
(2023) 04 NCLT CK 0040

In the National Company Law Tribunal

Case No : CP (IB) No.365/MB-IV/2021

Vishwa Green Realtors Pvt. Ltd Vs Suhem Facades Pvt. Ltd ?

Date of Decision : 19-04-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 8, 9

Citation : (2023) 04 NCLT CK 0040

Hon'ble Judges : Kishore Vemulapalli, Member (J);Prabhat Kumar, Member (T)

Bench : Division Bench

Advocate : Mily Ghoshal, Madhavi Nalluri

Final Decision : Dismissed

Judgement

Kishore Vemulapalli, Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) VISHWA GREEN REALTORS PRIVATE LIMITED, ("the Operational Creditor"), seeking initiation of Corporate Insolvency Resolution Process (CIRP) against SUHEM FACADES PRIVATE LIMITED, ("the Corporate Debtor").

1.1. The petition is filed on 12.02.2021 claiming an amount of "Rs.3,04,72,487/, with a further interest rate of 18% p.a. to be calculated till the date of actual payment from the date of notice of termination i.e. 16.03.2020" as stated Part IV of the Petition. The amount claimed to be due is advance paid by the applicant towards works contract awarded to the Corporate Debtor.

2. The Operational Creditor states that the Corporate Debtor is into the business of manufacturing glass facades and fabrication. The Operational Creditor agreed to engage the Corporate Debtor for Engineering, fabrication, Supply and installation of Façade works for the proposed S Tower for a sum of Rs.10.30 Crores in response to Corporate Debtor's commercial offer dated 11.01.2018 specifying payment terms and other conditions.

2.1. The Operational Creditor paid total amount Rs.3,65,42,987 from 23.01.2019

to 18.02.2020 towards execution of different works. It is a case of Operational Creditor that Corporate Debtor could complete work entitling it payment of Rs.60,73,500/- only, thus a sum of Rs. 3,04,72,487/- being the amount of unadjusted advance is payable by the Corporate Debtor along with interest @18% from the date of termination of the agreement.

2.2. The Operational Creditor further states that after various inspections about the quality of the performance of the Corporate Debtor, it has been noticed that there has been poor performance due to which the Operational Creditor terminated the contract vide notice dated 16.03.2020. The said notice further stated at Para 6 that " we are in the process of reconciling the damages and loss on account of inefficient work for which we reserve the right to initiate separate appropriation action against your firm " and at Para 9 "Please confirm the receipt of this letter as termination of our contract and the closing of our account. If you have any questions you can reach us to our director Shri. Siddharth Khanna"

2.3. The Operational Creditor has filed inspection report dated 21.01.2020 counting on deficiencies in the work of Corporate Debtor

2.4. The Corporate Debtor through its reply dated 27.03.2020 to the said notice has denied each and every allegation made by the Operational Creditor which are stated as follows:

a) The Façade Works Contract dt. 11.1.2019, does not contain any termination clause. Therefore, you are not entitled to terminate the contract. It was agreed that since the project involves heavy expenditure to be incurred from our end, and it also requires continuous work flow, it was agreed that the contract would not be terminated and. therefore, there was no termination clause inserted in the contract. Therefore, prima facie you are not entitled to terminate the contract.

b) We also have to state that substantial work. i.e. more than 50% of the work has been completed and at this stage we have substantial interest in the project and as such you are not entitled to terminate the contract. Further, you are aware that all our materials and articles are lying at the site and as such the question of terminating the contract would not arise. It is settled law that a party who puts in substantial investment and further has completed substantial work, his contract cannot be terminated:

c) No opportunity to show cause has been given prior to the Issuance of the termination notice. It is a well settled principle of natural justice that in any contract between the parties, an opportunity to show cause ought to be given and opportunity to explain the allegations levelled must be given. In the absence of the same, the termination is deemed to be illegal and bad in law.

d) The allegations are not corroborated or substantiated. On a bare reading of the allegations, it is clear that you have not given the documents on which you rely in support of your allegations as mentioned in paras 4 (a) & (b) of the notice under reply. It is also an accepted proposition of law and natural justice that in

case there is any allegation of wrong doing or breach under the contract, the allegations along with documents/evidence on which the party relies are also to be furnished to the other party. You are immediately and forthwith requested to give all the documents, evidences and reports on which you rely in support of your allegations in paras 4 (a) & (b) of the notice to state that there has been delay in our work and that the quality of materials provided by us are not up to the mark. You are requested to give documentary proof to show whether you have given us an opportunity to show cause any alleged breach.

e) The act of termination is malafide. You are hereby called upon to explain the urgency in purportedly terminating the Façade Works Contract on 16.3.2020. There have been Government directives in respect of non-conduct of business. You are requested to explain the urgency why despite Government directives you have issued the notice on 16.3.2020.

2.5. The Operational Creditor through letter dated 29.09.2020 and 15.10.2020 replied to the above-mentioned letter and reiterated the various facts and put to the Corporate Debtor that the total quotation was Rs. 8,50,13,000/- ; against the said amount for Tower S an amount of Rs. 3,65,45,987/- was paid; and only 7.15% work amounting to Rs. 80,73,500/- has been completed. Thus, there has been an excess amount of Rs 3,04,72,487/-being paid to the Corporate Debtor.

2.6. The Operational Creditor issued a Demand Notice under section 8 of the Insolvency and Bankruptcy Code dated 03.11.2020 demanding the payment of the undisputed debt i.e. Ra 3,04,72,487/-along with a further interest at the rate of 24% p.a. to be calculated till the date of actual payment and the said demand notice.

3. The Corporate Debtor has filed reply stating that, there is a pre-existing dispute between the parties; present petition is liable to be dismissed on the account of threshold limit; the contract dated 11.01.2019 does not contain any termination clause and the same was taken unilaterally without giving prior caution letter; the Operational Creditor has not raised any dispute regarding the defective work;

Findings

4. We have heard the Ld. Counsel(s) and perused the material available on record.

5. The Corporate Debtor has relied on the email dated 29.11.2019 alleging "on numerous other occasions requested to hold on and delay the installation of façade work as the site was not in ready and worthy condition and sought time to make the site in a ready and worthy condition for installing the façade work." However, on perusal the mail correspondence we do not find it to be correct appreciation of the contents. We find in letter dated 21.12.2019 from the Corporate Debtor to the Operational Creditor, an invoice of Rs.5,11,53,000/- is claimed to have been raised upon the Operational Creditor and after

appropriation of advance of Rs. 3,07,00,900/- received till that date, an amount of Rs. 2,04,52,100/- is shown due from the Operational Creditor. Further, vide email date 27.11.2019, the Corporate Debtor has claimed that it is entitled to receive Rs.6.6 Crores and apprised the Operational Creditor about the status of work and vide another mail on same date with subject line "façade work start a plan S Business Park @Shirawane, which was responded by Operational Creditor on the same date taking note of the update. There is no communication on the mail relating to payment, but we feel that the mail related to payment and update were sent on the same mail id it cannot be said that mail relating to payment would not have come to knowledge of Operational Creditor. We feel Operational Creditor has consciously suppressed these communications even though it forms part of Corporate Debtor's reply 27.03.2020 which is appended to the application as exhibit "D". Further, no evidence on record has been placed by the Operational Creditor to claim that the amount claimed by the Corporate Debtor vide invoice referred in letter dated 21.12.2019 was not payable or lesser amount was payable. The Operational Creditor's claim that only 7.5% work has been completed is in stark contradiction to the claim of the Corporate Debtor, which we find is evidenced from material placed by Corporate Debtor before us. Accordingly, we feel that this petition is not maintainable on ground of pre-existing dispute also as to whether the amount claimed as due is really due or not and such dispute requires determination, which we are not appropriate forum to adjudicate upon.

6. According, we find that there is sufficient material to infer a dispute as to quantum of work done by the Corporate Debtor which needs adjudication. Further, the operational creditor has not come with clean hands and has suppressed material evidence(s) which substantiates that an invoice for services already rendered by the Corporate Debtor was in knowledge of the Operational Creditor. Hence, we feel that the present petition is not maintainable on ground of pre-existing dispute as well as for suppression of relevant facts by the Operational Creditor.

7. In view of the above, we feel that this Petition deserve to be dismissed.

ORDER

8. The petition bearing CP(IB) 365/MB-IV/2021 filed by VISHWA GREEN REALTORS PRIVATE LIMITED ("the Operational Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against SUHEM FACADES PRIVATE LIMITED ("the Corporate Debtor"), is Dismissed.

9. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.