

Ivalue Advisors Pvt. Ltd vs Srinagar Banihal Expressway Ltd on 13 January, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.1142 of 2019

IN THE MATTER OF:

iValue Advisors Pvt. Ltd.

...Appellant

Versus

Srinagar Banihal Expressway Ltd.

...Respondent

For Appellant: Shri Sameer Rastogi, Advocate

For Respondent: Shri Mahfooz Nazki and Shri Zain Maqbool,
Advocates

ORDER

13.01.2020 Heard Counsel for the Appellant - Operational Creditor as well as the learned Counsel for the Respondent - Corporate Debtor.

2. The Appellant is an MSME (Micro, Small and Medium Enterprise) and filed Section 9 Application under Insolvency and Bankruptcy Code, 2016 (IBC

- in short) against the Respondent. The Appellant claimed in the Application that the Corporate Debtor is a special purpose vehicle company incorporated for execution of project, that is, rehabilitation, strengthening and four laning of Srinagar to Banihal section in the State of J&K. The Appellant claimed that in 2014, an engagement letter dated 21st November, 2014 was signed between the Operational Creditor and the Corporate Debtor and fee was fixed at Rs.22 Lakhs for availing project monitoring services, which were to be rendered by the Appellant. The Appellant raised invoices between 24.11.2014 till 16th February, 2017 and the Corporate Debtor had released payments up to 6th October, 2016. The Appellant claimed that part payment was due and the Appellant sent Notice under Section 8 of IBC on 21st January, 2019 (Page -

94) referring to the invoices due and outstanding and sought to recover the dues for services rendered. In spite of the Notice, the Respondent did not pay and thus, Section 9 Application was moved under IBC.

3. The learned Counsel for the Respondent refers to the Reply which was filed by the Respondent before the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench,

Hyderabad). According to the Counsel, the Appellant had approached Delhi MSME Facilitation Council for the same purpose for which Section 9 Application was moved. The Respondent - Corporate Debtor claimed that the Corporate Debtor had been instructed by the MSME to conciliate the alleged dispute with the Operational Creditor and Corporate Debtor had sent Reply dated 4th March, 2019 (Page - 90) and refuted all the allegations made by the Operational Creditor. According to the Respondent, when reference was made by the Appellant to MSME Council, that itself showed that there was dispute and the arbitration proceedings under the MSME Council are to be initiated and thus the Application under Section 9 was liable to be rejected.

4. The Adjudicating Authority heard the parties and rejected the Section 9 Application observing in para - 5 of the Impugned Order as under:-

"5. It is the case of petitioner that various invoices were raised from 24.11.2014 till 16.02.2017 and the Corporate Debtor has released payments for the services in full up to 06.10.2016 and there was a substantial delay in making part payment and the amount in default is Rs.73,52,122.92/-. On perusal of Company Appeal (AT) (Ins) No.1142 of 2019 record by this Adjudicating Authority, it is observed that the Petitioner themselves in the petition has stated that the subject matter has already been taken to the MSME facilitation council for redressal in terms of MSME Development Act, 2016 and Arbitration proceedings between the Operational Creditor and Corporate Debtor have been commenced with the failure of conciliation between the parties as per section 18(3) of the MSME Development Act, 2006. Furthermore, the Corporate Debtor has also sent a reply on 07.02.2019, to the demand notice dated 21.01.2019, sent by the Operational Creditor raising the pre-existing dispute with regards to the amount claimed to the demand notice. The Adjudicating Authority has already held that the pendency of the Application before MSME establishes pre-existing dispute as long as the dispute is not spurious, hypothetical or illusory but an admitted fact on record. (Shrishti Electromech Pvt. Ltd. Vs Vijay Home Appliances Pvt Ltd in CP(IB) No.396/9/HDB/2018). In the case in hand, the Petitioner Company itself had admitted to the fact that the matter is seized of by MSME council and the adjudication by the said council is pending Arbitration proceedings between the parties have been commenced which clearly establishes that there is a pre-existing dispute between the parties."

5. We have heard the learned counsel for the Appellant and learned Counsel for the Respondent. The learned Counsel for the Appellant submits that the Appellant had no doubt moved the MSME Council as the Appellant was having a source of relief under the Micro, Small and Medium Enterprise Development Act, 2006 (MSME Act - in short). It is argued that the amounts were due under the invoices as at Page - 54 to 57 dated 2nd January, 2017 for periods as specified in the invoices. The amounts were not paid and hence the Appellant had sought relief from MSME and according to the Counsel, the observation of the Adjudicating Authority in the Impugned Order, which is reproduced above, was apparently wrong because the Counsel was yet to take up the proceeding which was filed by the Appellant for getting relief which is Company Appeal (AT) (Ins) No.1142 of 2019 clear from the letter dated 15th October, 2019 sent by the MSME Council (Page

89). The Counsel states that though this was after the Impugned Order, it clearly shows the Authority informing that no conciliation proceedings had started or Arbitrator was appointed. It is argued that even if the arbitration is pending that by itself is no bar to move an Application under Section 9. The Counsel referred to engagement letter (Page - 48 at Page - 53) to state that when the invoices were raised in 2017, no disputes were ever raised by the Respondent even till the Notice dated 21st January, 2019 sent under Section 8 of IBC. The Counsel states that the Adjudicating Authority has gravely erred in rejecting the Application as there was no pre-existing dispute as contemplated under Section 5(6) of IBC.

6. The learned Counsel further pointed out that for the invoices which were raised on 2nd January, 2017 (copies of which have been filed at Pages - 54 to 57), the Respondent - Corporate Debtor had deducted TDS from the amounts payable to the Appellant under the invoices but the dues of the Appellant were not paid for the same invoices.

7. The learned Counsel for the Respondent submitted that engagement letter showed that the project was to be completed by 31st December, 2015 and referring to Section 18 of MSME Act, it is stated that when the Appellant made reference to the Council, that itself has been referred in the Act as "dispute" and thus when MSME Council had been moved before sending Section 8 Notice, there was an existing dispute. It is further argued that as per the engagement letter, the Appellant was entitled to Rs.22 Lakhs per month for the services but surprisingly, invoices raised were for lesser amount Company Appeal (AT) (Ins) No.1142 of 2019 without specifying any reason. It is further argued that merely because TDS was deducted does not mean that there is admission of liability. Learned Counsel for Respondent relied on the Judgements in the matter of "S.P. Brothers, a partnership firm Vs. Biren Ramesh Kadakia" reported as MANU/MH/0279/2008. He referred to portion from the para - 8 of the Judgement as under:-

"The issuance of TDS certificates does not amount to an acknowledgement of defendant within the meaning of Section 25 of the Indian Evidence Act and the Full Bench judgement of this Court in the case of Jyotsna (supra) puts the matter beyond doubt. This certificate is primarily to acknowledge the deduction of tax at source.

The certificate does not refer to any amount of loan or even the rate of interest which is payable on the said principal amount. It does not refer to any contract between the parties and even a transaction."

The Counsel further relied on Judgement in the matter of "Utility Powertech Limited Vs. Amit Traders" reported as MANU/DE/1872/2018 and referred to para 19 for the following observations:-

"19. On the issue of TDS deduction, the Trial Court may have erred as the settled position is that deduction of TDS does not constitute an admission of liability. The Trial Court may be wrong in holding that the TDS certificate by itself constitutes an admission of liability. This is not so, inasmuch as the TDS can be deducted even on the expectation of estimated liability."

8. It is further argued that in the subsequent financial statements of the Appellant, the Appellant has not shown these amounts claimed in the proceeding under Section 9 in its record as outstanding dues.

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9. We have heard Counsel for both sides and going through the matter, we find that the Adjudicating Authority erred in concluding that because Operational Creditor had moved the MSME Authorities, it showed pre-existing dispute. The Appellant had a relief open under the MSME Act and only because the Appellant moved the Authority under MSME Act, it does not mean that there is a pre-existing dispute. The dispute raised by the Appellant before the MSME was that it had dues to recover and that the Respondent has not paid. This by itself does not mean that there is pre-existing dispute as far as the Respondent is concerned. Under the IBC Section 5 Sub-Section (6), the dispute is defined as under:-

"(6) "dispute" includes a suit or arbitration proceedings relating to--

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty"

10. Section 17 of MSME Act reads as under:-

"17. Recovery of amount due.--For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16"

Sub-Section (1) of Section 18 of that Act reads as under:-

"(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprise Facilitation Council."

Company Appeal (AT) (Ins) No.1142 of 2019 Thus the context of the word "dispute" in Section 18 takes colour from Section 17 of MSME Act. It is different from context of Section 5(6) read with Section 8 of IBC.

11. At present, nothing is shown that there was any pre-existing dispute raised by the Respondent with regard to the services rendered by the Appellant. When this is so, only because the Appellant went to the MSME Authorities was no ground for the Adjudicating Authority to reject the Application under Section 9. A further communication from the Authority has been placed on record by the Appellant at Page - 89. Although the subsequent letter shows that the conciliation

proceedings had yet to start. We will go a little ahead so that even if the conciliation proceeding was to start, if the Respondent did not raise dispute regarding the supply of goods or quality of services, still it would be open for the Adjudicating Authority to look into the question whether or not dispute as covered under the IBC, is attracted.

12. We have seen the Judgements relied on by the learned Counsel for the Respondent. Appellant is not relying merely on TDS deducted to make claim. The liability is claimed on the basis of invoices raised and permitted by Section 9(3) of IBC. Reliance is placed on invoices and documents relied on in Section 9 Application.

13. We do not find that there was any pre-existing dispute raised by Respondent and we hold that the Section 9 Application was wrongly rejected.

14. No other shortcoming in the Section 9 Application has been pointed out in the Impugned Order. As such, Impugned Order is set aside. Appeal is Company Appeal (AT) (Ins) No.1142 of 2019 allowed. We remit back the matter to the Adjudicating Authority. The parties are directed to appear before the Adjudicating Authority on 3rd February, 2020. The Adjudicating Authority will admit the Section 9 Application and pass further necessary orders under the provisions of IBC. Before the Adjudicating Authority passes order of admission, if the Respondent settles the dispute with the Appellant, the Adjudicating Authority in that case may pass suitable orders accordingly.

Appeal is disposed accordingly. No costs.

[Justice A.I.S. Cheema] Member (Judicial) [Kanthi Narahari] Member (Technical) [V.P. Singh] Member (Technical) /rs/md Company Appeal (AT) (Ins) No.1142 of 2019