

IBC DOSSIER

Bulletin on Landmark Judgments under IBC, 2016



M/s Consolidated Construction Consortium Limited VS. M/s Hitro Energy Solutions Private Limited

Brief Facts

The genesis of the appeal arises from a project which was being executed by the appellant with Chennai Metro Rail Limited, during which the latter placed an order for supply of light fittings. In turn, the appellant placed orders with the Proprietary Concern, which was the supplier of Thorn Lighting India Private Limited, through three purchase orders dated 24th June 2013. It was noted in these purchase orders that the delivery of the light fittings would strictly be in accordance with the schedule provided by the appellant.

The Adjudicating Authority held that the Respondent's Memorandum of Association, proved that it took over a proprietary concern, Hitro Energy Solutions, and that the proprietary concern owed the Appellant an outstanding operational debt. Further, the AA declared a moratorium under Section 14 of the IBC vide its order, upon initiation of CIRP.

The NCLAT set aside the order of the Adjudicating Authority and dismissed the application of the Appellant filed under Section 9 of the IBC and released the respondent from the ongoing CIRP. Further, in support of its conclusions, the NCLAT held that: firstly, the Appellant was a 'purchaser', and thus did not come under the definition of 'Operational Creditor' under the IBC since it did not supply any goods or services to the Proprietary Concern/respondent; secondly, there was nothing on record to suggest that the Respondent has taken over the proprietary concern and thirdly, the appellant cannot move an application under Sections 7 or 9 of the IBC since all purchase orders were issued on 24th June 2013 and cheques were issued on advance basis.

Decision

The Supreme Court regarding the first question stated that in the present case, the phrase “in respect of” in Section 5(21) of IBC must be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the Corporate Debtor, which ultimately lead to an operational debt and the appellant clearly sought an operational service from the proprietary concern.

Further, when the contract was terminated the proprietary concern nevertheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remained unpaid.

Hence, the appellant is an operational creditor under Section 5(20) of the IBC. Regarding the second question, the Apex Court stated that the dispute resolved around the MOA of the Respondent whereby the MOA stated that one of its main object is to take over the proprietary concern.

However, the respondent produced a resolution passed by its Board of Directors, purportedly resolving not to take over the Proprietary Concern. In this regard the respondent provided no proof that the procedure prescribed in Companies Act 2013 was followed to amend the MOA. Hence the MOA of the respondent remained unchanged and conclusive proof that the respondent took over the Proprietary Concern and was liable to re-pay the debt to the appellant.

Regarding the third question, the Supreme Court held that the application under Section 9 of the IBC was not barred by limitation as a letter was addressed by the Appellant to the proprietary concern on 27th February 2017, demanding the payment and the same was replied by the proprietary concern on 2nd March 2017, finally refusing to make payment to the Appellant.

The appeal is allowed by setting aside the impugned judgment and order of the NCLAT dated 12th December 2019. Since the CIRP in respect of the respondent is ongoing due to this Court’s order dated 18th November 2020, no further directions are required.

Link of the Order

<https://ibbi.gov.in/uploads/order/3e23af91d69b62d6b42c80625a736382.pdf>

