

Regards

Yatri Vihar Hospitality Pvt. Ltd.”

9. The respondents have not disputed about the receipt of the aforesaid emails. Learned counsel appearing on behalf of the respondents submitted that the invoices amounting to Rs. 9,62,29,567/- for construction of the hotel were raised from time to time for earthwork and site development, water proofing, floor finishing etc. Against the said invoices the ‘Corporate Debtor’ paid a sum of Rs.7,42,36,671/- but not paid the balance outstanding of Rs.2,12,92,896/-.

10. The respondents have not disputed the fact as raised by the learned counsel for the appellant that the final invoice was not raised by the ‘Operational Creditor’.

11. The Adjudicating Authority has noticed the certificate given by an Architect Engineer to the 'Operational Creditor', which is at page 40 of the reply filed by the "Operational Creditor". The said certificate is dated 4th December, 2017 reads as follows:

"Date : 04.12.2017"

TO WHOM IT MAY CONCERN

This is to certify that the construction work of Hotel Mahabodhi (100 rooms), having covered area of about 1,00,000 sq. ft. at Bodh Gaya (Bihar) for M/s. Yatri Vihar Hospitality Pvt. Ltd. Regd. Office at 61, Road No. 8B, Rajendra Nagar, Patna, Bihar – 800 016, was awarded to M/s. Technofac Contracts Pvt. Ltd. in the year 2012 for a contract value of Rs. 6.15 crore.

M/s. Technofac Contracts Pvt. Ltd. has maintained quality, workmanship and required specifications consistently throughout the period of construction.

This certificate is issued on the request from M/s. Technofac Contracts Pvt. Ltd.

For furnishing their credentials to their potential clients.

We strongly recommend for entrusting them any prestigious and quality projects. We wish them all success.

For Upalghosh Associates,

sd/-

*(Upal Ghosh)
Partner”*

12. Learned counsel for the respondent accepted that it is not a legal document but a general certificate given for getting the benefit of order from other organisations.

13. From the aforesaid fact, we find that there is an ‘existence of dispute’ since prior to issuance of Demand Notice under Section 8(1). For the said reason the ‘Corporate Debtor’ stopped payment to ‘Operational Creditor’ for not completing the job and for sub-standard work. In fact the ‘Corporate Debtor’ imposed penalty on the ‘Operational Creditor’.

14. In the aforesaid circumstances, we are of the view that the application under Section 9 of the I&B Code was not maintainable. The Adjudicating Authority though noticed the aforesaid existence of dispute but having failed to appreciate, we have no other option but to set aside the impugned order.

15. We accordingly set aside the impugned order dated 12th January, 2018 passed in CP(IB) No. 412/KB/2017.

16. In effect, order(s) passed by Ld. Adjudicating Authority appointing any ‘Interim Resolution Professional’, declaring moratorium, freezing of account, and all other order(s) passed by Adjudicating Authority pursuant to impugned order and action taken by the ‘Interim Resolution Professional’, including the advertisement published in the newspaper calling for applications all such

orders and actions are declared illegal and are set aside. The application preferred by Respondent under Section 9 of the I&B Code, 2016 is dismissed. Learned Adjudicating Authority will now close the proceeding. The 'Corporate Debtor' is released from all the rigour of law and is allowed to function independently through its Board of Directors from immediate effect.

17. Learned Adjudicating Authority will fix the fee of 'Interim Resolution Professional', and the 'Corporate Debtor' will pay the fees of the Interim Resolution Professional, and other cost incurred by him. The appeal is allowed with aforesaid observation and direction. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member(Judicial)

New Delhi

26th April, 2018

/ns/