

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

**CP (IB) No. 838/MB-VI/2019**

*[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:

**SURESH GUPTA**

**Address:** House No. 1312, Sector-14  
Faridabad-121007, Haryana.

**...Operational Creditor**

V/s

**B.E. BILLIMORIA & COMPANY LIMITED**

[CIN: U45200MH1962PLC012268]

**Registered Office:** Shiv Sagar Estate, 'A' Block  
2<sup>nd</sup> Floor, Dr. A.B. Nair Road, Worli  
Mumbai -400018, Maharashtra.

**...Corporate Debtor**

Pronounced on:19.01.2024

**CORAM:**

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

**HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)**

***Hearing: Hybrid***

**Appearances:**

Operational Creditor: Adv. Dhiraj Mhetre a/w. Satyasarikant Vutha i/b M/s.  
Khaitan Legal Associates.

Corporate Debtor: Adv. Yash Jariwala

**ORDER**

***[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]***

**1. Background**

1.1. This Company Petition bearing C.P. (IB) No. 838 / MB / 2019 (Application) was filed on 17.01.2019 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 (AA Rules) by Mr. Suresh Gupta, the Operational Creditor (OC) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of B.E. Billimoria & Company Limited, the Corporate Debtor (CD).

1.2. The total amount of default involved is Rs. 1,36,95,472/- (One Crore Thirty-Six Lakhs Ninety-Five Thousand Four Hundred Seventy-Two Rupees) which is based on the Settlement Agreement dated 09.02.2017, executed between the parties in which the CD was supposed to pay the outstanding amount due and payable to the OC in six equal instalments.

1.3. The date of default as mentioned in the Part IV of the Application is 01.10.2017 i.e., after the date on which the CD was supposed to pay the amount of Rs. 34,23,868/- to the OC as first instalment as per the said the Settlement Agreement.

**2. Contentions of OC**

2.1. The OC submits that the CD had appointed the OC *vide* its letter dated 16.11.2009 (Appointment Letter) for not only to represent and act on its behalf but also to monitor, supervise, manage, coordinate and complete the following

construction projects related to the Delhi Commonwealth Games, 2010 (CWG Site) entered between the CD and the Delhi Development Authority (DDA):

- a) Badminton and Squash Stadium at Sirifort;
- b) Table Tennis Stadium at Yamuna (Yamuna Sports Complex).

2.2. The OC submits that due to the CD's default in payment to the OC for his services with respect to the CWG Site, the OC and the CD entered into a Settlement Agreement dated 09.02.2017 (Settlement Agreement), wherein the CD undertook to pay the total lump-sum settlement amount of Rs. 2,05,43,208/- (Two Crore Five Lakh Forty-Three Thousand Two Hundred and Eight Rupees) in six instalments in the following manner:

<b>Date of Payment</b>	<b>Amount to be paid (In Rupees)</b>
1 <sup>st</sup> October 2017	34,23,868/-
1 <sup>st</sup> January 2018	34,23,868/-
1 <sup>st</sup> April 2018	34,23,868/-
1 <sup>st</sup> July 2018	34,23,868/-
1 <sup>st</sup> January 2019	34,23,868/-
1 <sup>st</sup> October 2018	34,23,868/-
Total Amount	2,05,43,208/-

In the Settlement Agreement, it was also recorded that as on 03.10.2016, an amount of Rs. 94,34,056/- (Ninety-Four Lakhs Thirty-Four Thousand and Fifty-Six Rupees) was due to be received from the DDA and the CD also undertook to pay 17% of the net amount due to be received from DDA (less pocket expenses), to the OC, as and when it would be received by the CD from the DDA. The Settlement

Agreement was a full and final settlement regarding the OC's claims as per mutual consent of the parties.

- 2.3. The OC submits that acting upon the Settlement Agreement, the CD issued a Salary Slip for the month of August, 2017 to the OC for Rs. 5,10,000/- (Five Lakhs Ten Thousand Rupees) as the amount received from the DDA which inclusive of Rs. 15,000/- as TDS for the same. However, the CD failed to pay the outstanding dues to the OC as agreed under the Settlement Agreement despite the OC sending reminders dated 11.11.2017, 29.12.2017 and 16.08.2018 to the CD regarding the same.
- 2.4. In view of the above events, the OC issued a Demand Notice under Section 8 of the IBC on 02.07.2018 to the CD. The CD replied *vide* its letters dated 18.07.2018 and 20.09.2018 and rejected OC's claims on ground of non-finalisation of their accounts and certain complaints from the DDA over defective work as well as non-disbursal of amount from the DDA in favour of the OC till that date.
- 2.5. The OC provided the certificate received from HDFC Bank dated 06.10.2018 stating that the OC did not receive any payment from the CD during the period of 01.10.2017 to 05.10.2018. In the circumstances, the OC prays for initiation of CIRP in respect of the CD.

### **3. Contentions of CD**

3.1. The CD filed its reply dated 30.06.2023, wherein it has submitted the following:

- a) It is not only a solvent company but also it is well known as a civil engineering company delivering superior quality construction including successful completion of

projects such as railway bridges for Konkan Railway, etc., and had won awards for the same.

- b) Due to inefficient service as well as failure to pay service tax dues on OC's part, the CD not only received complaints from the DDA regarding poor quality of work in the CWG Site but also refrained from releasing payments to the CD. This in turn hindered the CD in making payments to the OC. The CD relies upon the DDA's letter dated 18.03.2019, which relates to rectification of defects in the construction of the CWG Site.
- c) Pre-existing dispute between the parties over service tax dues and incomplete work at CWG Site despite making past payments by the CD in good faith to the OC. The CD relied upon a list of letters exchanged between the parties during the period of 2009 to 2018.
- d) The OC is misusing the IBC procedure to extort money from the CD which is sheer abuse of law for which the CD relied upon the settled law that the IBC cannot be used as mechanism for money recovery and NCLT is not a debt collection forum as laid down by Hon'ble Apex Court in *M/s. S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd, (Civil (A) No. 4583 of 2022, decided on 15.07.2022)*.
- e) Unpaid instalments of a settlement agreement cannot be treated as an operational debt.
  - i) That during the course of the contractual work, certain disputes had arisen between the parties with regard to the outstanding dues. In the background of the said disputes vis-à-vis the quantum of the outstanding dues, such disputes came to be settled by way of the Settlement Agreement dated 09.02.2017, whereby outstanding dues were settled for an amount of Rs. 2,05,43,208/- towards full and final settlement of all the disputed dues. Even otherwise, it was clearly

mentioned that such payment does not amount to admission of any liability of the OC.

- ii) As per the Settlement Agreement, the liability to pay dues to the OC would arise only upon receipt of completion certificate from DDA and release of payment from them. However, the DDA neither issued the completion certificate nor the CD received any payment from the DDA, post execution of the Settlement Agreement.
- iii) Claim arising out of unpaid debt under a settlement agreement, cannot be a ground to trigger CIRP a under Section 5(21) of the IBC, even though a remedy may lie elsewhere, but not necessarily before this Tribunal.
- iv) The CD relied on evolved jurisprudence regarding the fact that mere default in payment of instalments of a settlement agreement executed does not amount to an operational debt for the purpose of Section 5(21) of the IBC.

#### **4. Rejoinder of OC**

4.1. The OC filed its reply dated 16.02.2022 wherein it has submitted the following points:

- a) CD's claim that it is a reputed company and has executed mega projects as also a solvent company is incorrect as various petitions have been filed against the CD due to default in making payments to different creditors. In fact, during the pendency of the present Application, another bench of NCLT Mumbai had admitted Section 7 Application in respect of the CD in *Bank of India v B.E. Billimoria & Co Ltd, [CP(IB) 1329(MB)2019]* vide its order dated 20.09.2019, which was later set aside by the Hon'ble NCLAT vide an order dated 20.11.2019, as the matter was finally settled between the parties.
- b) The OC submits that during 2011, since the CD did not release payments to the OC, it issued a winding up notice dated November 28, 2011 but after the promoters

of the CD approaching the OC and releasing some payments, it was not pursued. On a promise to release further payments, *vide letter* dated December 2, 2011, the said notice was withdrawn by the OC.

- c) The OC submits that it is a matter of record that the CD had *vide* the Appointment Letter dated 16.11.2009, appointed the OC to monitor, supervise, manage, coordinate and complete two constructions entered into between the CD and the DDA the default in the present case is in respect of default in making payment towards the services rendered by the OC, which culminated into the Settlement Agreement to record the admission of liability of the CD and its payment obligations towards the OC.
- d) The OC submits that as per the terms of the Appointment Letter, the OC was appointed for management and execution of a badminton and squash stadium and a table tennis stadium for the Commonwealth Games held in New Delhi. It is pertinent to note that the OC carried out the work with utmost diligence and sincerity. The completion certificate in respect of the CWG Site was handed over by the DDA on October 12, 2010 and the Commonwealth Games, 2010 were conducted in New Delhi including events hosted at the CWG Site. The OC has produced copy of the provisional completion certificate dated October 12, 2010.
- e) However, after carrying out the work, since no payments were made, the OC addressed various letters; however, the CD failed to release any payment. Despite non-payment of amounts due to the OC by the CD, he 'acted' as an agent of the CD and 'assisted' the CD by voluntarily engaged with DDA and got released total amount of Rs. 28,64,10,228 on various dates from 01.08.2013 to 28.01.2015 which happened during the subsistence of OC's engagement. Hence, according to the OC, the CD has concealed receipt of many payments from the DDA.

- f) Regarding the allegation of deficiency of service raised by the CD, the OC submits that quality of work has never been flagged by the CD in the past ten years and is only an afterthought and is only to wriggle out of payment obligations. No document provided by the CD has proved any deficiency of service of the OC and no document has been produced relating to dispute regarding quality of work raised by the DDA and, thus, the CD's contention of 'defective service' as ground for pre-existing dispute is nothing but a moonshine defence concocted by the CD to evade its payment obligations towards the OC.
- g) The OC further clarified that he was not a sub-contractor of the CD but was merely engaged in a supervisory capacity to work under the direct supervision of the Chairman of the CD and along with the team of the CD. The fact that retention of an amount of one crore rupees by the CD till 01.10.2020 under clause 2 of the Settlement Agreement only indicates admission of liability of outstanding amount. The OC further submits that the CD has already received one crore rupees kept as security with the DDA. At the time of entering into the Settlement Agreement, the CD had already received the same amount.
- h) The OC relied on decision of the NCLT Mumbai in *Outdoor Advertising Professionals (India) Private Limited v/s Graphene Media Private Limited (C.P. No. 427/IBC/MB/2019, decided on 25.01.2022)* to contend that mere execution of a settlement agreement would not change the nature of operational debt.

## **5. Analysis and Findings**

- 5.1. We have heard both the Ld. Counsel for the OC and the CD and have also carefully gone through all the pleadings and submissions by both the parties.

5.2. As per the Settlement Agreement, the CD appointed the OC to represent and act on its behalf to satisfactorily and successfully monitor, supervise, manage, coordinate and complete the construction contract entered into between the CD and the DDA in connection with construction of CWG Site associated with CWG Games, 2010. The CD's Appointment Letter dated 16.11.2009 states that the OC shall be eligible for Gross Commission in respect of the profits of the projects at the rate of 17% of the final net pre-tax profits and that the commission due to the OC shall be paid at the end of the project after the completion certificate has been issued and the bills and accounts have been finalised, tallied and settled fully but the OC would be eligible for some advance on mutual agreement. It further states that the final dues are to be adjusted only on finalisation of accounts and receipt of final dues from the DDA. The OC has agreed for engagement for commission, Annexure-D of the Application is the salary slip for the month of August 2017 in which the OC is shown as an 'employee' of the CD in the capacity as 'Advisor' for its 'Site Delhi Branch' in the grade of 'Top Management'. A consolidated payment of Rs. 5,10,000/- is shown to have been made to the OC by deducting Rs. 15,000/- as TDS and making other deductions. The Settlement Deed dated 09.02.2017 is shown to be entered between Mr. Suresh Gupta, the OC in his individual capacity and the Managing Director of the CD, i.e., B.E. Billimoria & Co., viz., Mr. Digant L. Kapadia. However, the Acknowledgment Letter dated 09.02.2017 is on the Letter Head of 'Bebanco Northern Contracts Ltd.', which is shown as a subsidiary of B.E. Billimoria & Co. Ltd. It is interesting to find that the said Acknowledgment Letter is signed on behalf of 'Bebanco Northern Contracts Ltd.' (BNCL) by the same Mr. Digant Kapadia as the Director of BNCL who also executed the Settlement Agreement on behalf of the CD in the capacity of its

Managing Director. It is the same Mr. Kapadia had filed the Affidavit-in-Reply for and on behalf of the CD.

5.3. Further, the Acknowledgment Letter attached to the Settlement Agreement is addressed to two entities, namely, 'RSB Projects Ltd, A-34 Okhla Industrial Area, Phase-I, New Delhi- 1100020' and 'RSB Infrastructure' having the same address. The Acknowledgment Letter is seen to have been accepted by Mr. Suresh Gupta on behalf of 'RSB Projects Ltd.' The said Acknowledgment Letter has also been accepted on behalf of 'RSB Infrastructure' and signed by yet another person on behalf of it. The Acknowledgment Letter bears the stamp of 'RSB Infrastructure', New Delhi. As per Annexure- F "(Colly)", all the emails between Mr. Suresh Gupta are seen to have been sent from the ID of the OC, viz., 'gupta@rsbinfra.com' and the recipients 'dlk@bebanco.com' with copies to 'margaret@bebenco.com' and 'nimish@rsbinfra.com'. All other correspondence is seen to have been made to the CD herein by the OC. Neither 'RSB Projects Ltd.' nor 'RSB Infrastructure' is a party to the dispute. Further, Annexure 1- "Colly" to Annexure 39 are correspondences between the OC in his individual capacity and the CD, i.e., B.E Billimoria & Co. However, Bebanco Northern Contracts Ltd was never in the picture. Then the question remains as to the role and involvement of 'Bebanco Northern Contracts Ltd' in the matter. Neither the OC nor the CD has offered any explanation to the above discrepancy, either in their pleadings or during arguments. The above certainly casts shadow on the pleadings advanced by both the OC and the CD, which points to the fact that both the parties have suppressed certain material facts before us.

5.4. Be that as it may, the CD has contended that one of the pre-conditions for payments to the OC was procurement of completion certificate from the DDA and tallying and finalisation of bills and accounts in the Settlement Agreement and the Appointment

Letter. The OC has produced copy of the provisional completion certificate dated 12.10.2010. The said certificate has flagged certain rectifications; however, there is nothing directly or indirectly connecting the performance of the OC in the said certificate. No dispute regarding quality of service of OC was ever raised by the CD before 02.07.2018, on which date the OC issued demand notice under Section 8 of the IBC. In its reply dated 18.07.2018, the CD stated that they were receiving various complaints from DDA for completion and rectification of the defective work and that the same had to be looked into by them on their own due to the inability of the OC to attend the same. Further, on a bare perusal of the Settlement Agreement, it is evident that it was executed to resolve the disputes between the parties. The relevant portion of the recital of the Settlement Agreement is reproduced hereunder:

*“And whereas thereafter there were certain dispute and differences that arose between the parties with regards to the payment and dues pending towards Commission amount payable to the party of the ‘Second Part’ by the party of ‘First Part’ as set out in the said letter.”*

Hence, it is seen that the ‘dispute’ mentioned therein is only with regard to ‘payment and dues’ and nothing else. There existed no dispute as to quality of service rendered by the OC. The decision of NCLT Mumbai in *Outdoor Advertising Professionals* (supra) as relied by the OC is not applicable in the present matter since not only the facts and circumstances of the aforesaid decision was totally different from the present matter but also the CD never admitted the OC’s claims as mentioned in the aforesaid Settlement Agreement. Therefore, the defence of this moonshine pre-existing dispute by the CD goes against it.

5.5. Now, the cardinal question is to decide whether there existed an operational debt for the OC to invoke Section 9 of the IBC. The cause of action for the OC revolves around the

Settlement Agreement dated 09.02.2017 and failure of the CD to give effect to the same. Further to this agreement, a salary slip was issued for the month of August, 2017. The OC has claimed Rs. 1,36,95,472/- as the amount of default. However, the manner in which the OC arrived at this figure in Part IV has not been explained. The Application has been filed for the failure to give effect to the terms of the Settlement Agreement. Clause 5 of the Settlement Agreement listed out 6(six) instalments of Rs. 34,23,868/- each. The question as to whether a claim in respect of a settlement agreement can be regarded as "operational debt" within the meaning of Section 5(21) has been considered in a number of cases by the Courts and Tribunals. It has been held by the Hon'ble NCLAT Bench Chennai in *Maulik Kirtibhai Shah v United Telecom Limited, Company Appeal (AT)(CH)(Ins) 268/2023* on 15.09.2023 that definition of "operational debt" cannot be interpreted widely so as to include any agreement between parties which does not specifically pertain to the supply of goods or service. It is the case of the OC that out of the total 6 instalments of payment as agreed in the Settlement Agreement, the CD has not made payment even against one instalment. Hence it is found that the cause of action for the OC against the CD arose out of the Settlement Agreement and the failure of the CD to pay instalments to the OC as agreed between them.

5.6. From the records, it is seen that pursuant to the Settlement Agreement entered between the parties, the parties had agreed to settle the outstanding operational debt at Rs. 2,05,43,208/- which is lower than alleged outstanding dues of Rs. 5, 58,61,000/-, when the second winding up notice was issued by the OC on 18.05.2015. We find that the moment the parties entered into the Settlement Agreement, the nature of the debt changed. The amount outstanding pursuant to the Settlement Agreement is a settlement amount which can only be construed as a mere debt and does not qualify to

be an operational debt as defined under Section 3(11) of the IBC as it lost its character of operational debt. Hence, the claim of the OC as regards existence of operational debt due and payable by the CD fails.

5.7. Moreover, there is a shadow of doubt as regards the engagement and agreement between the OC and the CD. We feel that both parties have suppressed number of things from the Adjudicating Authority. An application under Section 9 of the IBC cannot be admitted when there exists a cloud of suspicion, especially when the nexus between the OC and CD in their engagement or agreement is not clearly made out. The Settlement Agreement does not offer any credence in establishing the relationship between the parties. Even if it is believable, CIRP cannot be initiated on the failure of the Settlement Agreement. Hence, we cannot admit this Application to initiate CIRP in respect of the CD.

### **ORDER**

On the basis of the above discussions, this Application bearing C.P. (IB) No. 838/MB/2019 under Section 9 of the IBC, filed by Mr. Suresh Gupta, the OC, for initiating CIRP in respect B.E. Billimoria and Company Limited, the CD is **rejected**.

We make it clear that any observations made in this Order shall not be construed as expressing opinion on merits. The OC's rights available as per law before any judicial/quasi-judicial forum shall not be prejudiced on the ground of rejection of the present Application. No orders as to costs. Ordered accordingly.

**Sd/-**  
**SANJIV DUTT**  
**MEMBER (TECHNICAL)**

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

//Tanmay Jain//