



IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI - BENCH-VI

CP (IB) No. 330/MB/2022

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

M/S. M. WARIS CONSTRUCTION

Through its Sole Proprietor- Mr. Khalik Khan

Address: 1337, Sanjeevani Nagar, Garha
Jabalpur-482003, Madhya Pradesh.

...Operational Creditor

V/s

ESSEL HIGHWAYS LIMITED

[CIN: U45200MH2013PLC274877]

Registered Office: 513/A, 5th Floor
Kohinoor City, Kirol Road, Kurla (West)
Mumbai-400070, Maharashtra.

...Corporate Debtor

Pronounced: 28.02.2025

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances: Hybrid

Operational Creditor: Adv. Vishal Hegde a/w. Adv. Pranav Khatkul and Adv.
Akshay Naik i/b. Airavat Chambers

Corporate Debtor: Adv. Nausher Kohli a/w. Adv. Shivani Varade, Adv. Nidhi
Desai and Adv. Rishab Jain i/b. MDP & Partners

**ORDER****[PER: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]****1. BACKGROUND**

- 1.1 This C.P. (IB) 330/MB/2022 (Application) was filed on 13.02.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s. M. Waris Construction, the Operational Creditor (OC), through Mr. Khalik Khan, its sole proprietor for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Essel Highways Limited, the Corporate Debtor (CD).
- 1.2 The total amount of default alleged is Rs. 1,84,22,552.80/- (One Crore Eighty-Four Lakh Twenty-Two Thousand Five Hundred Fifty-Two Rupees and Eighty Paise) including Rs.11,93,482.75/- as retention money. The claim is based on unpaid bills issued by the OC during the period of 2016 to the CD in lieu of providing services to the CD as sub-contractor, regarding maintenance of Damoh-Jabalpur Toll Road in the State of Madhya Pradesh as per the CD's purchase order dated 09.02.2016.
- 1.3 The date of default is not expressly mentioned in Part-IV of the Application. However, the OC, *vide* its Additional Affidavit dated 26.09.2023, submitted that the date of default in the present Application is 16.11.2018, i.e., the date on which the OC received the last payment from the CD. Since the CD defaulted in payment of its outstanding dues, the OC prays that CIRP may be initiated in respect of the CD under Section 9 of the IBC.



2. CONTENTIONS OF OC

- 2.1 The OC is a Jabalpur-based proprietary firm, which is engaged in the business of construction and maintenance of roads and other construction activities while the CD is engaged in the business of providing infrastructure construction services. For carrying out the punch list work of Damoh-Jabalpur Toll Road (Site), the CD issued the Purchase Order dated 09.02.2016, bearing No. 513214150032 (PO) in favour of the OC. As per the PO, the work was to be completed within three months and 100% of the payment would be paid to the OC within 15 (Fifteen) days on pro-rata basis, after the submission of certified Running Account Bills (RA Bills), and 5% of every running Bill deducted as retention money would be released, after the expiry of defect-liability period i.e., 12 (Twelve) months after the date of completion of total scope certified by Essel Damoh-Jabalpur Toll Roads Limited (EDJTRL).
- 2.2 Pursuant to the issuance of PO, the OC carried out the punch list work and issued its RA Bills and Interim Payment Certificates (IPCs) dated 05.05.2016 and 15.06.2016. The CD duly certified the OC's RA Bills through its officials.
- 2.3 It was later orally instructed by the CD for discontinuing the work under the PO. After contacting the CD over telephone and physical meetings, the CD made payments to the extent of Rs. 15,00,000/- (Fifteen Lakh Rupees) each in favour of the OC on three occasions i.e., 16.12.2017; 10.10.2018; and 16.11.2018, aggregating Rs. 45,00,000/- (Forty-Five Lakh Rupees). The OC placed the Certificate from ICICI Bank on record for show the last payment to its account.



- 2.4 However, the CD failed to pay the outstanding dues to the OC despite reminder emails sent to the CD's email on 28.11.2019; 02.12.2019; 05.12.2019; 12.12.2019; 28.01.2020; and 03.02.2020.
- 2.5 Due to CD's failure in making payment of outstanding invoices, the OC sent the two separate demand notices dated 28.04.2021, under Section 8 of the IBC at the CD's registered address and another office address at Worli, Mumbai. The demand notice sent at the CD's registered address returned with the remarks "Insufficient Address", while the CD received the demand notice at its Worli Office on 08.05.2021. This fact has not been denied by the CD. However, the CD failed to give any reply to the OC's demand notice. The OC contacted the CD's Chief Executive Officer (CEO), Mr. Nishikant Upadhyay through WhatsApp in 2021, for payment of outstanding dues wherein the CD did not deny its liability towards the OC and also sought extension of time for payment.
- 2.6 The OC, *vide* its Additional Affidavit dated 26.09.2023, submitted that the date of default in the present Application is 16.11.2018. Although the date of default is 16.11.2018 and the limitation period would have expired on 15.11.2021, the present Application is filed within the limitation period. To justify its contention, the OC cited the poor medical condition of its proprietor due to spinal dislocation during October 2021, as well as relied upon the decision of the Hon'ble Supreme Court in "*In Re: Cognizance for Extension of Limitation*", [M.A. No. 21 of 2022 in MA No. 665 of 2021, in *Suo Motu Writ Petition (C) No. 3 of 2020*]. Since the CD failed to make any payment after 16.11.2018, the OC prays that CIRP may be initiated in respect of the CD.



3. CONTENTIONS OF CD

- 3.1 The OC, being a sole proprietary firm, is ineligible to file application under Section 9 of the IBC as it cannot be considered as 'person' under Section 3(23) of the IBC.
- 3.2 There is no contractual relationship between the OC and the CD as the OC's RA Bills were issued in the name of EDJTRL, a Special Purpose Vehicle (SPV) of the CD for carrying out the work at the Site. The beneficiary of the alleged services provided by the OC was the SPV and not the CD. The PO dated 09.02.2016, was issued by the CD at behest of the SPV. To substantiate its contention, the CD placed the ledger of the said SPV wherein it provided all the payments made to the OC by the SPV.
- 3.3 The Application is defective as the date of default is not mentioned in Part-IV, which reveals its malafide intention to mislead the Tribunal. Mere mentioning of 16.11.2018, being the alleged last date of payment by the CD, cannot be treated as the date of default since it is a settled position of law that the date of default would be the first date of default or first date on which the default occurs and dates of subsequent payments do not shift the actual date of default.
- 3.4 The OC's alleged claims are barred by limitation since the alleged default in the present Application arises out of the OC's RA Bills dated 05.05.2016 and 16.06.2016, which were already time-barred at the time of filing the present Application, i.e., 13.02.2022. Since the alleged default occurred in the year 2016, and the limitation period would have expired in 2019, the decision of Hon'ble Supreme Court in *Suo Motu Writ Petition* (supra) is inapplicable.



- 3.5 The WhatsApp conversations between the OC and the SPV reveal the dispute over reconciliation of accounts between the parties. Moreover, the beneficiary of the OC's alleged services, i.e., the SPV, already went into CIRP *vide* order dated 17.12.2019 of this Tribunal in *Markolines Traffic Controls Pvt. Ltd. Vs. Damoh-Jabalpur Toll Roads Limited.*, [CP(IB) No. 4793/I&BP/MB/2018], which culminated in its liquidation *vide* order dated 01.12.2021, in *Mr. Milind B. Kasodekar.* [I.A. No. 1090 of 2021 in CP(IB) No. 4793/MB/2018]. Contrary to the OC's contention, the RA Bills, IPCs and the payments made to the OC show the linkage between the OC and the SPV and not the CD. The CD has nothing to do with the debt and liability of the SPV.
- 3.6 It is further submitted that the OC has approached this Tribunal with malafide intention to harass the CD for recovery of money, which is contrary to the objectives of the IBC. The fact that the OC filed the Application against the CD after the aforesaid Liquidation Order, despite already submitting its claim before the SPV's Liquidator, which the latter admitted to the extent of Rs. 79,55,557/-, reveals the actual intent behind the Application.

4. ANALYSIS AND FINDINGS

- 4.1 We have perused all the documents and pleadings of both the parties, and heard both the Ld. Counsel for the OC and the CD.
- 4.2 The major issues in the matter revolve around (i) OC's legal right to file the Application (ii) contractual relationship between the OC and the CD (iii) determination of date of default; and (iv) Limitation. Let us now examine these.
- 4.3 As far as the OC's eligibility to file his Application is concerned, we find that it is a proprietorship firm as per the available records. However, both the



Application as well as demand notice on 28.04.2021, were signed by Mr. Khalik Khan, as the Proprietor of the OC. The name of the OC in Part-I of the Application is mentioned as 'M/s. M. Waris Construction'. The Application is signed by Mr. Khalik Khan in his capacity as the Proprietor of 'M/s M. Waris Construction'. Hence, it can be safely held that the OC, being sole proprietorship, represented by Mr. Khan, is entitled to maintain this Application. The Hon'ble Calcutta High Court in *Devendra Surana Vs. Bank of Baroda & Ors.*, [WP No. 5521 (W) of 2017], held that a natural person and a sole proprietorship firm are the same legal entity. In the instant matter, the Application was filed by 'M/s. M. Waris Construction' represented by Mr. Khalik Khan, who is the Sole Proprietor, and hence, there exists no difference between M/s M. Waris Construction and Mr. Khalik Khan regards their right to be the Applicant. We, therefore, hold that the OC is entitled to maintain this Application under Section 9 of IBC and issue (i) is decided in favour of the OC.

4.4 The second issue to be considered whether there is any contractual relationship between the OC and the CD. Upon perusal of available documents and records, we find that the EDJTRL was the SPV of the CD, which was formed to carry out works at the Site and the CD issued the PO dated 09.02.2016, for Rs.3,16,52,590/- to the OC. However, the explanation by the CD in its reply is that the PO was issued by it at the request of the SPV. The PO, however, does not state that it was issued by the CD for and on behalf of the SPV. It is not clear as to why the CD should issue the PO to the CD, when an SPV is created exclusively for executing the work at the Site and that the payments were to be made to the OC by the SPV itself. The billing and the shipping addresses mentioned in the PO is that of the CD. Although the



registered addresses of the CD and the SPV are the same, the PO was specifically issued by the CD to the OC. We further observe that under Clause 4 of the PO under 'Special Conditions', it was provided that the SPV was to duly certify the work done by the OC and payments would be released only after such verification. In para 9(a) of the reply, however, the CD has stated that *"a) I say that, in and around 2016, for the works to be done at Damoh Jabalpur Toll Roads ("**Site**"), the a Special Purpose Vehicle of the Corporate Debtor named Essel Damoh Jabalpur Toll Roads Limited ("**SPV**") was desirous to hire contractors for the same. Accordingly, at the request of the SPV of the Corporate Debtor issued one Work Order dated 9th February 2016 bearing No. 513214150032 ("**Work Order**") for the work to be carried out at the site."* Thus, according to the CD, the work order was issued by the CD but the work was to be conducted was for the SPV. It is the case of the CD that it was the understanding between the parties always that the work was being undertaken for the SPV by the OC and invoices were also to be raised on the SPV and payments were to be made by the SPV itself. It is also observed that an amount of Rs.15,00,000/- was paid by the CD to the account of the OC on 16.11.2018. According to the OC, this was the last payment made by the CD to its account. The OC has produced Ext. 'F', Certificate from ICICI Bank certifying that the last payment received from the CD to the account of the OC was Rs. 15,00,000/- on 16.11.2018. However, no explanation has been offered by the CD as to this payment made by it to the OC. Hence, the story of the CD that the SPV was responsible for payments to the OC is unbelievable.

4.5 It is interesting to note that the Master Data of both the CD and the SPV reveals that both of them have the same registered address, viz., '513/A, 5th Floor,



Kohinoor City, Kiroi Road, Kurla (West), Mumbai- 400070. Both the CD and the SPV use the same email ID, viz., '*essel.roads@gmail.com*'. Further, the directors of the SPV and the CD were either directors or employees of the CD and also its group companies. The OC has produced copies of the WhatsApp communications between him and Mr. Nishikant Upadhyay, the CD's Chief Financial Officer (CFO). The MCA master data also reveals that Mr. Upadhyay was the CFO of the CD from 23.06.2020 until 15.03.2024. The WhatsApp communications are dated 30.04.2021 to 10.09.2021. The CD has also relied upon these WhatsApp communications between him and the CD, by saying that there were ongoing disputes and reconciliation of accounts were being worked out. In the WhatsApp communications, the CD never challenged the debt and liability due to the OC. If Mr. Nishikant Upadhyay was the CFO of the CD, who had nothing to do with the SPV, there was no need for him to have the WhatsApp communications. Mr. Upadhyay informed the OC that the payment to him seemed impossible as Pan India Infraprojects Private Limited (PIIPL) and the SPV are in the NCLT. From the above, the only inference that can be drawn is that the transactions have been undertaken between the OC and the CD and the SPV was only an agency for mere verification of work done by the OC and provide certificate to that effect. As regards the purported Ledger of the SPV, in the form of a statement of accounts, as produced at Ext. 'B' by the CD, it is observed that it does not carry any acknowledgment or authentication by the OC. The CD has not explained as to how it came by Ext. 'B', which belongs to the SPV. It is not signed or stamped even by the SPV. A unilateral statement prepared in the name of the SPV by the CD, or even by the SPV, does not inspire any confidence as to its veracity, and as such, no



credence could be attached to the authenticity of the statement as a Ledger. Hence, we do not buy the argument of the CD that all payments were made by the SPV to the OC. The CD has stated that the SPV went into CIRP and then slipped into liquidation. Hence, the contractual relationship between the OC and the CD is established and we hold that the CD was under liability to pay the dues to the OC in respect of the work done at the Site. It may be true that the OC has filed its claim before the Liquidator in the liquidation process of the SPV but that does not prevent it from moving against the CD, when there is evidence to suggest that the SPV was only a tool for the CD to carry out its work at the Site and that there was actual payment by the CD to the OC on 16.11.2018.


4.6 As regards the date of default, it is observed that the Ld. Counsel for the CD vehemently challenged 16.11.2018, as default date, on the ground that the claims arising out of the aforesaid RA Bills were raised in the year 2016. However, in its reply, the CD has admitted in Para 8(C), under the heading '*No date of default mentioned*', that "*on 16.11.2018, being the date on which he last payment from the Corporate Debtor came to be received.*" The CD has not offered any explanation as to how it paid the OC Rs. 15 Lakh on 16.11.2018. There was no need for the CD to make the payment to the OC, if there was no contractual obligation to pay. The ICICI Bank Certificate clearly shows that the CD failed to make any payment after 16.11.2018 and the last payment was made by the CD was Rs. 15,00,000/- on that date. The CD never bothered to reply to the Section 8 notice delivered to its Worli Office in Mumbai on 08.05.2021. The CD could have very well contested the claim of the OC that no debt was due and payable to it in the first instance when the statutory



demand notice was received by it. From the above discussions, we can safely determine that the date of default in the instant matter is 16.11.2018, i.e., the date on which the CD made the last payment to the OC. In view of the above, we determine 16.11.2018 as the date of default in the matter.

4.7 Having determined the date of default as 16.11.2018, now the only question remains to be decided is whether the present Application is filed within the limitation period. The OC ought to have filed the Application within three years from 16.11.2018, i.e., on or before 16.11.2021. However, it was filed on 13.02.2022. In *Suo Motu Writ Petition (supra)*, the Hon'ble Supreme Court held that limitation for all types of proceedings stands excluded from 15.03.2020 to 28.02.2022, for all cases irrespective of the type of case. This principle was recently applied by the Hon'ble Delhi High Court in *Captain Sudhanshu Bharadwaj Vs. Air India Limited.*, [OMP(T) COMM. 31/2023] and also the Principal Bench of the Hon'ble NCLAT, New Delhi in *Indospirit Distribution Limited Vs. Kristal Spirits India Pvt. Ltd.*, [Company Appeal (AT) (Ins.) No. 503 of 2024]. By applying the above, in the present matter, the Application ought to have been filed within a period of three years (1095 days) beginning from the date of default i.e., 16.11.2018; out of which a total number of 484 days had expired from 16.11.2018 till 14.03.2020. After the excluded period from 15.03.2020 to 28.02.2022, the balance period of limitation would run from 01.03.2022. In that case, the OC would get remaining balance of 611 days, and the new date of expiration of the limitation would be 02.11.2023, which is calculated as below:

Particulars	Dates
Date of Default	16.11.2018
Extent of limitation expired till 14.03.2020	484 days



Exclusion period	15.03.2020 to 28.02.2022
Balance limitation as available on 01.03.2022	611 days
611 days w.e.f. 01.03.2022	02.11.2023

Since, the present Application was filed on 13.02.2022, we find it is filed within the limitation period and the last issue is decided in favour of the OC.

4.8 In view of the above, we conclude that the OC has succeeded in proving its case for admission and thus, the present Application deserves to be admitted.

ORDER

In view of the aforesaid findings, this Application being C.P. (IB) 330/MB/2022 filed under Section 9 of the IBC by M/s. M. Waris Construction, the OC for initiating CIRP in respect of Essel Highways Limited, the CD, is **admitted**.

We further declare moratorium under Section 14 of IBC with consequential directions as mentioned below:

I. We prohibit-

- a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD 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 possession of the CD.
- II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under section 31(1) of the IBC or passes an order for the liquidation of the CD under section 33 thereof, as the case may be.
- IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.
- V. That this Bench hereby appoints **Mr. Kolapalli Srinivasa Rao**, a registered Insolvency Professional having Registration Number- **IBBI/IPA-002/IP-N01303/2024-2025/14478** and e-mail- **raoksrinivasaa@gmail.com**, having valid Authorisation for Assignment up to **31.12.2025** as the Interim Resolution Professional (IRP) to carry out the functions under the IBC. The fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.
- VI. That during the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the case may be, of IBC. The officers and managers of the CD are directed to provide effective assistance to the IRP as and when he takes charge of the assets and management of the CD. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP within a period of one week from the date of receipt of this Order and shall not commit any offence punishable under



Chapter VII of Part II of the IBC. Coercive steps will follow against them under the provisions of the IBC read with Rule 11 of the NCLT Rules for any violation of law.

- VII. That the IRP/IP shall submit to this Tribunal periodical reports with regard to the progress of the CIRP in respect of the CD.
- VIII. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, the OC is directed to deposit a sum of Rs. 5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost arising out of issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the OC on priority upon the funds becoming available with IRP/RP from the Committee of Creditors (CoC). The expenses incurred by IRP out of this fund are subject to approval by the CoC.
- IX. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the CD.
- X. A copy of the Order shall also be forwarded to the IBBI for record; dissemination on their website; and for maintaining data.
- XI. The Registry is directed to immediately communicate this Order to the OC, the CD and the IRP by way of Speed Post, e-mail and WhatsApp.
- XII. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

//Tanmay Jain/