



THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

COURT- III

IB-1941/ND/2019

U/S. 9 of the IBC, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule, 2016.

IN THE MATTER OF:

M/s. AHLUWALIA CONTRACTS (INDIA) LIMITED

Registered Office: -

A-177, Okhla Industrial Area,

Phase – I, New Delhi - 110020

.....Operational Creditor

Versus

M/s. JASMINE BUILDMART PRIVATE LIMITED

Registered Office: -

406, 4th Floor, Elegance Tower 8,

Jasola District, New Delhi – 110025

..... Corporate Debtor

Delivered on: - 05.03.2024

Coram:

Shri Bachu Venkat Balaram Das

Hon'ble Member (Judicial)

Shri Atul Chaturvedi

Hon'ble Member (Technical)

**Appearances:**

For Applicant : Mr. Anil Airi, Sr. Advocate

For Respondent : Mrs. Sheena Taqui and Mrs. Bina Gupta, Advocates

O R D E R**Per: ATUL CHATURVEDI, MEMBER (TECHNICAL)**

1. The present application has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditor, M/s. Ahluwalia Contracts (India) Limited is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s. Jasmin Buildmart Private Limited, to declare moratorium and to appoint Interim Resolution Professional (hereinafter referred as 'IRP'). The Corporate debtor is registered with ROC, NCT of Delhi & Haryana and is therefore, within the jurisdiction of this Adjudicating Authority.

Brief Background of the case

i This Adjudicating Authority vide Order dated 12.01.2023 dismissed the present Section 9 Application bearing IB – 1941(ND)/2019 on the ground that:

“It can be concluded that mere breach of terms of any agreement including a settlement agreement by a party, whereby some payment is due cannot take colour of an operational debt arising out of supply of any goods or services as envisaged under Section 5(20) of the Code, 2016.”



ii. Thereafter, the Operational Creditor preferred an appeal bearing Company Appeal (Insolvency) No. 345 of 2023 before the Hon'ble National Company Law Appellate Tribunal (NCLAT). The Hon'ble NCLAT vide Order dated 01.09.2023 set aside the Order dated 12.01.2023 passed by this Adjudicating Authority in view of the findings and held that: -

“The Adjudicating Authority has taken too technical view of the matter in holding that breach of settlement does not entitle the Operational Creditor to file Section 9 Application whereas Section 9 Application was filed on the basis of debt which became due on account of work awarded to the Appellant by the Corporate Debtor. We are of the view that filing of claim in the CIRP of ‘VentaRealtech Pvt. Ltd.’ has no effect on maintainability of Section 9 Application. We, thus, are of the view that the Adjudicating Authority committed an error in rejecting the Application of the Appellant on the ground that there is no Operational Debt.”

iii. Hence the present Section 9 Application is revived and remanded before this Adjudicating Authority.

Pleadings of Operational Creditor

2. The Operational Creditor/Petitioner has averred as follows: -

a) Briefly stated, the facts of the present application as submitted by the Operational Creditor are that, the Operational Creditor had accepted a contract awarded by the Corporate Debtor i.e., M/s. Jasmine Buildmart Private Limited for construction of Krrish Provence Estate (Structure and Finishing Work) at Sector 3 Gwal Pahari, Gurgaon, Haryana. The said contract consisted of two independent components, first being the structure work and the second one being the finishing work. In pursuance of the work done under both structure and finishing work, the Operational Creditor raised timely bills which were duly certified by the Corporate Debtor. The 49th and 50th RA bill for the work done by ACIL towards the finishing work were accordingly raised and were duly certified by the Corporate Debtor.



b) Despite giving numerous reminders, the Corporate Debtor failed to make the due payment and having no recourse, the Operational Creditor issued first demand notice dated 31.07.2017 under Section – 8 of IBC 2016. During the course of the proceedings, parties entered into a ‘Settlement Deed’ for a sum of Rs. 19,81,00,000/- whereby securities of such amount was offered to the Operational Creditor. On 18.12.2017, matter pending before this Tribunal was dismissed as compromised between the parties based upon the Settlement Deed dated 16.12.2017.

c) Subsequently, the Corporate Debtor failed to adhere to the terms and condition of the Settlement Deed. On 28.05.2019, the Operational Creditor issued second Demand Notice under Section – 8 of IBC 2016, for the demand of Rs. 19,81,00,000/-. The Corporate Debtor replied to the Demand Notice and denied its liability to pay the alleged due amount as there were various defects in the work done by the Operational Creditor.

Pleadings of Corporate Debtor

3. In response to the contentions raised by the Operational Creditor/ Applicant. Corporate Debtor has raised various counter contentions which are as follows: -

a) It is submitted that Corporate Debtor is not liable to pay any amount as the amount claimed in the present Application is arising out of a Settlement Agreement dated 16.12.2017 and the Operational Creditor had already filed a claim of Rs.19,81,00,000/- before the Insolvency Resolution Professional (IRP) in the CIRP of M/s. Venta Realtech Private Limited and the same has already been admitted by the IRP.



b) It is submitted that, the Corporate Debtor sent reply dated 07.06.2019 to the demand notice sent by the Operational Creditor on 28.05.2019, the Corporate Debtor had pointed out that on account of shoddy quality of work done by the Operational Creditor, the Corporate Debtor had to invest additional funds to the tune of Rs. 13,00,00,000/- for rectification work. Moreover, the Corporate Debtor had to pay an extra settlement compensation over Rs. 25,00,00,000/- to more than 50 Home Buyers who had approached the National Consumer Disputes Redressal Commissioner (NCDRC) on account of delay in completion of work by the Operational Creditor and the Corporate Debtor had incurred huge losses. The Operational Creditor abandoned the project work after submitting the 49th and 50th with respect to the structural work.

c) There are pre-existing disputes between the parties, which the Operational Creditor seeks to side-step by filing the instant Application under section – 9 of the code and has relied upon Clause – 7 of the Settlement Agreement to prove the existence of dispute.

Our findings and decision

4. We have heard the arguments advanced by the Ld. Counsel appearing for the Operational Creditor as well as for the Corporate Debtor and also perused the records.

5. The Operational Creditor's claim is based on the facts that, the Applicant had accepted a contract awarded by the Corporate Debtor. The Operational Creditor raised timely bills which were duly certified by the Corporate Debtor. As per the demands and requirements of the Corporate Debtor work, the services were provided by the Operational Creditor to the Corporate Debtor



and tax invoices were raised by the Operational Creditor, which were duly served on the Corporate Debtor and thus, the contract came into existence. It is stated by the Applicant that, since the Corporate Debtor did not make the due payment of the Operational Debt, the Applicant had issued Demand Notice dated 28.05.2019 under section – 8 of IBC, 2016 and served at the registered office of the Corporate Debtor.

6. In essence, the first contention raised by the Corporate Debtor is that the Applicant has already filed its claim before the Insolvency Resolution Professional (IRP) in the CIRP of M/s. Venta Realtech Private Limited and the same has already been admitted by the IRP. It is vehemently argued by the Ld. Counsel appearing on the behalf of Corporate Debtor that there is a duplicity of claim as on the first part the Applicant has already filed its claim before IRP and on the second part the Applicant has simultaneously filed this Application to recover its claim. While perusing the records, we find that the claim of the Applicant in the present Application arises out of the work order executed in March, 2011 and the Corporate Debtor had failed to pay its dues of bills which are admitted by the Corporate Debtor and committed default in payments of the bills. Further, the pleading on record are silent under which head the Applicant had filed its claim before IRP as the Corporate Debtor has not placed on record adequate evidence on record to support its contention. We have no hesitation to hold that failure on the part of the Corporate Debtor to pay dues of the Applicant would be considered as Default. Further, it would not be prudent at this stage to dismiss the instant petition on the first contention raised by the Corporate Debtor on the issue of duplicity of claim. Further it is noted that, same observations were given by Hon'ble NCLAT in *Company Appeal (Insolvency) No. 345 of 2023 M/s. Ahluwalia Contracts Limited vs. M/s. Jasmine Buildmart Private Limited*, the relevant paragraph is reproduced below for reference: -

“18. We are of the view that filing of claim in the CIRP of ‘Venta Realtech Pvt. Ltd.’ has no effect on maintainability of Section 9 Application. In the



CIRP what amount Operational Creditor i.e. Appellant is entitled or receives are different issues, any amount received by the Appellant in CIRP of 'VentaRealtech Pvt. Ltd.' may be adjusted but that itself cannot be a ground to not proceed with Section 9 Application filed by the Operational Creditor. We, thus, are of the view that the Adjudicating Authority committed error in rejecting the Application of the Appellant on the ground that there is no operational debt”.

7. The second contention raised by the Corporate Debtor relates to the fact that, the Applicant has left the work in between and the Corporate Debtor has to arrange a different contractor to get the pending work done. It is the case of the Applicant that it has abandoned the work after submission of the 49th and 50th RA bill with respect to structure and 7th RA bill with respect to finishing work. The Applicant conducted all works as agreed upon in the work order executed in March, 2011 and subsequently raised certified RA bills but the Corporate Debtor defaulted qua the payments and obligation because of which the Applicant has abandoned the work without completing it. We found force in the submission made by the Applicant because under any circumstances the Applicant cannot be expected to continue working without getting paid. Further, the Applicant before leaving the work in between has sent various reminders to the Corporate Debtor for the due payments of RA bills which are still not paid by the Corporate Debtor.

8. The Ld. Counsel appearing for the Operational Creditor submitted that the Corporate Debtor has categorically failed to produce even a single document to substantiate that there was any 'Pre-existing Dispute'. We have perused the record available on record, and we are of the considered view that the Corporate Debtor has failed to prove the existence of a dispute before the section – 8 notice as the Corporate Debtor has only raised the issue of a pre-existing Dispute' for the first time in the reply to Section – 8 notice. The argument made by the Corporate Debtor that there was a pre-existing



Dispute' between the parties is nothing but a feeble argument, as no document is placed on record to prove that there was any dispute before the issuance of Section 8 notice.

9. It is pertinent at this stage to refer the decision of Hon'ble Supreme Court given in ***M/S Innovative Industries Ltd Vs ICICI Bank Civil Appeal 8337 of 2017***. The relevant extract is reproduced below for reference: -

"The Corporate debtor must bring to the notice of the creditor the existence of a dispute or the record of the pendency of the suit which is pre-existing i.e. before such notice or invoice was received by the corporate debtor."

Also Apex Court in ***Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd. SC 4532/2017*** held that: -

"What is important is that the dispute must be pre-Existing under section 8 and 9 i.e., it must be before the receipt of the notice." In the present case the Corporate Debtor never raised any dispute, before receiving demand notice from Operational Creditor.

10. In the light of findings of the present petition, when we consider the submissions of the Operational Creditor for the claims towards the goods supplied to the Corporate debtor it appears to us that the same shall also fall within the ambit of the definition of operational debt and the applicant will qualify as an Operational Creditor in terms of section 5(20) of the Code. The averments of the applicant stating that there is a 'debt' which the corporate debtor was liable to pay but failed to do so have not been rebutted by the Corporate Debtor by placing suitable evidence. Therefore, this Adjudicating Authority admit the Corporate Debtor into CIRP under the provisions of the Code.



11. The Operational Creditor has not proposed the name of the IRP, therefore this Adjudicating Authority hereby appoints Mr. Devvart Rana having Regn. No. IBBI/IPA-002/IP-N00680/2018-19/12025 as IRP from the IBBI list. Consent and valid AoA of the IRP must be filed within three days of passing this order. The said IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

12. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely:

- a. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b. Transferring, encumbering, alienating or disposing of by the Corporate Debtor's assets or any legal right or beneficial interest therein;
- c. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. The explanation below section - 14 (1) also stipulates "that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time



being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period”.

13. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. However, The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

14. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.

15. The Operational Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor’s assets etc., with respect to said project and make compliance with this order as per the provisions of IBC, 2016.

16. The Operational Creditor is directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect. Further, Operational creditor shall provide initial finance to the tune of Rs. 2,00,000/- to the aforesaid Interim Resolution Professional within a weeks’ time from the date of this order as advance towards initial cost and expenses of CIRP process. The said advance of Rs. 2,00,000/- shall be adjustable as CIRP cost by the Committee of Creditors immediately after its constitution by the IRP.



17. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.

18. The application bearing IB – 1941/(ND)/2019 is **admitted**.

SD/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

SD/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**