

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-V)

CP No. (IB)-263(ND)/2021

IN THE MATTER OF:

R S Infra

Through its partner Sh. Rama Kant Sharma

Registered Office at:

43/462

Radha Nagar, Vashitabad

Sikandra, Agra – 282007, U.P.

Ph: 6394599474

Email: rsinfratech20@gmail.com

...Applicant/Operational Creditor

VERSUS

R P Infraventure Pvt. Ltd.

Registered Office at

FF-22, First Floor Omaxe Square

Jasola Distt. Centre

New Delhi – 110044

Ph: 725181334

Email: rpinfraapl@gmail.com

...Respondent /Corporate Debtor

Section: 9 of IBC, 2016

Order Delivered on: 16.11.2022

CORAM:

SH. P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)

SH. RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For Applicant : Mr. Shailendra Kumar, Adv.

For Respondent: Mr. Ajay Garg Adv.

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ORDER

PER - SHRI RAHUL BHATNAGAR, MEMBER (T)

The present Petition is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Sh. Rama Kant Sharma, being the partner of R S Infra (for brevity '**Operational Creditor/ Applicant**'), with a prayer to initiate the Corporate Insolvency Resolution Process against R P Infraventure Private Limited (for brevity '**Corporate Debtor/ Respondent**').

2. That the Applicant is a partnership firm, incorporated vide partnership deed dated 01.02.2013 under the provisions of the Partnership Act, 1932 having its registered Office at 46/462, Radha Nagar, Vashitabad Sikandra, Agra -282007, U.P.

3. That the Corporate Debtor namely, R P Infraventure Private Limited is a Company incorporated on 30.05.2014 with CIN U45206DL2014PTC267733 under the provisions of the Erstwhile Companies Act, 2013 having its registered Office at FF-22, First Floor Omaxe Square Jasola District Centre New Delhi, DL - 110044 IN.

4. It is submitted by the Applicant that the Agra Development Authority had awarded the contract/work of Construction of Agra Inner Ring Road (Phase I) from Keberpur to Fatehabad from KM+400 to KM 11+000 in the state of Uttar Pradesh to HG Infra Engineering Pvt. Ltd. having address plot no.25, Yudhister Marg, C- Scheme, Jaipur- 302001, Rajasthan. That HG Infra Engineering Pvt. Ltd., further awarded the sub contract/work order to the Corporate Debtor. Subsequently, the corporate Debtor engaged the applicant for evacuation, loading, Transportation unloading of soil (from borrow

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area) at the site with lead and lifts from the said construction site for the total value of sum of Rs. 5,40,00,000/-

5. The applicant stated that they completed its part of the sub contract/ work order awarded by the corporate debtor and the corporate debtor never raised any objection on the services/work done by the applicant and also made a payment of Rs. 3,81,63,417/- upto 18.04.2018 and the sum of Rs. 1,58,36,583/- is still outstanding and remain unpaid by the corporate debtor.

6. It is further stated by the applicant that corporate debtor had deducted TDS on the entire sum of Rs. 5,40,00,000/- and paid to the income tax dept. towards PAN no. of the applicant the said sum is reflected In Form 26AS. Accordingly, it is contended by the applicant that this is an acknowledgment of debt on part of corporate debtor and despite the said admission, the corporate debtor has deliberately and willingly failed to pay the outstanding amount.

7. The applicant stated that despite numerous requests, failed to discharge the liability and thereafter, on 30.07.2020, the corporate debtor served Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 calling upon the corporate debtor to pay an amount of INR 1,58,36,583/- The said notices were duly served at the registered office of the corporate debtor as per the MCA website. However, no reply of the said notices has been received till date.

8. It is submitted by the applicant in Part IV that the amount of his total debt due as on date is of Rs. 1,58,36,583/-, including the security amount, remaining amount out of the contracted cost of Rs. 5,40,00,000/- of the awarded contract on 01.08.2014 and part payment being made in running account manner and TDS on entire contracted cost amount being deducted and reflected in Form 26AS and last payment was made on 18.04.2018 and remaining payment is

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due since then. The applicant has also filed an affidavit under Section 9(3)(b) stating that no notice of dispute has been raised.

9. The Corporate Debtor filed reply to the application and stated the following:

a) That no payment is due and payable by the corporate debtor towards the applicant as per the terms of work order dated 1st August, 2014.

b) The brief facts of the case is:

- ❖ That the employer of the project was Agra Development Authority (ADA) who had appointed H.G. Infra Engineering Pvt. Ltd., as the main contractor, who thereafter appointed applicant as the sub-contractor for the purpose of excavation, loading, transportation and unloading of soil (from borrow area) at the site with all lead and lifts as per work order dated 1st August 2014 for a total value of Rs. 5,40,00,000/-.
- ❖ That during the course of hearing it came to the notice of the Adjudicating Authority, that applicant has failed to enclose all the invoices on the basis of which the alleged debt fell due. The same was recorded vide order dated 28th July 2021, after which direction were passed to file all invoices. In compliance of the said order the applicant submitted that total 5 invoices had been raised and the net payable amount is Rs. 1,48,77,388.16 (Rupees One Crore Forty Eight Lakh Seventy Seven Thousand Three Hundred Eighty Eight and Sixteen Paise Only). It is also stated that as on date the corporate debtor has paid a total amount of 4,19,00,000/-
- ❖ That as per the payment terms under clause 17 of the work order dated 1st August, 2014, it is clearly mentioned that the payment will be released by the Respondent

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Company within 10 days after receiving corresponding payment from the employer. The final payment shall be subject to the "Taking over certificate" for the works. The corporate debtor contended that as per the terms of the said clause no amount is due and payable by the corporate debtor to the applicant.

- ❖ That there exists a pending dispute regarding the quality of work done by the applicant, which resulted in non-payment by the Employer i.e. Agra Development Authority to the main contractor H.G. Infra Engineering Pvt. Ltd., who in turn failed to make payment to the applicant. The issue between the employer and the main contractor was also referred to a sole Arbitrator and an application under Section 34 of the Arbitration and Conciliation Act, 1996 was filed against which an award dated 9th November 2019 was obtained. That the said award was challenged and is pending before the Hon'ble Delhi High Court. Further stated that disputes including quality issues related to work done by the applicant which has resulted in non-payment to the main contractor and hence to the corporate debtor.
- c) The corporate debtor stated that applicant was well aware of the quality issues and disputes in the said projects and therefore did not pursue any payment after 18th April 2018, the corporate Debtor also issued a debit note of Rs. 1,24,12,236.20/- on 31st March, 2020 against the quality issues and communicated the same through WhatsApp on 20th July 2020 to the applicant. On 23rd July 2020, the applicant replied to the said message and stated "*why after work completion of more than 2 years the debit note is to be issued without prior intimation regarding quality of good*" also threatened the corporate debtor of legal action and issued a demand notice dated 30th July 2020.

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- d) Corporate debtor submits that the demand notice dated 30th July 2020 is defective and illegal and without any merits as the applicant has failed to annex invoices and other documents in support of the alleged claim.
- e) It is the contention of the corporate debtor that the Applicant is claiming the disputed amount of Rs. 1,58,36,583/-, which includes the security amount of Rs. 35,24,347/- and the security amount is not due and payable by the Corporate Debtor in terms of Clause 16 of the work order dated 1st August 2014.
- f) The Corporate Debtor further contends that the present application is not maintainable in terms of Section 10A of the Insolvency and Bankruptcy Code, 2016, as the WhatsApp messages were exchanged on 20th July 2020 and the effectiveness of the debit note started from 31st March, 2020 which falls within the period barred by the code, therefore CIRP could not have been initiated against the Corporate Debtor for alleged default during this period.
- g) The Applicant has placed on record the Balance Sheet and Profit and Loss accounts for the financial years 2016-17 and 2017-18 along with the application. On perusal of Balance Sheet, it is depicted that no amount is outstanding from the corporate debtor under the head sundry debtors. Further the statement also reflects that monthly contractor wages for alleged work done by the Applicant has been booked during the period October 2014 to May 2016, which makes it clear that the present application has been filed after a delay of more than 4 years.
- h) The applicant failed to follow up or recovered its dues even after 4 years of the alleged completion of work. That TDS under section 194C of the Income Tax Act, 1961 is required to be deducted at the time of credit of such sum of account or at the time of payment. It does not imply acknowledgment of specific amount outstanding to the Corporate Debtor.

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- i) The Corporate Debtor highlighted that as per clause 18 of the work order dated 1st August, 2014, notice for any claim shall be submitted within 14 days of the date of occurrence of the event. Further as per clause 20 of the work order dated 1st August, 2014, all disputes arising out of the contract have to be referred to a sole arbitrator. The award of the Arbitrator shall be final, conclusive and binding on all the parties to this work order.

10. The Applicant filed rejoinder to the reply of the corporate debtor and stated the following:

- a) The documents of the corporate debtor who had granted the work order for Rs, 5,40,00,000/- had crossed the contract amount of Rs. 8,70,43,936/- and there is no document filed by the Corporate Debtor to support the said enhancement of contract amount to such large amount by Rs. 3,30,43,936/-.
- b) Further stated that arbitration proceeding the corporate debtor is referring to pertaining to quality issue was subsisting when the notice under Section 8 of IBC was served. However, the corporate debtor never replied to the said notice nor informed them about the same and is now raising the plea about arbitration proceedings to show pre-existing dispute. Further no dispute was raised by the corporate debtor vis a vis performance of the contract by the applicant, in spite of receiving a notice under Section 8 if the IBC.
- c) The applicant stated that it had never mentioned about the proceedings u/Section 34 of Arbitration and Conciliation Act bearing No. OMP(Comm) 373/2020 pending before the Hon'ble Delhi High Court. Further also stated that till date the applicant has not received any notice from with the corporate debtor or HG Infra Engineering Ltd. Or Ld. Arbitrator or Hon'ble Delhi High Court in the said Arbitration filed by H.G. Infra Engineering Ltd. against Agra Development Authority. That there is no bonafide in mentioning about the arbitration

proceedings about the dispute as the operational creditor was not granted any project of construction activity. Moreover, the quality issued raised by Agra Development Authority has nowhere been detailed by the Corporate Debtor.

- d) The Corporate debtor has raised objection with regards the Section 8 being defective, however, if the said notice was defective, the corporate debtor should have filed reply and raised dispute stating the pending arbitration proceedings. But the corporate debtor failed to file any reply and raised objections only after the present petition was filed.
- e) The denial of the corporate debtor regarding it own bills is contrary to its records. Further the calculation sheet submitted by the corporate debtor is incomplete and manipulated as the debit note finds no mention in the ledger statement of account. As per law the debit note should have been in accordance with the law in force i.e. UP VAT for the years 2014-17 and thereafter as per the GST Act, the act also prescribes as to what should be the contents and how it should be made.
- f) The applicant states that if it was not perusing its huge outstanding debt then why would it issue the WhatsApp communication for the debit note issued on 31.03.2020. The corporate debtor also failed to place on record the WhatsApp conversation exchanged between the parties nor placed on record the alleged debit note. The Corporate Debtor after repeated follow ups paid a sum of Rs. 10,00,000/- via RTGS on 13.04.2018 and 18.04.2018 each. Also promised to pay the remaining amount at the earliest. Moreover, there is no mention of the debit note even in the GST returns.
- g) As regards the maintainability issue with respect to Section 10A of the IBC, 2016 it is stated that it does not apply in the present case as unilateral issuance of debit note without any basis cannot be considered as arising of fresh cause of action. Further the debit note in question is itself uncertain, as the same has

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not been placed on record. The last payment was made on 18.04.2018 and default is continuing since then, in such a case in order to delay the payment without any basis the corporate debtor has chosen a whimsical date by issuing a false and fabricated debit note dated 31.03.2020 which was communicated to the applicant on 20.07.2020 without any attachment.

11. The corporate debtor filed written synopsis and stated the following:

- a) The corporate debtor is solely relying upon the work order dated 01.08.2014 for work order granted to the applicant for a total value of Rs. 5,40,00,000/-, further emphasis is placed on **Clause 17 of the work order** which mentions that the payment will be released by the Respondent Company within 10 (ten) days after receiving corresponding payment from the employer. Further the corporate debtor stated that he has not received the full payment from the main contractor and therefore no payment is due and payable by the corporate debtor towards the applicant. The corporate debtor has also relied upon the **Clause 18 of the work order** which states that notice of any claim must be submitted within 14 days of the occurrence of the event.
- b) The corporate debtor stated that applicant was well aware of the quality issue and disputes in the project and therefore the applicant did not pursue the payment after 18th April 2018. Therefore on 20.07.2020, the corporate debtor issued a debit note and communicated the same through WhatsApp to the applicant.
- c) That the demand notice under Section 8 IBC was incomplete as the applicant has not annexed all invoices along with the demand notice. Further no affidavit except Section 9(3)(b) has

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been annexed with the applicant. Moreover, in spite of directions the applicant failed to annex all the invoices.

12. The applicant filed the written synopsis and stated the following:

- a) That the certificate from the NeSL evidencing a default on part of the corporate debtor has been filed with the application. The corporate debtor failed to respond to or dispute the said default therefore it is deemed to be authenticated.
- b) The deductions of TDS on invoice clearly proves that though the operational creditor has failed to file certain invoices but all the invoices have been admitted by the corporate debtor due to which the TDS has been deducted.

13. We have perused the averments and heard the arguments made by the applicant and the Corporate Debtor. The corporate debtor has raised objection as regards the default and claimed that no default has occurred and no amount is due and payable. Moreover, the corporate debtor has issued a debit note dated 20.07.2020 on grounds of defect in quality of services provided due to which it had to incur major losses and in terms of which an arbitration proceeding as regards the quality of services provided by the applicant due to which the payment has been withheld by the main contractor, is pending before the Hon'ble Delhi High Court. The Corporate debtor is mainly relying on the argument upon the work order dated 01.08.2016 wherein as per clause 18 it is specifically stated that the payment shall be released by the Respondent Company within 10 (ten) days after receiving corresponding payment from the employer. Another, objection raised by the corporate debtor is with regards to the incomplete demand notice being defective and incomplete. The said objection does not sustain as the applicant has filed the relevant invoices, subsequently, as per the directions of the Bench and cured the defects. Hence, we are of the view that there is a pre-existing dispute as has been contended by the corporate debtor. It is clear that without going into the merits of the dispute, the corporate debtor has raised a plausible contention requiring further

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RS Infra Vs. RP Infraventure Pvt. Ltd.

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investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed. In the given facts and circumstances, the applicant has failed to establish default on part of the corporate debtor in payment of operational debt. Therefore, this bench is not inclined to admit the present application. Accordingly, the present application is rejected.

18. A copy of the order shall be communicated to the applicants as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records and to ROC for updating the master data. ROC shall send compliance report to the Registrar, NCLT.

19. In terms of the above order IB/263/ND/2021 is disposed of.

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MEMBER (T)

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