

(2019) 05 NCLT CK 0016

In the National Company Law Appellate Tribunal

Case No : Company Petition No. IB-1207/ND Of 2018

M/S Kline Technical Consulting Llc.

APPELLANT

Vs

M/S Central Electronics Limited

RESPONDENT

Date of Decision : 20-05-2019

Acts Referred:

Limitation Act, 1963 — Article 137

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 6

Insolvency And Bankruptcy Code, 2016 — Section 4, 5(6), 8, 8(1), 9, 9(5), 238A

Citation : (2019) 05 NCLT CK 0016

Hon'ble Judges : Dr. Deepti Mukesh, J

Bench : Single Bench

Advocate : Alok Tripathi, Rajiv Ranjan, Abhishek Thakur, Anuj Kumar

Final Decision : Dismissed

Judgement

S. No.,Description,Amount (Rs. In Crores),Remarks

1.,Equipment Cost,11.01,"a. Rs. 9.91 Crores i.e.

90% against LCs and

b. Rs. 1.10 Crores i.e.

10% against PBG for

12 months from the

date of installation.

2.,"(a)Towards technology

cost (includes software,

source codes,

passwords and keys

etc.)

(b) Engineering support,
training, travel and local
operating cost

(c) Licensing", 10.74, "Rs. 7.49 Crores to be
released in
progressive Five
installments towards
the milestones
achieved as approved
by CEL/TDB.

a. 1st installment:

Rs. 2.49 Crores
against a bank
guarantee of Rs. 2.49
Crores for 90 days

b. Rs. 5 Crores- in

four equal
installments of Rs.

1.25 Crores each
against submission of
a revolving bank
guarantee of the said
amount on similar
terms valid till the
execution of the
work.

c. C. Balance

payment of Rs. 3.25
Crores to be retained

for 12 months from
the date of
satisfactory
commissioning of the
system

,TOTAL,21.75,

,PARTICULARS OF OPERATIONAL DEBT,,

1. TOTAL AMOUNT OF DEBT,, "The total amount of Rs. 3,57,87,336.66/- is due and

payable by the Corporate Debtor, in which amount of
Rs. 2,30,00,000/- is due against the Engineering Contract
and an amount of Rs.1,27,87,336/- is due against supply
of equipment from 01.01.2012 till date.",

2. AMOUNT CLAIMED TO BE IN DEFAULT

AND THE DATE ON WHICH THE DEFAULT

OCCURED",, "An amount of Rs. 3,57,87,336.66/- is due and payable by
the Corporate Debtor, in which amount of Rs.

2,30,00,000/- is due against the Engineering Contract and
an amount of Rs.1,27,87,336/- is due against supply of
equipment from 01.01.2012 till date. It is submitted that
the operational creditor has also claimed interest at the
rate of 18% of the amount due from the due date till its
payment.",

21. It is further submitted by the Corporate Debtor that it has all through the
period has raised dispute on the invoices raised by the Operational,,,

Creditor. The Corporate Debtor had raised the dispute way back in November
2010 wherein apprehension was raised regarding the discrepancies,,,

with the documents. Further on 28.01.2015, Corporate Debtor had categorically
asked for the submission of documents by the Operational Creditor.",,,,

Further by letter dated 05.11.2016, the Corporate Debtor had raised the dispute
pertaining to the invoices and the non -supply of goods by the",,,,

Operational Creditor.,,,

22. It is further submitted by the Corporate Debtor that Operational Creditor has not disclosed on which invoice the Payment is due as the invoice.,,,

number and the invoice annexed with the notice has already been paid 90% by the Corporate Debtor even though the Operational Creditor has not.,,,

supplied the 4 items vide invoice bearing no. KTCHBE016/2010-004. The Corporate Debtor had earlier raised the dispute on this matter and asked for.,,,

various documents like original copy of airway bill, certificate of origin, manufactures conformity certificate, Insurance policy, Warranty Certificate",,,

and proof of dispatch.,,,

23. It is the case of Corporate Debtor that Operational Creditor in connivance with other persons have raised false invoice for the 4 equipment which.,,,

were never supplied by the Operational Creditor. The operational creditor did not supply 4 items as per the Purchase order and the Operational.,,,

Creditor in collusion with the employees of the Corporate Debtor got released the payment of USD 5,42,762.10. When the Corporate Debtor came to",,,

know about it, an enquiry was initiated against its officer Sh. G.C. Tayal and vide office order dated 03.01.2017 Sh. G. C. Tayal in an enquiry formally",,,

ordered for the punishment. Further departmental enquiry was initiated against another employee of the Corporate Debtor Sh. Rajiv Agarwal who.,,,

was found guilty of causing financial loss to the Corporate Debtor in collusion with the Operational Creditor and he has been dismissed from the.,,,

service of the Corporate Debtor.,,,

24. It is further argued by the Corporate Debtor that amount claimed by the operational creditor is disputed and as this has been shown as contingent.,,,

liability in the balance sheet of the Corporate Debtor for the year ending 31.03.2017, it cannot be termed as an acceptance of debt by the Corporate",,,

Debtor. Subsequently as per the audit done, the said disputed amount has been removed from the balance sheet for the year ending on 31.03.2018.",,,

Further the Corporate Debtor had removed the claim from the contingent liability and had transferred/ refunded the payment to Technology.,,,

Development Board on 07.04.2018.,,,

25. A rejoinder is filed reiterating the submissions made in the application and controverting the assertions in the reply. On the question of limitation,",,

Operational Creditor has submitted that the Govt. of India has decided to

disinvest 100% of its equity shareholding in Corporate debtor and therefore,,, have invited expression of interest in September 2018, as annexed in additional affidavit of Operational Creditor and in the said EOI in clause 2.6.4, the",,,, Corporate Debtor has again admitted its liability of Rs. 2.48 Crores towards the Operational Creditor.,,,

26. The Operational Creditor has further submitted that the Insolvency and Bankruptcy Code, 2016 come in to force on 01.12.2016 and therefore right",,,, to apply under the Code of 2016 accrued only on or after 01.12.2016 as well as Article 137 of Limitation Act is applicable therefore the present,,, application is within limitation.,,,

27. Facts which are material to the controversy raised with respect to Limitation may first be addressed. The default in payment of operational debt,,, first became due from the date of the invoice raised by the Applicant that is 31.01.2012. As per the Insolvency and Bankruptcy Code (Amendment),,, Ordinance, 2018 published in the Official Gazette of India on 06.06.2018 a new provision Section 238A to the Code which makes the Limitation Act,",,, 1963 applicable to the Code and reads as follows:,,,

â??238A. The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating",,,,

Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case",,,,

may be.â??,,,,

Since there were numerous correspondences and meetings which were held during the period of 2012 to 2016 between the Operational Creditor and,,,

Corporate Debtor raising disputes and issues with respect to delivery and performance of contract, shows that the debt is not time barred.",,,,

28. The corporate debtor has submitted that debt is disputed and not payable as the Work Order has not been completed till date. It is necessary to,,,

ascertain the definition of â??disputeâ??. In relation to Code, 2016, dispute has been defined in Section 5(6) as follows:",,,

Dispute"" includes a suit or arbitration proceedings relating toâ?"(a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the",,,,

breach of a representation or warranty.,,,

Further the Honâ??ble Supreme of India in Mobilox Innovations Private Limited vs. Kirusa Software Private limited has observed that-,,,

â??The adjudicating authority, when examining an application under Section 9 of the Act will have to determine:",,,

(i) Whether there is an â??operational debtâ?? as defined exceeding Rs.1 lakh? (See Section 4 of the Act),,,

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been,,,
paid? and,,,

(iii) 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?,,,

If any one of the aforesaid conditions is lacking, the application would have to be rejected.",,,

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of",,,

Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the",,,

Act.â??,,,

29. As per the reply filed by the Corporate Debtor, it can be inferred & concluded that the dispute raised by the corporate debtor falls well within the",,,

definition of dispute as reproduced above. Nowhere in the application any document has been produced to support that the alleged Work Order has,,,

been completed to the satisfaction of the Corporate Debtor. The Corporate Debtor has placed various correspondences regarding the non- supply of,,,

goods and non -completion of Work Order on record. The claim made by the applicant is untenable without any supportive evidence reflecting the,,,

performance of contract and completion of work as per the terms of Work Order.,,,,

30. It is further seen that the demand notice in the present case was issued under Section 8 (1) of the Code on 31.05.2018. Respondents have placed,,,

their earlier correspondences dated 28.01.2015 and 05.11.2016 raising dispute and issues with respect to delivery and performance of contract. It is,,,

thus seen that the dispute was brought to the notice of the applicant prior to the issuance of the demand notice dated 31.05.2018 issued under Section,,,

8 (1) of the Code.,,,,

31. In an application filed under Section 9 of the Code, Tribunal is not supposed to examine the merits of the dispute nor the adequacy of the dispute is",,,
to be seen. However, in matters under Section 9, the tribunal is only to see that a dispute pre-exists and that the dispute is not vague, got up or raised",,,
for the first time to evade the liability. The Respondent had raised the dispute way back in November 2010 wherein apprehension was raised,,,
regarding the discrepancies with the documents as per the terms and condition of the Letter of Credit. The documents on record clearly show that the,,,
dispute was raised by the respondent prior to the demand notice issued under Section 8 (1) of the Code.,,,

32. Section 9 (5) of the Code provides that adjudicating authority shall reject the application if notice of dispute has been received by the operational,,,
creditor or there is a record of dispute in the information utility. In present case, there is a pre-existing dispute supported by documents. As a sequel to",,,
the above discussion, this application fails and the same is hereby rejected and dismissed.",,,

33. It is made clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the,,,
right of the applicant before any other forum shall not be prejudiced on account of dismissal of the instant application.,,,

34. Let the copy of the order be served to the parties,,,