



SL. No.3

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 20.11.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/328/9/2022
NAME OF THE COMPANY	KMC Constructions Ltd
NAME OF THE PETITIONER(S)	Devi Constructions Co
NAME OF THE RESPONDENT(S)	KMC Constructions Ltd
UNDER SECTION	9 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, the Company Petition is allowed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II, HYDERABAD**

C.P.(IB) No.328/9/HDB/2022

*Under Rule 6 of the Insolvency and Bankruptcy Code, 2016
(Application to Adjudicating Authority) Rules, 2016*

In the matter of :

M/s.Devi Constructions Company
through its authorized Partner
Mr.Abhijeet Yadav,
Plot No.115-120, Anand Nagar,
Sirsa Road, Jaipur,
Rajasthan – 302 012.

...Applicant/Operational Creditor

A n d

M/s.KMC Constructions Limited,
Door No.1-80/40/SP/58-65,
Shilpa Homes,
Layout Gachibowli,
Hyderabad – 500 032,
Telangana.

...Respondent/Corporate Debtor

Date of Order: 20.11.2024

Coram:

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)
Sri Sanjay Puri, Hon'ble Member (Technical)

Counsel/Parties present:

For the Applicant : Mr.Prabhansh Sharma, Advocate
For the Respondent : Mr.P.Sreeshylam, Advocate

P e r : Rajeev Bhardwaj, Member (Judicial)

O R D E R

1. This Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 is filed by M/s.Devi Constructions Company (**Applicant/Operational Creditor**) for initiating Corporate Insolvency Resolution



Process (**CIRP**) against M/s.KMC Constructions Limited (Respondent/Corporate Debtor) for not paying the debt amounting to Rs.6,23,75,441/-.

2. The case of the Applicant is that the Respondent issued work orders, i.e., KMC/WO/1718/120 dated 01.06.2017 and KM/15-16/WO/107 dated 07.11.2016 for completion of certain works on the Gurgaon-Kotputli-Jaipur section of NH-8. From time to time, work orders along with the interim payment certificates **Annexure 5** were issued. The ledger account of the Respondent in the books of the Applicant w.e.f., 01.04.2017 to 01.08.2022 is **Annexure 7**. The Respondent is also liable to pay the retention money which is duly reflected in the ledger account, **Annexure 7**. The bank statement **Annexure 8** also confirm that no payment was received from the Respondent after the date of default.
3. When the payment was not made by the Respondent, default has occurred from 23.08.2017 till 04.04.2018. Therefore, it is claimed that the Respondent is liable to pay amount of Rs.6,23,75,441/- which includes invoice value of Rs.2,86,16,396/- and interest amounting to Rs.2,77,94,377/- @ 18 per cent.
4. The case of the Respondent is of denial that any due is pending to the Applicant, though issuance of the work orders have not been disputed. The Respondent has relied upon the documents at pages 54, 55, 57,58, 60, 61, 63, 64, 66 & 67 of the Petition to say that the amount claimed is baseless. Further, document No.2 of the counter has been referred, which is the extract of the bank payments to the Applicant, to show that the entire payment has been made to the Applicant. The Respondent



has also referred to non-submission of the performance guarantee and receipts showing the payments of the royalties to stress that despite the Applicant not adhering to these conditions, payments had been made.

5. The Respondent has also taken up the issue of limitation by submitting that this petition has been filed after the expiry of the limitation period by referring to the decisions of the Hon'ble Supreme Court in *Suo Moto Writ Petition (Civil) No.3 of 2020, (2022)3 SCC 117 and B.K.Educational Services Private Limited vs Parag Gupta & Associates (2019)11 SCC 633*. It is also submitted that there is pre-existing dispute between the parties because the Applicant is not able to prove that the amount claimed is due from the Respondent. Besides, the Respondent has taken the point that being a solvent company, the Respondent cannot be put in CIRP.
6. We have heard the learned counsels for both the parties and have gone through the entire records including written submissions filed by the parties.
7. Indisputably, the works orders, KMC/WO/1718/120 dated 01.06.2017 and KM/15-16/WO/107 dated 07.11.2016 **Annexure 4** was issued in favour of the Respondent by the Applicant. In pursuance thereof, work order-cum-interim payment certificates **Annexure 5** were issued from time to time. The last such work order was issued on 31.03.2018. There are entries of retention amount in the ledger account **Annexures 6 & 7** of the Respondent. The Applicant has also relied upon the bank account statement **Annexure 8** of the Respondent, showing as what payments have been received by the Applicant.



8. On the basis of the accounts maintained by the Applicant, the total claim due from the Respondent has been summarized **Annexure 3**. This amount includes principal amount of Rs.3,45,81,063/- and interest of Rs.2,77,94,377/-. As per the statutory requirements, the Applicant has issued demand notice **Annexure 9** under Section 8 of the IBC which give details of the demand duly supported by documents. However, the Respondent has not replied to this notice.
9. In view of the factual background of the case, the question arises about the due debt and further the limitation period to file the present petition.
10. In order to justify the claim made against the Respondent, the Applicant has placed reliance on the work orders, ledger account, bank statements and notice issued under Section 8 of the IBC. To the contrary, the Respondent has tried to make out a case from the documents of the Applicant and further document No.2 of the counter, which is the extract of the details of bank payments made by the Respondent, but this is incomplete. The statements of accounts referred by the Applicant have been prepared in the manner prescribed under the Bankers Books Evidence Act, 1891, while the Respondent has only relied upon relevant entries of bank statements which have no relevance until and unless the bank statements are relied upon. Therefore, the documents referred by the Applicant are more reliable and convincing, as compared to the random entries of the bank statement referred by the Respondent. Even otherwise, from the perusal of the documents, it is crystal clear that the summarized statement **Annexure 3** has been



prepared on the basis of the work orders/interim payment certificates and ledger account.

11. Coming to the debt amount, it is proved from the documents relied upon by the Applicant that the principal amount due from the Respondent is what has been shown under the heading ‘Computation of Principal and Interest Calculation Statement, **Annexure 3**. The Respondent has picked up a part of the bank statement without taking note of the actual work orders and the amount paid to the Applicant. They have also not produced their bank statements as well as books of accounts to support their case. Therefore, the principal amount comes to Rs.3,45,81,063/-.
12. The Applicant also claimed interest of Rs.2,77,94,377/- @18 per cent per annum. There is no written agreement between both the parties for payment of the interest. However, the Applicant has calculated the interest in view of the provisions under the Micro Small and Medium Enterprises Development Act, 2006 (**MSMDE Act**).
13. The term ‘financial debt’ under Section 5(8) of the IBC expressly includes interest as a part of the debt. However, the ‘operational debt’ as defined under Section 5(21) of the IBC does not specifically mention interest as part of the debt. Hon’ble NCLAT in *S.S. Polymers vs Kanodia Technoplast Ltd Company Appeal (AT) (Insolvency) No. 1227 of 2019, decided on 13.11.2019* held that interest cannot be claimed as a matter of right when there is no written agreement between the parties. In another judgement of *Rohit Motawat vs. Madhu Sharma, Proprietor Hind Chem Corporation and Ors Comp. App. (AT) (Ins) No. 1152 of 2022, decided on 03.02.2023*, it was held that



the interest amount cannot be claimed separately, when the principal amount has been paid in full by the Corporate Debtor.

14. However, the Applicant stands on a different footing because he is entitled for interest by way of statutory provisions under the MSMED Act. Sections 15, 16 and 17 of the MSMED Act govern the payment of interest on delayed payments to suppliers registered under this Act. The Applicant is a registered MSME Company as per **Annexure 1**. Under the provisions of MSMED Act, the liability to pay the interest is irrespective of written agreement between the parties. There are legal consequences if the payment is not made to the MSME Company after the expiry of 45 days of the supply. Under the Companies Act, 2013, the company must file E-form MSME 1 every half year with the RoC mentioning all the transactions in which the payment is made after 45 days. The company is also required to provide information relating to the interest amount due, interest paid under Section 16 of the MSMED Act etc. Under the MSMED Act, the interest will be 3 times of the bank rate notified by the RBI if the payment is not made within 45 days and further disclosure is to be made by the company in the financial statements as also required under the Companies Act.
15. It cannot also be said that if interest is not paid, only remedy left with MSME is to approach the Micro and Small Enterprises Facilitation Council constituted under Section 18 of the MSMED Act. If this is to be taken as the intention of the Act, the present Petition cannot be filed under Section 9 of IBC because ‘due amount’ under Section 17 of the



MSMED Act includes not only the actual amount, but also the interest.

The relevant provisions of Section 17 and 18 are reproduced below:

Section 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.

Section 18 - Reference to Micro and Small Enterprises Facilitation Council

(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 Enterprises Facilitation Council.

16. Therefore, it is clear that the remedy provided under Section 18 of the MSMED Act is different from the remedy available under Section 9 of the IBC. The MSMED Act provides incentive to the MSME units so that small industrial units can grow and help in the nation building. The Hon'ble Delhi High Court in *Indian Highways Management Company Limited vs Sowil Limited 2021 SCC online Delhi 5523* has considered Sections 15, 16 and 17 of the MSMED Act by holding that these provisions are different from Section 18 of the MSMED Act. The judgement of the Single Bench was upheld by the Divisional Bench of Hon'ble High Court of Delhi in *Indian Highways Management Company Limited vs Sowil Limited 2022, SCC online Delhi 4078* and the matter is pending before the Hon'ble Supreme Court in *SLP(C) No.14233 of 2022*.
17. When we see the entire gamut of controversy, it is to be noted that MSMED Act and IBC are special statutes and the IBC is latter in point of time. As the IBC was enacted after the MSMED Act and Section 9



of the IBC gives overriding effect vis-à-vis other statutes, we are of the opinion that in operational debt, interest part is not intentionally included like in case of 'financial debt' by the Parliament. Therefore, the interest can't be claimed for determining the threshold limit.

18. The second contention raised by the Respondent is that there existed bonafide dispute between the parties. It is to be noted that whenever there was existence of a real dispute, the IBC provisions cannot be invoked. [*Transmission Corporation of Andhra Pradesh Ltd. versus Equipment Conductors and Cables Ltd. (2019) 12 SCC 697*]. There must not only be a dispute before the issuance of Demand Notice, but it should also be genuine one. The celebrated case on the subject is the judgment of the Hon'ble Supreme Court in *Mobilox Innovations Private Limited versus Kirusa Software Private Limited (2018) 1 SCC 35* where after going through various judgments, it was laid down in para 51:

51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed.



The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

(own emphasis)

19. Further, the Hon'ble Supreme Court in ***M/s.Kay Bouvet Engineering Ltd. versus Overseas Infrastructure Alliance (India) Pvt. Ltd. (2021)10 SCC 483*** reiterated and explained the principles laid down in ***Mobilox case (supra)*** in the following words:

It is thus clear that once the "Operational Creditor" has filed an application which is otherwise complete, the adjudicating authority has to reject the application under Section 9(5)(ii)(d) of IBC, if a notice has been received by "Operational Creditor" or if there is a record of dispute in the information utility. What is required is that the notice by the "Corporate Debtor" must bring to the notice of "Operational Creditor" the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required to see at this stage is, whether there is a plausible contention which requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is a mere bluster. It has been held that however, at this stage, the Court is not required to be satisfied as to whether the defence is likely to succeed or not. The Court also cannot go into the merits of the dispute except to the extent indicated hereinabove. It has been held that so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application.

20. The Hon'ble NCLAT in ***Aalborg CSP A/S versus Solar Atria Cleantech Private Limited [2020] ibclaw.in 96 NCLAT*** after relying upon the decisions in ***Mobilox Innovations Private Limited*** supra has held:



It is clear from the Judgement of the Hon'ble Supreme Court that it is duty of the Adjudicating Authority to see whether there is plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. We are not required to be satisfied that the defence would succeed or examine the merits of the dispute. If the dispute truly exists and is not spurious, hypothetical or illusory, the Application under Section 9 would require to be rejected. Thus, it is necessary to see if the dispute truly exists in fact. On this basis, it would be appropriate to now see if the Respondent is able to show that dispute truly exists.

(Own emphasis)

21. Within the parameters of the decision in *M/s.Mobilox* case supra, the Respondent is required to show that there was pre-existing dispute between the parties. However, the Respondent never raised such dispute and it even did not respond to the demand notice **Annexure 9**. The Applicant has also sent various e-mails **Annexure 10** regarding the arrears, but the Respondent hardly contested that the Corporate Debtor is not liable to pay the amount. The argument of the Respondent is flimsy, baseless, spurious, hypothetical and illusory.
22. On the question of limitation, the petition is within limitation period if we exclude the period from 15.03.2020 to 28.02.2022 in light of the Covid-19 pandemic as per the judgement of the Hon'ble Apex Court in *Suo Moto Writ Petition No. 03 of 2022, reported in (2022)3 SCC 117*. It will be cogent to reproduce the relevant portions of the said judgment below:



"5.1. The order dated 23-3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10] is restored and in continuation of the subsequent orders dated 8-3-2021 [Cognizance for Extension of Limitation, In re, (2021) 5 SCC 452], 27-4-2021 [Cognizance for Extension of Limitation, In re (2021) 17 SCC 231], and 23-9-2021 [Cognizance for Extension of Limitation, In re, 2021 SCC Online SC 947] , it is directed that the period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

5.2. Consequently, the balance period of limitation remaining as on 3-10-2021, if any, shall become available with effect from 1-3-2022.

5.3. In cases where the limitation would have expired during the period between 15-3-2020 till 28-2-2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 1-3-2022. In the event the actual balance period of limitation remaining, with effect from 1-3-2022 is greater than 90 days, that longer period shall apply.

5.4. It is further clarified that the period from 15-3-2020 till 28-2-2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."

23. The Corporate Debtor has only quoted Para No.5.3 in the written arguments, but the entire judgment is to be read in its entirety and thus it is crystal clear that period from 15.03.2020 to 28.02.2022 is to be excluded for determining the limitation period and accordingly the present Petition is within limitation period.



24. Another inconsequential issue raised by the Respondent is that Mr.Abhijeet Yadav is not authorised to file the petition, but being the partner of the Applicant's firm, he is competent to do so. The Respondent has also not objected to his status in emails sent in such capacity.
25. In view of our aforesaid discussions, we come to conclusion that the Respondent has not paid the debt which is above the threshold limit and accordingly this CP (IB) No.328/9/HDB/2022 is allowed.
26. The Operational Creditor has failed to name anyone as Interim Resolution Professional and has requested the Tribunal to appoint one for the Corporate Insolvency Resolution Process. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional for the period from 1st January, 2021 to 30th June, 2021 in compliance with Section 16(3)(a) of the Code in order to avoid delay. Accordingly, this Tribunal appoints Mr.Narender Reddy Banala having Registration No. IBBI/IPA-003/ICAI-N-00376/2021-2022/13910 valid upto 07.01.2025, Mobile No.9177366615 and e-mail: bnreddy.acs@gmail.com as Interim Resolution Professional. The aforesaid interim resolution professional has no disciplinary proceedings pending against him. He shall file his written communication and all relevant papers immediately before Registrar of this Tribunal but not later than two days.



27. Hence, the the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with the following directions: -

- i. The Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor;
- ii. Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances 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, concessions, clearances or a similar grant or right during the moratorium period.
- iii. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- iv. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.



- v. That the order of moratorium shall have effect from the date of this Order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- vi. The Petitioner is directed to pay a sum of Rs.2,00,000/- (Rupees Two Lakhs Only) to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.
- vii. That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.
- viii. The Registry to send a copy of this order to the Registrar of Companies, Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.

Sd/-
SANJAY PURI
MEMBER (TECHNICAL)

Vinod

Sd/-
RAJEEV BHARDWAJ
MEMBER (JUDICIAL)