

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT NO. V**

CP No. 1348/(IB)-MB-V/2020

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

In the matter of

Mr. Rajesh Upadhyay

Proprietor of Mega Structures

1/D-6, Basant Park, RC Marg, Chembur, Mumbai
– 400071.

... Petitioner/Operational Creditor

V/s

NDS Art World Private Limited

V-5/103, Vinay Nagar, SNO14-3, 15-3, 17-2,
Village Hatnoli, Khalapur, Raigad-410207.

... Respondent/Corporate Debtor

Order Reserved on: 20.12.2022

Order Pronounced on: 15.02.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via Video Conferencing):

For the Petitioner : Mr. Sanjay Udeshi, Advocate

For the Corporate Debtor : Ms. Sonali Pawar, Advocate.

Per: Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. This Company Petition is filed by **Mr. Rajesh Upadhyay, Proprietor of Mega Structures** (hereinafter called "**Petitioner**") seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **NDS Art World Private Limited** (hereinafter called "**Corporate Debtor**") alleging that the Corporate Debtor committed default to the extent of Rs. 3,17,65,236/- inclusive of 24% per annum interest to the Petitioner. This Petition has been filed by invoking the provisions of Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called "**Code**") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The Petition reveals that the Petitioner is in the business of steel structure fabrication, constructing steel sheds, steel bridges, formwork, civil work, etc. The Petitioner undertakes construction of civil, steel and various structures for theme parks, studios and infrastructure works. The Corporate Debtor approached the Petitioner for construction of 3 structures namely, Theme Park at Karjat (hereinafter referred to as "**Karjat project**"), Old Thane New Thane theme park (hereinafter referred to as "**OTNT project**") and Bollywood Theme Park at Thane (hereinafter referred to as "**Bollywood Thane project**"). In respect of the above aforesaid projects, the Petitioner issued four invoices for the outstanding dues payable by the Corporate Debtor. The details of the same are given in a tabular chart below:

Sr. No.	Invoice No.	Date	Outstanding Amount (in Rs.)
1	24/ND/17-18	28th June, 2017	Rs. 1,03,66,028/-
2	23/ND/17-18	28th June, 2017	Rs. 2,12,26,219/-
3	05/17-18	28th September, 2017	Rs. 34,90,720/-
4	03/17-18	25th September, 2017	Rs. 12,39,000/-

3. The Petitioner states that the Corporate Debtor issued a Work Order in favour of the Petitioner for the **Bollywood Thane Project** on 01.02.2017 for an aggregate value of Rs. 6,10,50,000/-. Thereafter, various invoices were raised upon the Corporate Debtor by the Petitioner as per the work orders issued by the Corporate Debtor. The Corporate Debtor instead of making the payment for the invoices, appointed a new contractor to complete the work order awarded under the Bollywood Thane project even without terminating the project. Thus, the outstanding dues towards the Bollywood Thane Project in respect of the invoices raised aggregates to Rs. 3,20,95,447.79/-. However, the Corporate Debtor made a part payment of Rs. 2,22,75,000/- thereby leaving an outstanding balance of Rs. 98,20,447.79/- (without TDS and tax). An invoice of Rs. 1,03,66,028/- with TDS and tax vide the invoice being No. 24/ND/17-18 dated 28.06.2017 was raised.
4. Under the aforesaid circumstances, the Petitioner issued a Demand notice dated 20th February, 2020 in Form-3 calling upon the Corporate Debtor to make the total outstanding payment of Rs. 1,52,55,021/- being the amount of tax invoice along with interest @24% p.a. as on 18.11.2019. The said demand notice was received by the Corporate Debtor on 05.03.2020 and the Corporate Debtor replied to the said Demand Notice on 09.03.2020.
5. Further, the Petitioner states that the Corporate Debtor issued a Work Order for the **OTNT Project** on 31.01.2017 for an aggregate value of Rs. 4,99,50,000/- issued in favour of the Petitioner. The Petitioner completed the work given under the project and upon completion, various invoices were raised upon the Corporate Debtor by the Petitioner which were duly accepted by the Corporate Debtor. The invoices raised aggregated to an amount of Rs. 4,88,66,241.54/- wherein the Corporate Debtor made a part payment of Rs. 3,92,83,399.03/- thereby leaving an outstanding balance of Rs. 95,82,842.51/- after deducting TDS and tax which has already been paid towards the **invoice being No. 23/ND/17-18 dated 28.06.2017** for an amount of Rs. 2,12,26,219/- (less TDS amount and tax of Rs.

11,17,169.23/- admittedly paid by the Corporate Debtor and part payment of Rs. 1,39,87,345/- made by the Corporate debtor against the invoice) and **invoice no. 05/17-18 dated 28th September, 2017** for an amount of Rs. 34,90,720/- (less TDS amount of Rs. 29,582.37/- admittedly paid by the Corporate Debtor. The Petitioner states that all the invoices referred to above were raised upon the Corporate Debtor and were accepted by the Corporate Debtor without any protest. Thus, an amount of Rs. 95,82,843/- is due and payable by the Corporate Debtor.

6. Due to the aforesaid circumstances, the Petitioner issued a Demand notice dated 20th February, 2020 in Form-3 calling upon the Corporate Debtor to make the total outstanding payment of Rs. 1,46,72,648/- being the amount of tax invoice along with interest @24% p.a. as on 18th November, 2019. The said demand notice was received by the Corporate Debtor on 5th March 2020 and the Corporate Debtor replied to the said Demand Notice on 09th March, 2020.
7. Further, the Petitioner states that the Corporate Debtor issued three Work Orders for the **Karjat Project**, the details of which are as follows:

Work Order No.	Date	Aggregate Value (in Rs.)
1 st	24 th October, 2016	Rs. 66,60,000/-
2 nd	30 th November, 2016	Rs. 41,00,000/-
3 rd	28 th April, 2017	Rs. 77,00,000/-

8. Thereafter, various invoices were raised upon the Corporate Debtor by the Petitioner as per the work orders issued by the Corporate Debtor. The Petitioner states that towards the invoices aggregating to Rs. 2,79,80,100/-, the Corporate Debtor made a part payment of Rs. 2,67,51,600/- thereby leaving an outstanding balance of Rs. 12,28,500/- after deducting TDS which has already been paid towards the **invoice being No. 03/17-18 dated 25th September, 2017** for an amount of Rs. 12,39,000/- (less TDS amount of Rs. 10,500/- admittedly paid by the Corporate Debtor). The

Petitioner states that all the above referred invoices were raised upon the Corporate Debtor and were accepted by the Corporate Debtor without any protest. Thus, an amount of Rs. 12,28,500/- is due and payable by the Corporate Debtor.

9. Due to the aforesaid circumstances, the Petitioner issued a Demand notice dated 20th February, 2020 in Form-3 calling upon the corporate Debtor to make the total outstanding payment of Rs. 18,37,567/- being the amount of tax invoice along with interest @24% p.a. as on 18th November, 2019. The said demand notice was received by the Corporate Debtor on 5th March 2020 and the Corporate Debtor replied to the said Demand Notice on 09th March, 2020.
10. Pursuant to the aforementioned invoices, the Corporate Debtor addressed an email dated 3rd July, 2019, attaching a copy of the Operational Creditor ledger account in Corporate Debtor book wherein the Corporate Debtor has admitted its liability to the tune of Rs. 2,02,50,378/- as on 31st March, 2018 which inter alia includes the outstanding amounts under the invoices raised.
11. In view of the above circumstances, the Petitioner states that the Corporate Debtor has failed to repay its debts and there exists a Operational Debt.

REPLY OF THE CORPORATE DEBTOR:

12. The Corporate Debtor has filed its reply opposing the admission of the present petition. The Corporate Debtor has raised following contentions with regard to the Petition:
13. The Petitioner has submitted exaggerated and double invoice and there are discrepancies in the amount of invoice. The ledger annexed by the Applicant reflects an amount of Rs. 2,06,67,634/- and not Rs. 2,12,26,219/- and there is a difference of Rs.5,58,582/-

14. The claim mentioned in the Petition is below the threshold limit. The claim of the applicant is hit by Section 4 amendment as the three Invoices which are reflected in the ledger against which a payment of Rs. 1,85,00,000/- is clearly reflected in the Ledger.
15. Out of the four invoices mentioned above, only three Invoices are reflecting in the ledger of the Corporate Debtor. Hence, the fourth Invoice annexed to the Petition is bogus and concocted one for which CIRP cannot be triggered.
16. The Legal Demand Notice is defective as the same is addressed in the name of firm and not the person's name. The Legal Demand Notice is itself defective as the same is not addressed by the Petitioner and the same has been addressed in the name of "Mega Structures" however the Application has been filed by "Rajesh Upadhyay" claiming to be proprietor of the "Mega Structures".
17. The petitioner has exaggerated the claim amount by adding an interest component of 24% which was never agreed to by the parties.
18. The Petitioner has not mentioned the date of default and thus, no cause of action has arisen to file the present petition.
19. The Petitioner has not produced his ledger or any other substantive evident to corroborate his claim.
20. The Petitioner states that an amount of Rs. 30 lakhs are claimed which is not based upon any invoice. Thus, the applicant has wrongly included a claim of Rs. 30 lakhs without raising invoice.
21. The Petitioner has not annexed particulars of claim or his ledger account.

FINDINGS:

22. We have heard the counsel for the parties and gone through the records as well as the written submissions submitted by the parties.
23. It has been argued on behalf of the Operational Creditor that the agreement amounting to Rs. 3,17,65,236/- was outstanding against the Corporate Debtor in respect of the construction of civil work carried out by the Operational Creditor pertaining to the three work orders at three different sites namely Old Thane New Thane project Theme Park (**OTNT project**), Theme Park at Karjat (**Karjat project**) and Bollywood Theme Park at Thane (**Thane Project**). The Petitioner has referred to four invoices in the petition for sum of Rs. 1,03,66,028/- dated 28.06.2017, Rs. 2,12,26,219/- dated 28.06.2017, Rs. 34,90,720/- dated 28.09.2017 and Rs. 12,39,000/- dated 25.09.2017 respectively. It has further been pointed out by the counsel for the Operational Creditor that along with its email dated 03.07.2017, the Corporate Debtor has attached his ledger account maintained by them wherein the outstanding liability of Rs. 2,02,50,378 as on 31.03.2018 towards the Operational Creditor has been admitted. According to the Operational Creditor, it shows that there is no dispute with regards to the existence of Operational debt. As per the admission made in the Ledger account attached with the email dated 03.07.2019, the liability of more than Rs. 2 crores stands admitted. Apart from this, no dispute was ever raised with respect to the quality of work done by the Operational Creditor. It has further been contended on behalf of the Operational Creditor that no pre-existing dispute has been raised in the reply to the demand notices sent by the Corporate Debtor. Thus, there is no pre-existing dispute raised with regard to the transactions in respect of which the claim has been filed by the Operational Creditor.
24. The Operational Creditor has further contended that the dispute with regard to the interest has been raised only after the service of the demand notice. In respect of the limitation, the counsel for the Operational Creditor

argued that since there was COVID period from 5th March 2020 to 28 February 2021 and in view of the order passed by the Hon'ble Supreme Court, the petition cannot be said to be barred by time. The counsel for the Operational Creditor further submitted that the petition under section 9 filed by the Operational Creditor deserves to be admitted.

25. On the other hand, the counsel for the Corporate Debtor has argued that the instant petition filed by the Operational Creditor is not at all maintainable and deserves outright dismissal. The counsel for the Operational Creditor further argued that the work carried out by the petitioner is of inferior quality and the project was stopped by Thane Municipal Cooperation due to certain objections raised by the opposition leaders and it was got completed through an another contractor. The counsel for the Corporate Debtor has further contended that the Respondent has already paid a sum of Rs. 9,46,43,529/- to the Petitioner in respect of the work carried out by him pertaining to different work orders and there is dispute with regard to the remaining payment which can be resolved on the basis of the evidence to be adduced by the parties and the invocation of section 9 the code is not an appropriate remedy under these facts and circumstances of this case.
26. The counsel for the Corporate Debtor has further pointed out that the ledger account relied upon by the applicant clearly reflects an amount of Rs. 2,06,67,634/- and not Rs. 2,12,26,219 and, therefore, there is a difference of Rs. 5,58,582/- in the amount of the invoices. The counsel for the Corporate Debtor has further stated that as per the invoice referred to in para no. 11 of the petition, the amount is Rs. 95,82,843/- which is below the threshold limit of Rs. 1 crore.
27. The counsel for the Corporate Debtor further contended that out of the four invoices of Rs. 1,03,66,028/-, Rs. 2,12,26,219, Rs. 34,90,770 and Rs. 12,39,000/- only three invoices are reflected in the Ledger of the Corporate Debtor against which the payment of Rs. 1,85,00,000/- is shown

to have been made in the Ledger while the 4th invoice is clearly bogus one which has not been reflected in the Ledger account of the Corporate Debtor.

28. The counsel for the Corporate Debtor has further contended that interest at the rate of 24% has been claimed by the Operational Creditor which was never agreed between the parties. Moreover, the Corporate Debtor had allotted five different working orders and each working orders constituted a separate and distinct contract and the claim in respect of all the work orders could not have been jointly filed by the Operational Creditor and there is a clear cut misjoinder of the causes of action which is not permissible under the law. In fact, the Operational Creditor has filed an inflated and exaggerated claim charging interest at the rate of 24% without any basis and has also not mentioned the date of default. The Operational Creditor has also not produced any ledger maintained by it and, therefore, there is no corroboration of the claim cited in the petition. The Operational Creditor has further not placed on record any invoices or any receipt in respect of Rs. 30,00,000/- referred to in para 8 of the petition whereby admittedly the payment has been claimed on the basis of some verbal arrangement and no work order was admittedly issued by the Corporate Debtor. Therefore, the petition is not maintainable and deserves to be dismissed.
29. We have thoughtfully considered the contentions raised by the counsel for the parties and have also minutely gone through the records.
30. As per the case of the Corporate Debtor, as set forth in Part IV of the Petition under section 9 of the Code, the claim of Rs. 3,17,65,236/- has been made. It is an admitted case of the Operational Creditor that he was allotted construction work in respect of three different projects namely Old Thane New Thane project Theme Park (**OTNT project**), Theme Park at Karjat (**Karjat project**) and Bollywood Theme Park at Thane (**Thane Project**). It has further been admitted in Part IV that the Bollywood Thane Project working order dated 01.02.2017 in respect of Bollywood Thane project aggregated to Rs. 6,10,50,000/- and in para 12 of the Petition, the

Operational Creditor has further admitted that the work order dated 31.01.2017 in respect of OTNT project was for a sum of Rs. 4,99,50,000/-. The Operational Creditor has further admitted in para 21 of the petition that in respect of the Karjat project, work orders dated 24.10.2016, 30.11.2016 and 28.04.2017 for a sum of Rs. 66,60,000, Rs. 41,00,000/- and of Rs. 77,00,000/- respectively were also issued by the Corporate Debtor. However, the aforesaid work orders referred to in the petition have not been attached with the Petition.

31. On the contrary, the Corporate Debtor has relied upon the work orders in Annexure 2 to Annexure 6. To our mind, each work order is a separate and distinct contract, independent of the other contract /work orders. The perusal of the work orders further reveals that as per the different work orders, works were carried out, as specified in each work order with a separate and distinct time frame in accordance with the terms and conditions incorporated in each work order. It is further specified in each work order that the payments were to be made from time to time depending upon the progress and completion of work subject to the said terms and conditions mentioned in the different contract / work orders. As against this, the Operational Creditor has filed an amalgamated claim in respect of all the work orders without specifying the details of work carried out by it in respect of each contract. Surprisingly, the Operational Creditor has placed on record only four invoices as Annexure II (b) dated 28.06.2017, Annexure II (c) dated 28.06.2017, Annexure II (d) dated 28.09.2017 and Annexure II (e) dated 25.09.2017.
32. The invoices Annexures II (b), II (c) and II (d), pertain to work order number NDAWPL/ MS/009/2016-17. The work orders have not been produced by the Operational Creditor which have been produced and relied upon by the Corporate Debtor and as many as five work orders have been attached with the reply (Annexure 2 to 6). The aforesaid three invoices produced by the Operational Creditor correspond to work order bearing number NDAWPL/ MS/009/2016-17 (Annexure 3) which was issued on 30.11.2016. So far

as the 4th invoice amounting to Rs. 12,39,000/- Annexure II (e) dated 25.09.2017 is concerned, no detail of any work order is mentioned in this invoice. Therefore, it is not clear in respect of which work order the invoice Annexure II (e) was raised. The proper course for the Operational Creditor would have been to place on record the invoices of each of the work order to legitimise its claim. Here one cannot lose sight of the fact and for the sake of repetition, it is worthwhile to mention that different contracts/work orders defined work separately having different time of completion and payments were to be made on completion of work in terms of its percentage at different levels and stages. Instead of crystalizing its claim qua each work order, strangely though the Operational Creditor has tried to confuse and obfuscate the whole issue by raising a joint claim amalgamating all the work orders. Therefore, it cannot be said that the Operational Creditor has been able to put forward a definite amount of operational debt which he claims to be due from the Corporate Debtor.

33. It is further worthwhile to mention that the Operational Creditor has not placed on record any invoice in respect of the work order Annexure 2 dated 24.10.2016. Similarly, no invoices in respect of work orders Annexures 4, 5, 6 dated 31.01.2017, 01.02.2017 and 28.04.2017 respectively have been placed on record nor any other detail of the work carried out in respect of the said projects/ work orders have been given by the Operational Creditor which further makes the claim of the Operational Creditor tentative and equivocal. In addition to this, the Operational Creditor has also not placed on record its own Ledger account maintained in respect of all the contracts /work orders and has simply relied upon the Ledger account of the Operational Creditor wherein the sum of Rs. 2,02,50,378.00/- is stated to be due towards the Operational Creditor. The said Ledger is only an extract for the period from 01.04.2017 to 31.03.2018. It cannot be said to be sufficient prima facie evidence of the liability of the Corporate Debtor, especially when the Operational Creditor has not produced its own accounts along with the detail of the work carried out by him as per the terms of the contract where it could be seen that the Operational Creditor

has performed his part of the contract correctly as per the time scheduled given in each of the contracts/ work order.

34. The Corporate Debtor has further categorically claimed in its reply that it had already made the payment of Rs. 9,46,43,529/- in respect of all the contracts and this fact has not been denied by the Corporate Debtor as no rejoinder has been filed. The Operational Creditor has further claimed that the interest at the rate of 24% on the amount due which is without any basis as there is no contract between the parties with regard to the interest payable by the Corporate Debtor as can be discerned from the contracts/ work orders.
35. On the contrary, there are conditions in the contract for the work orders that in case of the delay in carrying out the work as per the time scheduled given in the contracts, penalty of 0.5% per week will be charged subject to the maximisation of 5% of the total value of the contract has to be imposed. Since it has not ever been averred by the Operational Creditor that the work was carried out within time in respect of each of the contract, it is disputable whether the petitioner is entitled to the payment of claim to be outstanding by him. In addition to this, the Corporate Debtor in his reply to the demand notice has clearly stated that the conditions with regard to the time frame of work has not been adhered to by the Operational Creditor and this part of the claim made in the reply to demand notice has not been controverted by the Operational Creditor as no record whatsoever with regard to the execution of the work in terms of the time has been placed on record by the Operational Creditor. Therefore, under the said circumstances, it can be said that there is no pre-existing dispute in this case especially when the petition suffers from two glaring anomalies. The first being the interest have been wrongly charged and included in the claim amount by the Operational Creditor without any contract. Secondly, the Operational Creditor has claimed the total outstanding due in respect of the five work orders without specifying the separate amounts due in respect

of each of the work orders/ contract. Therefore, the claim itself is uncertain and tentative and on this ground alone, the petition cannot succeed.

36. Another glaring defect in the claim of the Operational Creditor seems to be that no date of default has been mentioned anywhere in the petition much less part IV of the petition. There seems to be an obvious reason for withholding the date of default by the Operational Creditor. As pointed out above, the work carried by the Operational Creditor pertains to five different work orders within different times spans in terms of the progress of the work to be carried by the Operational Creditor and payments were to be made in accordance with the progress of the work. Therefore, there could not have be a single date of default. Even otherwise it appears that the Operational Creditor is trying to use the present proceeding as a tool to recover the outstanding due, but in its attempt has miserably failed to put forward a concrete and certain amount of operational debt outstanding against the Corporate Debtor
37. Therefore, in the light of the above submission, in our considered view, no case has been made out as admission of the petition under section 9 of the Code to initiate the CIRP against the Corporate Debtor.
38. Accordingly, CP 1348 of 2020 is **‘dismissed’**.

Sd/-

Anuradha Sanjay Bhatia
Member (Technical)

Sd/-

Kuldip Kumar Kareer
Member (Judicial)