Insolvency Plea: Disputes must be pre-existing to demand notice
written by Gaurav Singh Gaur | August 16, 2019


The Hon'ble National Company Law Appellate Tribunal,New Delhi, in its recent judgment in *Ahluwalia Contracts (India) Limited v. Raheja Developers Limited[1]* dated July 23, 2019, held that insolvency plea cannot be rejected if the disputed claim is not raised prior to the demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016.

FACTS

The Appellant in the aforesaid case i.e. Ahluwalia Contracts (India) Limited, filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 against the Raheja Developers Limited (Respondent). The Adjudicating Authority (National Company Law Tribunal, New Delhi), by an impugned order dated September 19, 2019, rejected the application on ground that the claim of the Appallent falls within the ambit of 'disputed claim'.

The Adjudicating Authority further observed that in respect of the same cause of action, arbitration proceedings have already been initiated.

Highly aggrieved by the impugned order, and having no other alternative or efficacious remedy, the Appellant challenged the same before the Hon'ble National Company Law Appellate Tribunal at New Delhi in the aforesaid appeal.

The Hon'ble National Company Law Appellate Tribunal considered the following question of law and fact:

– *"Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?"*

SUBMISSIONS

The learned counsel appearing on behalf of the Appellant submitted that as on the date of issuance of demand notice under Section 8(1), no arbitration proceeding was initiated or pending. The arbitration proceeding on April 28, 2018 was filed by the Respondent after receipt of demand notice pursuant to Section 8(1) of the Insolvency and Bankruptcy Code.

It was further submitted that the notice invoking arbitration sent by the Respondent to the Appellant was issued on May 24, 2018. The Appellant through its counsel, sent a letter dated June 01, 2018 to the learned sole arbitrator with a copy to the Respondent stating that the appointment of the

sole arbitrator made by the Management Review Committee of the Respondent was not acceptable to the Appellant. It was also submitted that pursuant to the agreement dated December 6, 2010, a bill was issued on March 18, 2016 in respect to civil work certified by the Respondent. Another bill for plumbing work executed by the Appellant was raised and certified by the Respondent. It was
further urged by the Appellant that several emails have been sent to the Respondent
requesting to provide the pending WCT certificates for the years 2014-15 and 2015-16 and several reminders had also been sent to the Respondent regarding the outstanding payment towards actual work executed by the Appellant. It is only on failure of payment that the demand
notice under Section 8(1) was issued by the Appellant on April 28, 2018.
The learned counsel
for the Appellant submitted that the amounts claimed by the Appellant as shown
in the application under Section 9 were derived from the Respondent's own admission in "Comparative Statement of Payment Status between ACIL and RDL" dated August 28, 2017which bears its seal and is duly signed. Therefore, according to the Appellant, Respondent cannot dispute the amounts.
On the other
hand, the learned counsel appearing on behalf of the Respondent- submitted that
the Appellant failed to complete the work by February, 2017 and therefore, abandoned it. The work was subsequently completed and rectified by the Respondent, as a result of which, the Respondent had to incur approx. Rs.4,60,00,000/- approximately. Therefore, the Appellant is not only liable to
pay the said amount to the Respondent but also liable to pay interest @5% towards 'liquidated damages' in terms of the 'General Conditions of the Contract'.
JUDGMENT
The Hon'ble Tribunal observed that in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software (P) Limited[2]*,
the Hon'ble Supreme Court held that the 'existence of dispute' and/or the suit
or arbitration proceeding must be pre-existing- i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In the said case,
the Hon'ble Supreme Court observed:
*"33. The Scheme under Section 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the Respondent in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016 read with Form 3
or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the Respondent must bring*

*to*
*the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and /or the suit or arbitration proceeding must be pre-existing- i.e. it must exist before*
*the receipt of the demand notice or invoice, as the case may be. ….”*
The Tribunal
further observed that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the ‘operational debt’ is exceeding Rs.1 lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of
dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of demand notice of the unpaid
‘operational debt’, the application under Section 9 cannot be rejected.
Furthermore, placing reliance on *Innovative*
*Industries Ltd. v. ICICI Bank and Anr.[3]*,
the NCLAT observed that ‘claim’ means a right to payment even if it is disputed. In the aforesaid case, the Hon’ble Supreme Court while explaining the
provisions of Sections 7 or 9 observed and held that:
*“27…….. For the meaning of “debt”, we have to go to Section 3(11),*
*which in turn tells us that a debt means a liability or obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6)*
*which defined “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4).”*
Therefore, the
Hon’ble NCLAT observed that it cannot be held that there is pre-existence of dispute. There is an absence of any evidence that can suggest if the dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.
It was
further observed by the NCLAT that the arbitration proceedings were initiated by the Respondent vide notice dated May 24, 2018 i.e. after one month from the
date of issuance of demand notice under Section 8 (1) which was issued on April
4, 2018. Therefore, the ‘Respondent’ cannot rely on arbitration proceedings to
suggest a pre-existing dispute. There is nothing on the record to suggest that
the Respondent raised any pre-existing dispute relating to the quality of work
performed by the Appellant. The ground of delay in execution of work cannot be

noticed to deny admission of application to execute the work and certified all the bills.

Having considered the entire facts on the touchstone of the provisions of the statute and the binding precedents, the Hon'ble Tribunal was of the opinion that the Adjudicating authority wrongly rejected the claim on the ground that the claim raised by the Appellant falls within the ambit of 'disputed claim'. Since the arbitration proceeding was initiated much after the issuance of the demand notice, thereby it was wrongly held that an arbitration proceeding is pending.

Consequently, the appeal was allowed and the impugned order dated September 19, 2018 was set-aside and the case was remitted to the Adjudicating authority for admitting the application under Section 9 after notice to the Respondent to enable the Respondent to settle the matter prior to admission.

CONCLUSION

The Hon'ble NCLAT rightly placed its reliance on the earlier decision of *Innovative Industries Ltd. v. ICICI Bank and Anr.[4],* wherein it has been observed that *"claim means a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4)."*

With regard to the disputed claim, in the light of the entire facts, documents on records and the authorities relied upon by the Hon'ble NCLAT, it is crystal clear that the Adjudicating Authority wrongly rejected the claim of the Appellant on the ground that the claim raised by the Appellant falls within the disputed claim.

From the earlier precedents it can be deduced that merely disputing a claim cannot be a ground for the rejection of Insolvency Plea.

- [1] Company Appeal (AT) (Insolvency) No. 703 of 2018.
- [2] 2017 1 SCC OnLine SC 353.
- [3] 2018 1 SCC 407.
- [4] 2018 1 SCC 407.

Contributed By - Gaurav Singh Gaur
Designation - Associate