

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No.315 of 2022

IN THE MATTER OF:

**Lomash Slurrytech Pvt. Ltd.
(Through Its Authorized Signatory)**

...Appellant

Versus

DSC Engineering Pvt. Ltd.

...Respondent

Present:

**For Appellant: Mr. Bhuvan Arora, Mr. Vijay Mishr and Mr. Karan
 Chaudhary, Advocates with Mr. Anirudh Lal,
 Director.**

For Respondent: Mr. Bhaskar, Advocate.

ORDER

31.07.2023: Heard learned counsel for the Appellant as well as learned counsel for the Respondent. This Appeal has been filed against order passed by the Adjudicating Authority dated 23.08.2021 by which Section 9 application filed by the Appellant has been dismissed. Appellant filed Section 9 application claiming Operational Debt of Rs.97,03,395/-. The Demand Notice was issued by the Operational Creditor on 09.05.2019 which Demand Notice was replied by the Corporate Debtor by letter dated 27.05.2019 and raised dispute. Subsequent to that Section 9 application was filed by the Appellant in July, 2019 to which a reply was also filed by the Corporate Debtor. The Adjudicating Authority after hearing both the parties, rejected the application. The Adjudicating Authority in the order noticed that there being settlement between the parties on 19.03.2018, all dues prior to that

Cont'd.../

stood paid and there were only two invoices after the said date and dispute has been raised regarding them and the application was rejected.

2. Learned counsel for the Appellant submits that the fact that settlement was entered between the parties dated 19.03.2018 was not relevant since the Appellant's claim was for subsequent invoices raised thereafter. It is further submitted that a settlement was also forwarded by the Corporate Debtor on 27.04.2019 which indicate that the Corporate Debtor acknowledged the debt, hence, the Adjudicating Authority committed error in rejecting Section 9 application.

3. Learned counsel for the Respondent submitted that the issues are already been under adjudication in an Arbitration Proceeding initiated by the Corporate Debtor.

4. We have considered the submissions of the parties and perused the record.

5. The Demand Notice was issued on 19.05.2019 was received by the Corporate Debtor on 23.05.2019 and reply to the Demand Notice was sent on 27.05.2019, which is part of the Section 9 application of the Appellant, appearing at page no.298 of the paper book. The Corporate Debtor in the reply to the Demand Notice has refuted the claim of the Appellant as frivolous and baseless. The Corporate Debtor in the reply has given details of the work and the minutes dated 02.02.2018 and agreement which was entered on

10.02.2018 and signed on 19.03.2018. It shall be sufficient to notice the following averments made in the reply to Demand Notice:

“4.

g)

iv. *The existing rates were revised to Rs. 164.50 per sq.m + GST from 10.02.2018. In this regard Lomash agreed to issue credit notes for the revised rates with retrospective effect for the rate difference.*

[Copy of Minutes dated 10.02.2018 is enclosed as Annexure-B-I]

Thus, it was clearly agreed to between the parties that no., amount was due and nothing was payable to Lomash, as on 18.03.2018. As per the said agreement, the existing rates were reduced from 172 to Rs. 164.50 per sq.m with retrospective effect and for which Lomash was to issue credit notes, Lomash has not issued the credit notes till date. Be that as it may, the difference in the rates is Rs. 7.5 per sq.m., and applying the same to the works executed [174746 sqm], an amount of Rs. 12,58,782 became payable by Lomash to DEPL for the said rate difference.

h) *It is further stated that that Lomash has failed to complete the Micro-surfacing works, of an area of 13044 sq.m (after considering-75% variation as per work order). For the said area, which is not a huge*

area, it-has not been possible to arrange for Micro-surfacing, and therefore, DEPL has no option but to get the works completed by laying down layer of Bituminous Concrete. The cost of the said works is estimated at an amount of Rs. 31,35,297/- [Documents showing the said estimate are enclosed as Annexure-C]-. The said work will be done at the risk and cost of Lomash and the loss suffered by DEPL has to be made good by Lomash.

- i) It is pertinent to note that in addition to leaving the works, incomplete, Lomash is seeking to retract from its earlier position. In utter violation of the agreement recorded in the above minutes of meeting, Lomash issued a letter; dated 10.04.2019 to DEPL demanding an amount of Rs. 22,26,300/- and 15% retention money. The basis of the said alleged demand of Rs. 74,87,794/- is a self-styled fabricated statement of account maintained by Lomash.*
- j) It is stated that the alleged demand raised by Lomash towards retention money is frivolous and baseless. It is submitted that as per the Contract between the parties, the amount towards 15% retention money could have become due only on submission of the Performance Bank Guarantee (PBG). Admittedly Lomash has not issued the PBG in terms of the Work Order and therefore, the said demand of Lomash is contrary to the terms of the Work Order and wholly misconceived & not maintainable.*

- k) *It is further pertinent to note that, the Lender's Engineer (Engineer appointed by the Project, lenders [Banks/FIs] vide its letter dated 28.04.2019 informed DEPL that during its visit to the site, it has found many defects in the Microsurfacing work carried out by Lomash. The Lender's Engineer has raised serious objection to the sub-standard workmanship in the Micro-surfacing work & has pointed out that longitudinal zig zag cracks were found on the road, road surface at many; places was found to be damaged, excessive bleedings at the joints of the Microsurfacing layer was seen and various undulations were found on the road surface. A copy of letter dated 28.04.2019 is enclosed as Annexure C-1.*
- l) *In light of the above, DEPL addressed a letter dated 04.05.2019 to Lomash, wherein it informed Lomash about the defects observed in the-Micro surfacing work carried but by Lomash. DEPL took serious objection to the substandard workmanship, which was evidenced by the poor quality of work executed by Lomash. It was also made clear to Lomash that nothing was due and payable to Lomash by DEPL and all payments had been made by DEPL. DEPL by way of the said letter also revoked the offer of settlement given by it to Lomash by way of its email dated 29.04.2019, after the following defects were noted at the site:*

- i. *At many locations, micro-surfacing layer has been chipped off from the earlier existing road surface.*
- ii. *At many locations, longitudinal and zig zag cracks are visible, which are widening during the course of time.*
- iii. *Longitudinal Joints are not properly filled up due to which cracks are visible.*
- iv. *There is bleeding at many location.*
- v. *Due to Asphalt Ravelling, there is deterioration of the pavement surface at many locations along the project route.*

[Copy of letter dated 04.05.2019 is enclosed as Annexure-D]

It is stated that the total estimate for repair of the said defects, works out to an amount of Rs. 20,32,800/-, which is to Lomash's account.

5. *Furthermore, an amount of Rs.16.77 lacs is payable by Lomash in terms of the Work Order, and an amount of Rs.12.58, 782 is payable by Lomash towards reduction of rates. Therefore, it is Lomash who owes an amount of Rs.81,03,879/- to DEPL.*

[Calculation is annexed as Annexure - E]"

6. With regard to invoices which were issued subsequent to agreement between the parties' details have been given by the Corporate Debtor. It was pleaded that the Operational Creditor was obliged to issue Credit Notes with
Company Appeal (AT) (Insolvency) No.315 of 2022

regard to amount of Rs.12,58,782/-, which was never issued. With regard to settlement which was forwarded by the Corporate Debtor it has been pleaded in the reply that settlement was withdrawn subsequently by Corporate Debtor and the Operational Creditor owes an amount to the Corporate Debtor.

7. We are of the view that when Demand Notice issued under Section 8 is replied by the Corporate Debtor, which is notice of dispute raising the dispute regarding claim of the Appellant, the Adjudicating Authority has rightly not proceeded to admit the Section 9 application. The submission of learned counsel for the Appellant that there were no disputes cannot be accepted. Details as noted above which were reflected in the reply to notice of demand clearly indicate that there was genuine dispute regarding the claim of the Appellant, which cannot be decided in a Section 9 proceeding. We, thus, do not find any fault with the order of the Adjudicating Authority rejecting Section 9 application.

8. We, however, make it clear rejection of Section 9 application shall not preclude the parties to settle their inter-se dispute and rights under appropriate proceeding. With these observations, Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Archana/nn