

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH - V

C.P. (I.B) No. 867/MB/2020

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules 2016)

In the matter of

M/s Mega Construction

**A Partnership Firm through its
Authorised Partner Mr. Sachin Navale**

Having its address at 63, Shivaji Housing
Society, Opposite Vasantdada Sugar
Factory, Sangli 416416

.....Petitioner/Operational Creditor

Vs

Aquatech Projects Pvt. Ltd.

Having its registered office at 7/3, 7/4,
Swar Sudha, Pinnac Memories, Kothrud,
Pune 411038.

.....Corporate Debtor

Order Delivered On: 19.10.2023

Quoram:

Mrs. Reeta Kohli, Hon'ble Member (Judicial)
Mr. Sanjiv Dutt, Hon'ble Member(Technical)

Appearances:

For the Petitioner/Operational Creditor: Adv. Ankit Lohia a/w Adv.

Suyath More i/b Rahul Soman

For the Corporate Debtor: Adv Rahul Gaikwad and Adv Vikita

Abhyakar i/b Gravitas Legal

Per: Reeta Kohli, Member (Judicial)

ORDER

This Company Petition is filed by **M/s Mega Construction** (hereinafter referred as "**the Petitioner/Operational Creditor**") on 06.03.2020 seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as "**CIRP**") against **Aquatech Projects Pvt. Ltd.** (hereinafter called "**Corporate Debtor**") on 06.03.2020 by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "**the Code**") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for committing default in payment of an Operational Debt of **Rs.14,19,52,148/- (Principal Amount of Rs.7,18,19,666 including refundable security deposit Rs. 46,62,755/- plus interest on principal amount of Rs.6,71,56,911 from 10.05.2014 till 31.01.2020 amounting to Rs.7,01,32,482).**

Brief Facts:-

1. In June - July, 2013, the Corporate Debtor approached the Operational Creditor and informed that the Sangli Miraj Kupwad Corporation (hereinafter referred as "Corporation") had awarded a tender to SMC Infrastructures Pvt. Ltd. for executing a project relating to the Sangli Underground Drainage Scheme Phase II Stage II. A part of the aforementioned project was sub contracted by SMC Infrastructures Pvt. Ltd to the Corporate Debtor vide a Memorandum of Understanding dated 02.05.2013 for an amount of Rs. 96,95,92,485/- which was further subcontracted by the Corporate Debtor to the Operational Creditor for an amount of Rs.51,89,49,504/- and a Memorandum of Understanding dated

11.07.2013 was executed in this regard between the parties to the case.

2. The amount in dispute is on account of non- payment of amounts under the Running Account (R.A. Bills) and Escalation Bills being (i) 1st R.A Bill dated 25.03.2014 for an amount of Rs. 3,78,58,688/- (ii) 2nd R.A. Bill dated 07.08.2014 for an amount of Rs. 3,71,23,465/- (iii) 3rd R.A. Bill dated 23.10.2014 for an amount of Rs. 1,17,23,978/- (iv) Escalation Bill dated 25.12.2014 for an amount of Rs. 22,40,491.001- (v) 4th R.A. Bill dated 25.01.2015 for an amount of Rs. 52,36,528/- (vi) 5th R.A. Bill dated 26.11.2015 Bill for an amount of Rs. 2,58,93,706/- (vii) 6th R.A. Bill dated 25.03.2016 for an amount of Rs.2,03,48,672/. (viii) R.A. Bill dated 05.01.2017 for an amount of Rs. 1,10,25,306/- (ix) Escalation Bill dated 25.03.2017 for an amount of Rs.74,05,378/- (x) 8th R.A Bill dated 25.03.2017 for an amount of Rs.1,10,45,607/- (xi) 10th R.A. Bill dated 24.06.2017 for an amount of Rs.1,09,94,150/- (xii) 4th Escalation revised bill dated 25.06.2017 for an amount of Rs.25,36,271/-. Thus, the cumulative sum of Rs.18,34,32,241/- fell due to the Operational Creditor from the Corporate Debtor from 25.03.2014 to 25.06.2017.
3. Thereafter, a certain amount corresponding to each of the abovementioned bills was paid by the Corporate Debtor as is evident from the computation sheet provided by the Operational Creditor.
4. The Operational Creditor further submitted that all disputes and differences were resolved during the contract period itself only after which the abovementioned bills were accepted by the Corporate Debtor followed by their booking in the accounts of the Corporate Debtor.
5. The Operational Creditor further submits that Tax Deducted at Source (TDS) has been deducted and deposited by the Corporate

Debtor as per the bills raised by the Operational Creditor. Extracts of Form 26AS and a table showing the Date of Bills and TDS Payments are provided in proof thereof. This deposit of TDS is an admission of liability by the Corporate Debtor.

6. The Operational Creditor further states that due to non-payment by the Corporate Debtor, the Operational Creditor was unable to carry out the work after 31.07.2017. Also as a consequence thereof, the Operational Creditor's Bank vide letter dated 06.02.2018 issued to the Operational Creditor declared its account as a Non Performing Asset (NPA).
7. The Operational Creditor further submits that there has been acknowledgement of liability by the Corporate Debtor in favour of the Operational Creditor on 23.09.2018.
8. The Operational Creditor issued letters dated 02.05.2019 and 07.09.2019 calling upon the Corporate Debtor to release balance payments along with security deposit. At no time during correspondences did the Corporate Debtor raise any objection as to poor performance of the work. No reply was tendered by Corporate Debtor to these letters.
9. As no payments were forthcoming the Operational Creditor sent a Demand Notice dated 06.02.2020 under in Form 3 Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
10. By its interim reply dated 18.02.2020, the Corporate Debtor for the first time attempted to raise allegations regarding poor performance of work and discrepancies in bills as an afterthought and merely to get out of the ambit of the Code.
11. The Operational Creditor further submitted a Certificate issued by its bank under section 9(3)(c) of the Code, confirming that out of the total outstanding of Rs.18,34,32,241/- an amount of

Rs.6,52,00,000/- had been received from SMC Infrastructures Pvt. Ltd. on behalf of the Corporate Debtor.

12. The Operational Creditor further submitted that vide letter dated 15.07.2023, SMC Infrastructures Private Ltd has expressly confirmed that the entire amount has been paid to the Corporate Debtor which includes the amounts for which the Operational Creditor raised bills on the Corporate Debtor.

Submissions by the Corporate Debtor:

13. The Corporate Debtor completely disputes that the total outstanding amount of **Rs. 14,19,52,148/-** is due and payable.
14. The Corporate Debtor claims that the Petition is not maintainable on account of pre-existing dispute on several issues since the year 2013 as is evident from emails and other correspondences addressed to SMC Infrastructure Private Ltd and the Operational Creditor. The Corporate Debtor has placed on record email dated 20.04.2015 addressed to SMC Infrastructure Pvt. Ltd. requesting it to stop making direct payments to the Operational Creditor followed by a letter dated 27.11.2015 informing SMC Infrastructure Pvt. Ltd. regarding the incomplete and slow work executed by the Operational Creditor which compelled the Corporate Debtor to deploy its own men and machinery for speeding up the work. It is pointed out that SMC Infrastructure Pvt. Ltd. had categorically admitted the slow progress of work of Operational Creditor through its letter dated 23.06.2017. The Corporate Debtor further submits that the Operational Creditor himself admits that the bills raised by it are only of an aggregate amount of Rs.18,34,32,241/- as claimed in Part-IV of the Application and confirmed by the Bank Certificate provided by the Operational Creditor under Section 9(3)(c) of the Code where in fact the total work amounted to Rs.

51,89,49,509/- as per the Memorandum of Understanding dated 11.07.2013.

15. The Corporate Debtor affirms that it has not made a single direct payment to the Operational Creditor and that it has received an amount of Rs. 6,52,00,000/- from SMC Infrastructures Pvt. Ltd. directly which can be established from the Bank Certificate provided by the Operational Creditor under Section 9(3)(c) of the Code. The Corporate Debtor further alleges that by such a conduct of accepting payment directly from SMC Infrastructures Pvt. Ltd., the Operational Creditor has gone against the scheme of "Back to Back Payments" meaning thereby that on receipt of payment from SMC Infrastructures Pvt. Ltd., the Corporate Debtor would pay the due amount to the Operational Creditor as incorporated in Clause 4 of the Memorandum of Understanding dated 11.07.2013. The said clause clearly stipulates that the subcontract work is assigned to the Operational Creditor on Back to Back basis. The clause further explains the meaning of this Back to Back basis by stipulating that the payment to Operational Creditor will be made by the Corporate Debtor only on receipt of the same from SMC Infrastructure Pvt. Ltd. The bills issued by the Operational Creditor to the Corporate Debtor specify the mode of payment as Cheque Payment.
16. The Corporate Debtor further submits that payment of TDS against the various bills issued by the Operational Creditor was with the object of avoiding any anticipated statutory liability and the same was also communicated to SMC Infrastucture Pvt. Ltd. through a letter dated 06.03.2018.
17. The Corporate Debtor claims that a sum of Rs.2,24,93,613/- is payable to it by the Operational Creditor on account of additional

expenses incurred by the Corporate Debtor to execute the work on account of deficiency in performance by the Operational Creditor.

18. The Corporate Debtor points out that it is a profit making construction and infrastructure company and had been making profits even during and after the Covid 19 period. It has provided a summary of Net Profit before and after tax for the financial years 2013-2014 to 2023-2024 in the Written Submissions.
19. The Corporate Debtor also brings to the notice of this Bench the existence of an Escrow Agreement dated September 23, 2013 executed between SMC Infrastructures Private Ltd and Corporate Debtor with the Bank of Maharashtra so that Corporate Debtor utilizes the funds transferred in the account by SMC Infrastructures Private Ltd for disbursement towards Operational Creditor. However, the Corporate Debtor itself admits the contents of the said Agreement to be irrelevant and consequently the said Agreement has not been placed on record.

Findings

20. Upon perusal of the Petition and Submissions of both the parties, and particularly in light of perusal of the Bank Certificate provided by the Operational Creditor under Section 9(3)(c) of the Code, it is established that no single direct payment has ever been made by the Corporate Debtor to the Operational Creditor. This negates the submission of the Operational Creditor regarding part payments received by it corresponding to each bill raised by it. Further, the Operational Creditor has failed to place sufficient evidence on record to substantiate its submission. The Computation Sheet placed on record is a mere Table prepared by the Operational Creditor itself which does not qualify to be considered an evidence.

21. On perusal of the letter dated 15.07.2023 sent by SMC Infrastructures Pvt. Ltd. to the Operational Creditor wherein SMC Infrastructures Pvt. Ltd. clearly mentions that direct payments have been made by it to the Operational Creditor, it emerges that the condition of “Back to Back Payments” as mentioned in the Memorandum of Understanding dated 11.07.2013 has been violated by the Operational Creditor itself to its own advantage.
22. On further and detailed perusal of the Pleadings and Submissions of both the parties and particularly of the letter dated 23.06.2017 referred to in Para 14 above it comes to light that SMC Infrastructures Pvt. Ltd. had pointed out the slow progress of work by the Operational Creditor and thus, in fact, delay in execution of the work by the Operational Creditor is established.
23. Furthermore, there have been correspondences between the parties through emails and letters from 19.09.2013 to 06.03.2018, the detailed perusal of which establish the existence of financial issues between the parties to case with respect to percentage of price escalation and payment of royalty charges. These financial issues also form part of the Pre-existing Dispute which was existing between the parties.
24. The Memorandum of Understanding dated 11.07.2013 entered into between the parties to the case very expressly and clearly mentions Rs. 51,89,49,509/- as the value of the total assigned work. The Operational Creditor itself raised bills only of an aggregate amount of Rs.18,34,32,241/- as claimed in Part IV of the Application. Thus on perusal of the Bank Certificate furnished by the Operational Creditor under Section 9(3)(c) of the Code which provides that Rs.6,52,00,000/- out of Rs.18,34,32,241/- was received in the bank account of the Operational Creditor on behalf of the Corporate Debtor. Thus, deficiency in the total value of the work on part of

the Operational Creditor is established. This deficiency is directly attributable to violation of the condition of “Back to Back Payments”, delay in the execution of work on behalf of the Operational Creditor and financial issues existing between the parties to the case.

25. Reliance is placed on the judgement of the Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd. (2017) ibclaw.in 01 SC with respect to Pre-existing Dispute in which it was held that the breach of the terms and conditions of the Agreement entered into between the parties to the case before the Demand Notice is sent under Section 8 of the Code qualifies to be a Pre-existing dispute and, therefore on the ground of existence of such a Pre-existing Dispute, an Application under Section 9 of the Code is not maintainable.
26. Thus, on detailed perusal of all the documentary evidence placed on record by the parties, it can be concluded that there was breach of contractual terms and conditions by the Operational Creditor as it started receiving payments directly from SMC Infrastructures Pvt. Ltd. from the very beginning of the contract and also that there was delay and deficiency on part of the Operational Creditor in execution of work along with financial issues between the parties. Therefore, the plea of Pre-existing Dispute raised by the Corporate Debtor stands proved.
27. As regards the contention of the Operational Creditor with respect to acceptance of liability by the Corporate Debtor by virtue of payment of TDS, the Hon'ble NCLAT in PM Cold Storage Pvt. Ltd. vs. Gouksheer Farm Fresh Pvt. Ltd. and Ors. [Company Appeal (AT) (Ins) No. 615 of 2020] has held that mere payment of TDS cannot be considered as an acknowledgement in writing of the liability of the Corporate Debtor and, therefore, in light of the aforementioned

judgment, the existence of debt of Corporate Debtor stands to be disproved. The Operational Creditor submitted that there has been acknowledgement of liability by the Corporate Debtor in favour of the Operational Creditor on 23.09.2018. However, again the Operational Creditor places no evidence on record to substantiate the same. The Corporate Debtor had in no manner whatsoever accepted any liability of any amount. Thus, the basic ingredient which is the existence of debt and corresponding default to admit a Section 9 Petition has not been successfully proved by the Petitioner.

28. Thus, on the grounds of existence of Pre-existing Dispute and failure on the part of the Petitioner to establish debt and default this Company Petition No. 867/IBC/MB/2020 filed by the Operational Creditor under Section 9 of the Code for initiation of CIRP of the Corporate Debtor is **rejected**.

Sd/-

SANJIV DUTT

MEMBER (TECHNICAL)

Sd/-

REETA KOHLI

MEMBER (JUDICIAL)