

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI**

T.C.P NO. 362/I&BP/NCLT/MB/MAH/2017

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

In the matter of

M/s. Lansh Engineering Pvt. Ltd.,)
R-702, MIDC, TTC Industrial Area,)
Rabale, Navi Mumbai 400 701.) .. Petitioner

V/s

M/s. Topworth Infra Pvt. Ltd.,)
308, 3rd Floor, Ceejay House,)
Dr. A.B. Road, Worli, Mumbai 400 018.) .. Respondent

Order delivered on: 17th, October, 2017

Coram: 1. Hon'ble Shri M.K. Shrawat, Member (Judicial)
2. Hon'ble Shri Bhaskara Pantula Mohan (Judicial)

For the Petitioner : 1. Mr. Atul Singh, Advocate,
2. Mr. Vedant Desai, Advocate

For the Respondent : 1. Mr. Sachin Bhaskar, Advocate

Per M.K. Shrawat, Member (Judicial)

ORDER

1. The Petition under consideration is a transferred Petition from the Hon'ble High Court and thereafter requisite Form No.5 was submitted on 14th July, 2017 as an **"Operational Creditor"** for 'operational debt' of ₹65,97,617/- /- (Rupees sixty five lakhs ninety seven thousand six hundred seventeen only) recoverable from M/s. Topworth Infra Ltd., Worli, Mumbai. On receiving the prescribed Form No. 5 and **Demand Notice dated 11th July, 2017**, the Respondent **'Corporate Debtor'** has raised objection vide letter dated 22nd July, 2017. The Respondent has objected the **admission** of this Petition primarily on the ground that the debt in question was **disputed** by the Respondent Debtor, hence the remedy is not available under I & B Code.

2. Facts of the case, as narrated by the Ld. Counsel of the Petitioner, are that a **Work Order dated 20th June, 2011** was executed and according to which services were provided at the project site on the agreed terms and settled rates. Our attention has been drawn on several Invoices which were raised by the Petitioner totalling ₹ 3,86,62,256/- (Rupees three crores eighty six lakhs sixty two thousand two hundred fifty six only). Against those Invoices, part payments have been made, details are also on record. After appropriating the part payment, which is not in dispute, the Petitioner's claim is that balance ₹ 43,40,538/- (Rupees forty three lakhs forty thousand five hundred thirty eight only) remained payable and in spite of repeated reminders the alleged Debtor has not made any payment. Because of the said default, a Petition under the old Provisions of the Companies Act u/s 433(e) and u/s 434 for 'winding up' was filed before the Hon'ble High Court, which stood transferred as on date. As per the calculation of the Petitioner, the principal amount along with interest is stated to be as under:-

**"SUMMARY OF DEBT RECEIVABLE FROM
TOPWORTH INFRA PVT. LTD.**

<i>DEBT OUTSTANDING</i>	<i>2,615,630.00</i>
<i>RETENTION</i>	<i>1,724,908.00</i>
<i>OPERATIONAL DEBT</i>	<i>4,340,538.00</i>
<i>INTEREST RECEIVABLE UPTO 30.06.2017</i>	<i>2,257,079.76</i>
<i>TOTAL AMOUNT RECEIVABLE FROM TOPWORTH INFRA PVT. LTD. UPTO 30.06.2017</i>	<i><u>6,597,617.76</u></i>

3.1 Our attention has also been drawn on one of the Work Orders dated 20th June, 2011 according to which the Corporate Debtor had awarded the Work Order for providing contractual services for unloading, fabrication, erection and alignment job for 2 x 35 MW power plant under Expansion of, CSPPL Project at Rajnandgaon, Chhattisgarh. The description of the job and the value was as under :-

SR. NO.	JOB DESCRIPTION	UNIT	QTY	RATES IN INR	TOTAL VALUE IN INR
1	Unloading, Erection Alignment, Testing & Commissioning of Entire Equipment supplied by our Vendors at different heights with our own material handling equipments and tools.	MT	2990	8500	25415000

3.2 As per the Contract, **the completion period was on or before 20th December, 2012.** Further, Clause 5 has provided that if the Contractor failed to complete the work within the prescribed period, it would be construed as a breach of the "Work Order". There was a right to recover from the Contractor the **liquidated damages** agreed to be 5% of the value of the Contract. Clause 6 of the Contract had specified that time was the essence for rendering the service under the "Work Contract". As per Clause 7 of "Terms of Payment", there was a provision of retention of Security Deposit to be released only on submission of Performance Bank Guarantee of 5% of Order value and a certificate from Officer-in-Charge certifying completion of work.

3.3 From the side of the Petitioner, it is vehemently contested that the Corporate Debtor had never objected the claim of the Petitioner, rather acknowledged the debt amount as is evidenced from one of the employees of the Company i.e. G.M., F&A, who has received the statement of the summary of the net amount payable to Lansh (Petitioner). Since the debt had already been acknowledged; hence, it is unfair on the part of the Debtor to contest the Petition on the ground of maintainability, pleaded by the Ld. Representative. Even in the Books of Accounts of Topworth Infra Ltd. (Debtor), the account of Lansh Engineering (Creditor) reflects a closing ₹46,15,638/- (Forty six lakhs fifteen thousand six hundred thirty eight only) for the accounting period ended on 31st March, 2015.

3.4 On the other hand, the Respondent has vehemently opposed the admission of the Petition and raised the "**dispute**" in the following manner:-

"Lastly, our Client draws your attention to the mandate of the said work order whereby you were required to undertake the unloading, fabrication, erection and alignment job for 2 sets of 35 MW power plant under expansion at site of Crest Steel and Power Private Limited for the total consideration of Rs. 13,84,57,275/- (rupees thirteen crores eighty four lakhs fifty seven thousand two hundred seventy five only). In connection therewith, it is an undeniable fact that you have abandoned the mandate of the work order without completing even 20% or the original scope of work. Further, even with respect to the work executed by you, you have failed to undertake the same within the respective timeline of 18 months i.e. on or before 20th December 2012. You will appreciate that the said work order provides for the consequences in respect of your failure to comply with the time sensitive work order. Accordingly, your failure to comply with the obligation envisaged in Clause 4 (Contract Completion Period) of the said work order entitles our Clients to the consequences provided under Clause 5 ("Delay in Completion of Work") of the said work order. Further our Client also states that you have wilfully and/or negligently failed to comply with Clause 2.2 (Obligation of the Contractor) of the said work order. The failure on your part under the said work order entitles our Client to certain claims for damages suffered by it which is quantified to 10% of the amount of the said work order i.e. Rs. 1,38,45,727.50/- (Rupees one crore thirty eight lakhs forty five thousand seven hundred and twenty seven and fifty paise only) ."

3.5 The argument of the Ld. Counsel of the Respondent is that the Petitioner had abandoned the work without even fully completing it, which caused substantial loss to the Company. The work was not completed within the time prescribed i.e. on or before 20th December, 2012. Our attention has been drawn on certain e-mails exchanged between the parties. On 17th October, 2013, Managing Director of Lansh Engineering (Petitioner) had written that the permission be granted to carry out whatever fabrication remained incomplete so that 100% could be completed and the Invoices could be cleared by removing misunderstanding. It was requested that the execution be permitted for completion of halfway work not carried out. From the side of the Respondent Company, it was objected and also informed that the financial claims were not true. It was also informed to stop the work with immediate effect from 7th October, 2013. Ld. Counsel has thus explained that the Petitioner had admitted that the work was incomplete and it was left halfway causing great hardship to the Respondent. It is also informed that the Petitioner had admitted in that email that there was misunderstanding about the amount claimed which resulted into a serious

dispute. Our attention has also been drawn on a correspondence of 12th September, 2013 to demonstrate that as and when the payment was demanded it was released so that the work should not suffer. Side-by-side, there was a discrepancy in the status of the account which was also the matter of discussion in those e-mails. The Respondent Company had informed about the delay in the progress of the project and also informed that there was mismatch of the net amount payable. According to the arguments all those admitted facts have thus clearly demonstrated that there was an existence of dispute.

4. **FINDINGS :** - Arguments of both the sides heard at length in the light of the Petition on record and the Compilation filed containing evidences. As per Sections 8 and 9 of The Code, an **Operational Creditor** can file an Application demanding payment of outstanding debt and also to issue a Notice of Demand, which can be objected by the Corporate Debtor u/s 8(2) of the Code. In the present case, the delivery of **Notice of Demand** and the **objections raised by the alleged Corporate Debtor** are very much on record and placed before us for our consideration. The parties have not questioned those pleadings on any technical ground. Therefore, the merits of the case on the basis of the evidences are to be examined and thereupon to adjudicate whether there was "**existence of a dispute**" as prescribed u/s 8(2)(a) of the Code. In the case of *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.* – S.C. (Civil Appeal No. 9405 of 2017), this terminology "existence of dispute" has been examined and held that the dispute must not be raised after the service of Notice of Demand, but the dispute should be genuine and must be in existence due to which the impugned debt remained unpaid. In this case earlier under the old Provisions of the Companies Act, a Demand Notice was issued on 4th July, 2016, annexed to the Petition filed before the Hon'ble High Court and at that point of time the Respondent Company vide reply dated 26th July, 2016, as well, had raised the genuineness of the demand primarily on the ground that the Petitioner had not completed the work assigned within the prescribed time and defaulted the terms and conditions of the "Work Order". Due to the lapses on the part of the Claimant, the Respondent Company had to suffer losses. The reply of the Respondent Company furnished at the very inception of the Petition, filed before the Hon'ble High Court, is not only an indication of the existence of the dispute, but also an evidence that the dispute had ascended due to the lapses on the part of the Claimant. We have also examined the exchange of e-mails, as discussed *supra* and noticed

that the Petitioner had accepted that there was delay in completion of the contract within the time agreed upon; hence, sought permission to get the unfinished work completed. From the side of the Respondent Company, it is established through various evidences that all the Invoices were cleared by making the payments and there was no delay of payment on the part of the Respondent Company. Still the completion of the work was delayed. The "Work Order" had put a condition to retain the "retention money", which amounted to ₹17,24,908/- (Rupees seventeen lakhs twenty four thousand nine hundred eight only). The alleged outstanding amount of Invoices was ₹26,15,630/- (Rupees twenty six thousand fifteen thousand six hundred thirty only). However, the admitted factual position is that out of the total "Work Order" of ₹13,84,57,275/- (Rupees thirteen crores eighty four lakhs fifty seven thousand two hundred seventy five only) the amount in dispute which is alleged to be the Operational Debt is ₹65,97,617/- (Rupees sixty five lakhs ninety seven thousand six hundred seventeen only). The Respondent Company has, therefore, made efforts to convey before this Bench its *bona fide* that the substantial amount had always been paid, as and when the Invoices were received. The payment in question was, in fact, remained unpaid only due to the fault and lapses on the part of the Petitioner Company so resulted into a dispute.

4.1 Considering the totality of the facts and circumstances of the case and after due perusal of the evidences on record, we now arrive at a conclusion that there was a genuine dispute in existence resulted into non-payment of retention money plus few Bills / Invoices. Once we have come to the conclusion that there was an '**existence of the dispute**', therefore, the provisions of Section 8(2)(a) The Code is applicable and as a consequence the Application deserves rejection u/s 9 of the Insolvency Code. According to us, this is not a fit case to approve the commencement of the Insolvency Resolution Process.

5. The Petition is not 'Admitted'; No order as to cost. Registry is directed to consign it to Records.

Sd/-

BHASKAR PANTULA MOHAN
Member (Judicial)

Sd/-

M.K. SHRAWAT
Member (Judicial)

Dated: 17th October, 2017

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