



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH,(Court-II)
KOLKATA**

C.P. (IB) No. 1058/KB/2019

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

In the matter of:

Innovators Facade Solutions Private Limited [CIN U74140DL2014PTC267404], having its registered office at 204, Bldg No. B-65, Jaydeep Chs Ltd Sector No. 1, Shanti Nagar, Mira Road - East, Thane - 401107;

....Operational Creditor

-Versus-

Pasari Multiprojects Private Limited [CIN U51909WB1993PTC058525], having its registered office at 35, Ballygunj Park, Kolkata - 700019;

...Corporate Debtor

Date of hearing: 07 June, 2023

Order Pronounced on: 28 August, 2023

Coram:

Smt. Bidisha Banerjee, Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing/physical)

For the Operational Creditor :	Mr. Joy Saha, Sr. Adv.
:	Mr. Shaunak Mitra, Adv.
:	Mr. Suryaksh Manot, Adv.
For the Corporate Debtor :	Mr. Jishnu Saha, Sr. Adv.
:	Ms. Manju Bhuteria, Adv.
:	Mr. Ishaan Saha, Adv.
:	Ms. Meenakshi Manot, Adv.
:	Mr. Abhishek Jain, Adv.

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ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (***‘the Code’***) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Samar Tunga, Commercial Manager, Innovators Facade Solutions Private Limited (***‘Operational Creditor’***) duly authorised *vide* Authorization Letter dated 09 May, 2019¹ for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against Pasari Multiprojects Private Limited (***‘Corporate Debtor’***).
3. The present Petition was filed on **20 July, 2019** before this Adjudicating Authority. The total amount claimed in default is Rs.4,75,70,047 (Rupees Four Crore Seventy Five Lakh Seventy Thousand Forty Seven only) including. The ***date of default*** is stated to be as on **05 January, 2018**;
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.8,00,00,000/- (Rupees Eight Crore only) with subscribed share capital of Rs.4,88,60,200/- (Rupees Four Crore Eighty Eight Lakh Sixty Thousand Two Hundred only). Part – IV of the Petition deals with the particulars of the Operational Debt.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Operational Creditor is a Private limited company inter alia engaged in the business of designing, engineering, fabrication, assembling, and erection of custom facade systems, providing complete design-build services in building construction. Whereas, the Corporate Debtor is a private limited company inter alia engaged in the business of real estate and development
 - 5.2 The Corporate Debtor had approached the Operational Creditor for unitized facade system works for their project Biowonder - A commercial cum Hotel project at 789 Anandpur, Kolkata West - 700107.

¹Annexure – C.

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5.3 By Letter of Intent(‘**LOI**’) dated 09 July, 2015, the Corporate Debtor approved the tender proposed by Operational Creditor for the final offer of Rs.10,68,79,250/-. The letter of Intent also contained terms and conditions in relevance to the terms of payment, time required for completion of project [Annexure - E].

5.4 The relevant clauses of the work order are as below;

“1. Glass of unitized systems and stone for dry cladding will be supplied by us free of cost at ready to install condition. Handling and co-ordination will be in your scope and is included in accepted contract value. Maximum 3 % handling breakage for glass and maximum 7% for stone is allowed Extra breakage beyond this limit will be adjusted from your receivables at procurement cost is allowed.

5. Payment Terms:


- i. 10% of the total contract value as mobilization advance against submission of the Bank Guarantee.(5% corporate Guarantee is accepted)*
- ii. 55% against supply of material against submission of bill within 30 days.*
- iii. 35% against installation submission of bill within 30 days of submission.*
- iv. 5% against virtual completion.*
- v. 5% retention after DLP period*

7. Total duration of the project 12 months is accepted however completion for commercial block is 7 months from the date of acceptance of LOI Validity for price is 16 months .Price validity will be increased if project delayed because of vendor (innovators facade solutions (Delhi) Put Ltd.) including other applicable terms for delay.

All other tender conditions will remain same otherwise Any other internal communication or change request will not be considered unless it would add substantial value to the project.”

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- 5.5 The Operational Creditor started with the work on Biowonder project from 09 July, 2015. The first bill RAB-1 was raised on 15 March, 2016. As work progressed, several Tax invoices were raised by the Operational Creditor as follows [Annexure F];
- (a) IFSDPL/248 / Biowonder/ RAB-1/15-16 dated 15.03.2016.
 - (b) IFSDPL/248/ Biowonder/RAB-2/16-17 dated 11.05.2016.
 - (c) IFSDPL/248/ Biowonder/RAB-3/16- 17 dated 10.06.2016.
 - (d) IFSDPL/248/Biowonder / RAB-4/16-17 dated 25.06.2016.
 - (e) IFSDPL/248 /Biowonder/RAB-5/16-17 dated 12.08.2016.
 - (f) IFSDPL/ 248 / Biowonder/RAB-6/16-17 dated 19.09.2016.
 - (g) IFSDPL/248/Biowonder/RAB-7/16-17 dated 18.10.2016.
 - (h) IFSDPL/248/Biowonder/RAB-8/16-17 dated 10.11.2016.
 - (i) IFSDPL/248/Biowonder/RAB-9&10/ 16-17 dated 26.12.2016.
 - (j) IFSDPL/248/Biowonder/RAB-11/16-17 dated 15.01.2016.
 - (k) IFSDPL/248/Biowonder/ RAB-12/ 16-17 dated 15.02.2017.
 - (l) IFSDPL/248/Biowonder/RAB-13/16-17 dated 25.04.2017.
 - (m) IFSDPL/248/Biowonder/RAB-14/17-18 dated 29.06.2017.
 - (n) IFSDPL/248/Biowonder/RAB-15/17-18 dated 21.09.2017.
 - (o) IFSDPL/248 / Biowonder / RAB-16/ 17-18 dated 27.10.2017.
 - (p) IFSDPL/248 / Biowonder/ RAB-17 / 17-18 dated 05.12.2017.
 - (q) IFSDPL/248/Biowonder/RAB-18/17-18 dated 18.01.2018.
 - (r) WB1/IFSDPL/248 /Biowonder/ RAB19& final/ 18-19 dated 10.12.2018.
- 5.6 The Corporate Debtor has failed to discharge the dues arising out of aforesaid bills. Several reminders have been sent by Operational Creditor to the Corporate Debtor for clearance of payment from March 2018 to January 2019 but have resulted in non-compliance. There is no dispute about the execution of the work and the amount billed.
- 5.7 The Operational Creditor issued a demand notice (Form No.3) dated 12 February, 2019 to the Corporate Debtor [Annexure H]. However, due to an inadvertent error the amount claimed therein was not correctly stated, but Corporate Debtor; vide its letter dated 23 February, 2019.

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- 5.8 However, after correcting the error, the Operational Creditor issued a fresh demand notice dated 25 April, 2019 [Annexure I]. The said fresh demand notice was replied by Corporate Debtor vide letter dated 03 May, 2019.
- 5.9 Out of the total amount as mentioned in the invoices, an aggregate amount of Rs.5,51,56,183/- (Rupees Five Crore Fifty One Lakh Fifty Six Thousand One Hundred and Eighty Three only) has been paid through bank and other approved deductions by Corporate Debtor to Operational Creditor leaving behind the outstanding balance Rs.4,75,70,047/- (Rupees Four Crore Seventy Five Lacs Seventy Thousand and Forty Seven only).
- 6. Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor would be as under:**
- 6.1 That, the present application is misconceived, not maintainable in law and in the facts and circumstances of the present case. It is barred by the principles of estoppel, acquiescence, waiver and principles of analogous. Furthermore, the application is defective and the same is not in proper form.
- 6.2 That, the present application is liable to be dismissed on the ground of pre-existing disputes between the parties and a Title Suit being T.S. No, 371 of 2019 have already been filed by the Corporate Debtor on 06 April, 2019 prior to issuance of the demand notice dated 25 April, 2019.
- 6.3 The Corporate Debtor awarded the Operational Creditor with the LOI dated 09 July, 2015 to carry out unitized facade system works at the project site. The LOI which is annexed to the Petition by the Operational Creditor is not the final LOI [Annexure – B].
- 6.4 It would be evident from the price summary sheet, of facadeworks, being an annexure to the said LOI, that value for the entire Hotel cum Commercial Project was for a total sum of Rs. 10,68,79,250/-. The commercial project was for a sum of Rs.5,62,14,673/-, the Hotel Block was for a sum of Rs.4,08,88,137/- and the podium was for a sum of Rs.97,76,440/-.
- 6.5 The said LOI contains another annexure which gives a breakup of the podium. The commercial block podium is for a sum of Rs.50,44,930/- and the hotel block is for a sum of Rs.47,31,510/-. As such the commercial block

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and podium was for a sum of Rs.6,12,59,603/- and the hotel block and podium was for a sum of Rs.4,56,19,647/-. It would be evident from the letter of intent that the Corporate Debtor was required to pay mobilisation advance for the commercial block including podium and subsequently on satisfactory progress and workmanship, the Corporate Debtor was to pay mobilisation advance for the hotel block including the podium.

- 6.6 It would be evident from the LOI that the time was the essence of the contract and the total duration of the project was twelve (12) months. The commercial project was to be completed in seven (07) months from the date of acceptance of the LOI.
- 6.7 The Operational Creditor from the beginning not only delayed their performance but also failed and neglected to perform their part of the obligations in terms of the LOI. After repeated request they commenced the façade works only in the first week of February, 2016
- 6.8 The parties agreed to a procedure for raising running bills. The procedure was that the Pro Forma invoice was sent by the Operational Creditor to the Corporate Debtor, and then the Corporate Debtor used to certify the Pro Forma invoices and the works done. After certification of the proforma invoices and the works done, the Operational Creditor used to raise the tax invoices and then the payments used to be made in respect of the said Bills. The Operational Creditor used to raise inflated bills and the same would be evident from the Pro Forma invoices and the certification which was done by the Corporate Debtor. The same was accepted by the Operational Creditor and the same has also been recorded in an email dated 13 October, 2017 [Annexure – C].
- 6.9 Between the periods from March, 2016 to November, 2016, the Operational Creditor raised 10 of Running Account ('RA') Bills. An aggregate sum of Rs.4,42,57,087/- (Rupees Four Crore Forty Two Lakh Fifty Seven Thousand Eighty Seven Only) was paid by the Corporate Debtor to the Operational Creditor towards the first ten RA Bills. The Operational Creditor was raising purported RA Bills with inflated measurements based on a different

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computation which eventually resulted in increase in the area of the Unitized Facade System. For the first time the area under the BOQ was found to have been increased from the agreed 6436 sq.mts.

- 6.10 Thereafter, the Corporate Debtor immediately called upon the Operational Creditor and despite several rounds of discussions the said issue could not be resolved amicably. The Operational Creditor claimed that the portion of the building where the fully unitized glass panel is not installed with glass, should be taken into consideration and be made a part of total measurement and the computation should also be done based on such purported measurement. Such purported claim of the Operational Creditor was wholly unacceptable to the Corporate Debtor for being wrongful and contrary to the terms of the contract.
- 6.11 The Operational Creditor raised RA bill nos. 11, 12, 13, 14, 15 and 16 during the period from January, 2017 to October, 2017. In or about the time when 15th RA bill was issued, the Operational Creditor contrary to the terms of the LOI demanded advance payment. The Corporate Debtor considering the fact that the project had already gone beyond the time, made several attempts to resolve the issues amicably.
- 6.12 By the time the 16th RA bill was issued, the Corporate Debtor realised the intention of the Operational Creditor was otherwise. The Operational Creditor had no intention to complete the project and was attempting to create a situation that would provide the Operational Creditor reasons to avoid performance of the contract. In spite of the fact that there were disputes regarding measurement, quality, quantity and delay caused by the Operational Creditor, the Corporate Debtor made payment of RA bill Nos. 11 to 16 so that the work does not get further delayed. The e-mails exchanged between the parties would demonstrate pre-existing disputes between the parties and the fact that there were disputes regarding measurement, quality, quantity and delay in work [Annexure – D].
- 6.13 The RA bill no. 17 was certified for a sum of Rs.9,02,057 / - and RA bill no. 18 was certified for a sum of Rs.2,73,730/-. The unadjusted mobilisation

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advance as on the date of issuance of RA bill no. 17 was Rs.8,50,000/- approximately. RA bill Nos.17 and 18 are not due and payable as the said bills have already been adjusted against the unadjusted mobilisation advance and against the Letter of Credit charges and against some dues payable on account of materials supplied by the Corporate Debtor.

6.14 The Operational Creditor did not do any work after RA bill No. 18. The Operational Creditor has suppressed that a proforma invoice in respect of purported RA bill no. 19 was also raised for a sum of Rs.43,47,968/-. However, no work has been done by the Operational Creditor and the said bill of Rs.43,47,968/- was wholly fictitious, incorrect and devoid of any substance whatsoever. It is pertinent to mention here that the said purported RA Bill No. 19 does not form part of the alleged claim of the Operational Creditor.

6.15 The Operational Creditor has admitted in their letter dated 07 May, 2019 that they have not completed the project. The Operational Creditor has also suppressed the fact that they had issued a purported RA bill no. 19 dated February 13, 2018. There were several disputes between the parties and the same would be evident from emails exchanged between the Operational Creditor and the Corporate Debtor and would be evident from the emails that the Operational Creditor is in breach of contract and has delayed the project and abandoned the work in the project site. Copies of the said emails are part of reply dated 23 February, 2019 and the same are not disputed.

Analysis and Findings

7. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.
8. The issue that cropped up for determination in the present matter is whether the suit was filed after the service of notice u/s 8 of the Code or whether it was before, so as to constitute a pre-existing dispute between the parties in terms of the Code?

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9. Reliance has been placed on ***Kailash Nath Associates v. Delhi Development Authority and Another***² to contend that it is a settled law that a claim for damages does not give rise to a crystallised debt unless there is an adjudication by a Court of competent jurisdiction that such damages are payable.
10. Reliance has been also placed on ***Mobilox Innovations (P) Ltd. v. Kirusa Software Private Ltd.***³ to contend that where “it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence” and “the defence is not spurious, mere bluster, plainly frivolous or vexatious”. Where it is found that “a dispute does truly exist in fact between the parties, which may or may not ultimately succeed” and it was held that “the Appellate Tribunal was wholly incorrect in characterising the defence as vague, got up and motivated to evade liability”.
11. Further that in ***S.S. Engineers v. Hindustan Petroleum Corporation Limited & Ors.***⁴ while referring to ***Mobilox Innovations (P) Ltd. (Supra)*** Hon’ble Apex Court held that “When examining an application under Section 9 of the IBC, the Adjudicating Authority would have to examine (i) whether there was an operational debt exceeding Rupees 1,00,000/- (Rupees One Lac); (ii) whether the evidence furnished with the application showed that debt exceeding Rupees one lac was due and payable and had not till then been paid; and (iii) whether there was existence of any dispute between the parties or the record of pendency of a suit or arbitration proceedings filed before the receipt of demand notice in relation to such dispute. If any one of the aforesaid conditions was not fulfilled, the application of the Operational Creditor would have to be rejected.”

²(2015) 4 SCC 136

³(2018) 1 SCC 353

⁴2022 SCC OnLine SC 1385

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- 12.** It is discernible that a demand notice was sent on 12 February, 2019 [Annexure – H at page 114 of the Petition], which said as under;

And the date from which such debt fell due	<ul style="list-style-type: none"> ○ Debt fell due from 15.2.2017 ○ Last payment received on 22.9.2017 ○ Last Invoice raised on 10.12.2018
Amount claimed to be in default and the date on which the default occurred.	Default Amount as on 15th February, 2017 is Rs 4,91,72,294/- (Rupees Four Crore Ninety-one Lakh Seventy Two thousand Two hundred ninety Four only)

- 13.** The fresh demand notice dated 25 April, 2019 [Annexure – I at pages 123-124 of the Petition] reads;

“IFSPL had issued a demand notice (Form no.3) dated 12.02.2019 to PMPPL. However, due to an inadvertent error the amount claimed therein was not correctly stated. Hence, after correcting the error, we hereby issue the present fresh demand notice.”

(Emphasis supplied)

And the date from which such debt fell due	<ul style="list-style-type: none"> ○ Debt fell due from 05.01.2018 ○ Last payment received on 26.12.2017 ○ Last Invoice raised on 10.12.2018
Amount claimed to be in default	Rs 4,75,70,047/- (Rupees Four Crore Seventy Five Lakh Seventy Thousand and Forty Seven only)

- 14.** The intention of the Operational Creditor is quite clear that it intended to issue a fresh demand notice with modified particulars and the fresh notice (dated 25 April, 2019) was not intended to be in continuation of the previous one, i.e. 12 February, 2019. Hence, previous erroneous notice dated

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12 February, 2019 should be ignored and the fresh notice u/s 8 dated 25 April, 2019 should be taken into account, and it is evident that before it could be served the civil suit already stood filed on 06 April, 2019.

- 15.** As such there is no gainsaying that the present application is not maintainable due a 'pre –existing dispute' as on the date section 8 notice, dated 25 April, 2019 was served.
- 16.** In view of the above, we hold that there was a pre-existing dispute when the Company Petition was filed. Hence, C.P (IB) No. 1058/KB/2029 is *rejected*. However, the Operational Creditor is at liberty to resort to other remedies that may be available under any other law.
- 17.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The Order is pronounced on 28th day of August, 2023

SA [LRA]