

**THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
Court VI**

Company Petition No. (IB)-915 (ND)/2020

In the matter of:

Carol Infrastructure Private Limited

..... Operational Creditor

AND

Dhanversha Builder Private Limited

..... Corporate Debtor

Section 9 of Insolvency and Bankruptcy Code, 2016

Judgment delivered on: 01.07.2021

Coram:

SHRI P.S.N. PRASAD

HON'BLE MEMBER (JUDICIAL)

SHRI NARENDER KUMAR BHOLA

HON'BLE MEMBER (TECHNICAL)

Present:

For the Applicant: Ms. Minakshi Jyoti, Advocate.

For the Respondent: Mr. Alok Dhir, Advocate.



ORDER

Per: P.S.N. PRASAD, MEMBER (J)

- 1) Carol Infrastructure Pvt. Ltd., claiming as the operational creditor has filed this application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 (for brevity 'the Rules') for initiation of Corporate Insolvency Resolution Process in respect of Respondent Company namely, Dhanversha Builders Private Limited claimed to be the Corporate Debtor.
- 2) The Respondent, Dhanversha Builder Private Limited against whom initiation of Corporate Insolvency Resolution Process has been prayed for, is a company incorporated on 22.09.2010 under the provisions of the Companies Act, 1956 having its registered office at office 1733, Bholanath Nagar, Shahdara, Delhi-110032. Since the registered office of the respondent Corporate Debtor is in Delhi, this Tribunal having territorial jurisdiction over the place, is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent Corporate Debtor under sub-section (1) of Section 60 of the Code.
- 3) The Operational creditor has submitted that the Corporate Debtor approached the Operational Creditor, pursuant to the several rounds of



negotiations and deliberations, Operational Creditor sold to Corporate Debtor vide Sale Deed dated 29.09.2011 land measuring 0.3100 hectare or 3100 Sq. mtr. (herein after referred to as the said "Land") falling in Khasra No. 548 located on undivided impartible total land of the project namely, River Heights situated at Village Noor Nagar, Raj Nagar Extension, Ghaziabad, Uttar Pradesh (herein after referred to as the said "Project") proposed to be developed by Operational Creditor.

- 4) That as per the sanction plan of the said Project, on the said Land, Tower No 18 of the said Project was to be constructed. Therefore, Operational Creditor and Corporate Debtor had also entered into a Performance Agreement, under which the Corporate Debtor had agreed to construct the Tower No. 18 of the said Project in accordance with the terms and conditions set out under the Performance Agreement.
- 5) That under the Performance Agreement, it was specifically agreed between the parties, that all the set up for the facilities within the said Project which shall be used by all the residents/allottees of the Project including residents of Tower 18 shall be set by Operational Creditor and the proportionate cost for such set up i.e., cost of the land on which such facility/equipment/machinery will be set up and other setting up cost; shall be shared in proportion by the Corporate Debtor, in accordance with the terms of the Performance Agreement. Clause 11 in this regard is



reproduced herein below. A copy of the Performance Agreement dated 29.09.2011 is annexed herewith as Annexure P4.

"That the Second Party and/or their allottees/flat buyers/ subsequent transferee/RWA shall also pay to the First Party (or its nominee agency as appointed by the First Party) such charges as may be determined by the First Party for maintaining various services/facilities in the said project such as street lighting, area security, maintenance of external sewer, STP and bulk water supply and distribution garbage disposal and scavenging of streets and public utility places and such like services and cost towards administrative setup to run the services and purchase of equipment and machinery required to provide these services and depreciation thereof until the same are handed over to the government or local body for maintenance. It shall be mandatory for the Second Party to incorporate this clause in the allotment letter, agreement to sell, flat buyer agreement and sale deed etc. to be' executed by the Second Party in favour of their allottees, flat buyers, subsequent transferee and the same shall be binding on them jointly and severally.

- 6) The Operational Creditor has in accordance with the terms and conditions under the Performance Agreement provided to allottees of Corporate Debtor in Tower No. 18, facilities for electricity connection line brought till the boundary Line of the said Project without which connection of



electricity in Tower No. 18 was not possible, arrangement and set up for power back up facility, set up for supplying water in underground tank of Tower No. 18. Further the Operational Creditor has also set up the STP Plant in the said Project for the benefits of all including the allottees of the Corporate Debtor. The other facilities which have been set up in the said Project depending on the overall requirement of the project are DG sets rooms, Dustbin/garbage collection area, firefighting provisions for the said Project in all. For all such services provided, the Corporate Debtor is liable to pay proportionally to the Operational Creditor in accordance with the agreed terms under the Performance Agreement. The Corporate Debtor however having agreed to pay unequivocally under the Performance Agreement the cost and charges for such set up, have not made the payment of same to the Operational Creditor,

- 7) As on date an amount of Rs. 2,68,50,551.32/- have become due and payable by the Corporate Debtor to the Operational Creditor, under various heads of the Performance Agreement for the facilities, equipments and set ups provided by the Operational Creditor in the said Project.
- 8) The operational-creditor on 25.02.2020 sent a demand Notice to the Corporate-debtor to pay outstanding debt. The Corporate Debtor has replied the demand notice and objected the claim of applicant.
- 9) Respondent company has filed its reply to the petition mainly with the contention that the claim of applicant does not fall within the ambit of



operational debt and thus no default has been committed by Corporate Debtor. It is stated that all such services for said Tower 18 have been provided by other parties to Corporate Debtor.

10) It is alleged by the Corporate Debtor that all the payments as per the performance agreement has been made to applicant in accordance with the said sale deed. It is claimed that there was no obligation of Corporate Debtor to pay any charges to applicant, in fact the Corporate Debtor itself has executed the said work through different contractors.

11) One of the main objections of the Corporate Debtor is that no 'debt' and 'default' exist in the claim of applicant. The applicant has not raised any invoices, the attached invoices were issued by a third party and hence there is no default committed by Corporate Debtor in making any due and payable payment. It is also stated that the invoices and other documents are dated post to the date of completion certificate, so the alleged work is not done for Tower-18.

12) The Corporate Debtor has relied upon various other clauses of the same contract to substantiate that the claim of applicant is not an operational debt. However, the respondent has failed to substantiate any dispute over quality and quantity of said maintenance services provided by the operational creditor and that the said performance agreement is not binding over the parties.



- 13) The petitioner in the rejoinder submitted that there was no obligation on the applicant to issue invoice as the obligation of Corporate Debtor to pay arises from terms of contract between the parties. Secondly, the dispute again is not the invoice has been issued rightly or not; because the error to raise invoice being not in compliance with any existing rules, does not vitiate the fact that there is an operational debt that is in default without there any pre-existing dispute raised in respect of that debt. It is submitted that the Tribunal is not a court and the process before the Tribunal not being a litigation, therefore the Tribunal is not to adjudicate the mandate as per which the invoice should be made but is simply required to ascertain that the amount claim in such invoice arises from the debt in default.
- 14) It is explained by applicant that invoices raised on third parties are evidence of services provide in the Project being documents in support of "Existence of Debt". The invoice has been raised by Nominated Maintenance Agency of applicant. Clause 11 specifically mentions *"its nominee/agency appointed by FIRST PARTY"*.
- 15) It is also submitted that submitted that the completion certificate by GDA was given in phased manner for the Project. Be that is it may, it is submitted that the demand raised by the applicant on the Corporate Debtor is based on the terms of the performance agreement read with sale deed and not on the date of the Completion Certificate. Irrespective of the fact when completion certificate was granted, the respondent is still liable to



pay in accordance with the terms of the agreement for the services provided by the applicant in the Project. It is not the case of the Corporate Debtor that the services for which proportionate claim has been demanded by applicant are not provided in the said Project not even there is any dispute regarding cost of such services.

- 16) It is claimed that subsequent to the receipt of Demand Notice the Corporate Debtor vide email exchanged in July, August and November 2020 in reply to email from applicant sought for details of the maintenance charges for taking action. [Emails at Annexure 11 Pg. 20-25 of Rejoinder].
- 17) Heard the parties and perused the case records.
- 18) Needless to say, that the expressions “Operational Creditor” and “Operational debt” have been defined in Section 5 (20) and 5 (21) of the Code, which are reproduced below:

“5. In this part, unless the context otherwise requires, -

.....

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”

- 19) From the definition of “operational creditor” and “operational debt”, it can be seen that the following persons can claim to be an “operational Creditor”.

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- i. The person who has claim in respect of provisions of goods (supplied) to the Corporate Debtor.*
- ii. Persons who have provided service to the Corporate Debtor, including those who are in employment.*
- iii. Central Govt., State Govt. and local authorities, who are entitled to claim debt in respect of dues arising under any law for time being in force.*

20) It is thus seen that the unpaid petitioner, who rendered services to the Corporate Debtor, comes within the purview of 'Operational creditor'.

21) The procedure in relation to the initiation of Corporate Insolvency Resolution Process by the "Operational Creditor" is delineated under Section 9 of the Code. The present application filed by operational creditor, accordingly, has to be dealt with in terms of Section 9 of the Code.

22) Sub-section (1) of Section 9 mandates filing of the petition only after expiry of the period of 10 days from the date of delivery of notice or invoice demanding payment under sub-section (1) of Section 8.

23) In the present case admittedly the demand notice in Form-3 as per Section 8 of the Code was sent on 27.08.2019. It is thus seen that before filing the present application under Section 9 of the Code, requisite notice under Section 8 was duly served on the Respondent. In response to Section 8 notice, respondent Corporate Debtor has filed its reply explaining certain clauses of the said agreement, however no pre-existing dispute regarding the services rendered by the applicant has been claimed or proved by the



respondent. The applicant in its rejoinder has placed various e-mails of respondent, asking details of maintenance charges. The respondent even incorporated relevant clause in the sale deeds of allottees in this regard, which again shows that the respondent was ready to pay maintenance service charges by taking it from allottees.

24) The present application under Section 9 of the Code has been filed in requisite Form-5, wherein it was specifically mentioned that services were rendered in accordance with the performance agreement which has not been denied by the Corporate Debtor and admittedly the said agreement is binding over both the parties. The application under Section 9 is thus complete and the required particulars have been furnished along with details of subsistence of default.

25) It is reiterated that in the present case the default committed by the Corporate Debtor is not denied. The material on record clearly goes to show that the respondent committed default in payment of the claimed operational debt even after demand made by the applicant operational creditor.

26) Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited V. Kirusa Software Private Limited, reported in AIR 2017 SC 4532 has held that:

"25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:



- (i) Whether there is an "operational debt" 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?"*

27) In the present application all the aforesaid requirements have been satisfied. It is seen that the application preferred by applicant operational creditor is complete in all respect. The material on record clearly goes to show that the respondent committed default in payment of the claimed operational debt even after demand made by the applicant operational creditor. The respondent failed to show that the claim of applicant is disputed. Once, the application is complete and in the absence of any dispute and with the subsistence of default, the application is liable to be admitted.

28) Therefore, on fulfillment of requirements of Section 9 (5) (i) (a) to (d) of the Code, the present application is admitted.

29) The Operational Creditor has proposed the name of Mr. Mansij Arya to be appointed as an IRP. Accordingly, we appoint Mr. Mansij Arya Registration No. IBBI/IPA-002/IPN00907/2019-20 email---pcsmansij@gmail.com. The IRP has filed its written consent in Form-2. He shall take such other and further steps as are required under the statute,



more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days.

30) The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs with the IRP to meet the immediate expenses of IRP. The same shall be fully accounted for by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIRP costs.

31) In terms of sub-section (6) of Section 9 of the Code the Corporate Insolvency Resolution Process in respect of respondent Corporate Debtor shall commence from the date of this admission order.

32) In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the IRP immediately (within 3 days) with regard to admission of this application under Section 9 of the Code.

33) We also declare a moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flow from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

- 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 any of its 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 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.
- 34) The supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period [Sec 14(2) of the Code]. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government in consultation with any financial regulator. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the Corporate Debtor in terms of Section 14 (3) (b) of the Code.
- 35) The IRP shall perform all his functions contemplated, inter-alia, under Sections 17, 18 and 21 of the Code and conduct proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations and shall file reports before the



Adjudicating Authority. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other persons associated with the Management of the Corporate Debtor are under legal obligation as per Section 19 of the Code to extend every assistance and cooperation to the IRP as may be required by him in managing the day-to-day affairs of the Corporate Debtor. The IRP shall be under duty to protect and preserve the value of the property of the Corporate Debtor as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

- 36) The office is directed to communicate a copy of the order to the OC, the Corporate Debtor, the IRP and the Registrar of Companies, New Delhi at the earliest possible but not later than seven days from today.



(Narender Kumar Bhola)
Member (Technical)



(P.S.N. Prasad)
Member (Judicial)