IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

C.P. No. 4028/IBC/MB/2018

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

In the matter of

Alfa Façade Systems Private Limited

Sr. No. 27-9/1A/2, Burhani Industrial Estate, Kondhwa Budruk, Pune 411048

……**Operational Creditor**

Vs

Marveledge Realtors Private Limited

(CIN: U70101PN2008PTC131638)

Registered office at: 310-302, Jewel Tower Survey No. 25/H, Lane No. 5, Koregaon Park, Pune 411001,

…….Corporate Debtor

Order delivered on: 10.08.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Applicant: Mr. Shashwat Rai, Advocate

For the Respondent: Mr. Amit Ghate, Advocate

Per: Shri Chandra Bhan Singh, Member (Technical)

ORDER

1. This Company petition is filed by *Alfa Façade Systems Private Limited* (hereinafter called "Operational Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *Marveledge Realtors Private Limited* (hereinafter called "Corporate Debtor") alleging that the Corporate debtor committed default in making payment to the Operational Creditor. This petition has been filed by invoking the provisions of Section 8 and 9 Insolvency and bankruptcy code (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 1,83,58,490 (Rupees One Crore Eighty-Three Lakhs Fifty-Eighty Thousand Four Hundred and Ninety Only) including interest.

The submissions of the Operational Creditor:

a. The Operational Creditor had on 23.02.2013, made quotation, being Quotation No.AFS-0668-05/ME/13 in regard to the work to be carried out at Marvell Edge, Viman Nagar, Pune, Pursuant to the Quotation, the Respondent awarded, via a Letter of Award, bearing Reference No. EDGE/FAC/001 dated 01.03.2013, work for design, drawing, fabrication, installation/erection, field test, protection cleaning and handover of Façade Grading System at Marvel Edge, Viman Nagar, Pune. Thereafter, the Applicant and Respondent entered into an Article of Agreement dated 14.03.2013.

b. Pursuant to the said Articles of Agreement, the Applicant has carried out the work in accordance with the said Articles of

Agreement and has raised 24 invoices from time to time for the amounts due and payable by the Respondent.

c. The principal amount of debt due from the Respondent to the Applicant in terms of the outstanding Invoices in sum of Rs. 1,33,61,251/-(Rupees One Crore Thirty-Three Lakhs, Sixty-One Thousand and Two Hundred and Fifty-One only). The Respondent has, however, admitted it's liability for an amount of Rs. 1,29,27,018/- (Rupees One Crores Twenty-Nine Lakhs Twenty-Seven Thousand and Eighteen Rupees Only), the same, which has been claimed through the demand notice dated 06.09.2018, served upon the Respondent, on behalf of the Operational Creditor.

d. An additional sum of Rs. 54,31,472/- (Rupees Fifty-Four Lakh Thirty-One Thousand and Four Hundred and Seventy-Two only) has been claimed as interest on said Admitted Principal Amount of Rs. 1,29,27,018/- (Rupees One Crore Twenty-Nine Lakhs Twenty-Seven Thousand and Eighteen Rupees Only). The said interest amount has been calculated at the rate of 18% per annum, from the due date of payment till 06.09.2018, because the Operational Creditor being a Micro, Small and Medium Enterprise (MSME) bearing Registration No. 270251202085 is entitled to interest at three times the prevalent bank rate, in accordance with the Section 17 r/w Section 16 of Micro, Small and Medium Enterprises Development Act, 2006. The lowest bank rate during the period of the transaction was 6% therefore, interest is calculated @ 18% per annum.

e. The total amount of debt due from the Respondent to the Operational Creditor in terms of the said Admitted Principal Amount and Interest is the aggregate sum of Rs. 1,83,58,490/- (Rupees One Crore Eighty-Three Lakhs Fifty-

Eight Thousand, Four Hundred and Ninety Only). The principal amount under the 24 invoices became due and payable on the respective due date of these invoices. The Respondent has never disputed its liability towards the amount due to the Operational Creditor, in spite of the Operational Creditor having addressed on multiple occasions inter alia demand letters for payment on 31.03.2016, 19.07.2016, 15.01.2017 and 17.05.2017 and account balance confirmation issued by the Auditors of the Respondent on 05.08.2016.

3. **The submissions of the Corporate Debtor are as follows:**

   a. The Corporate submitted that as per the own version of Operational Creditor, the original debt fell due on 20.07.2015. the Corporate Debtor further submitted that considering the version of the Operational Creditor the debt fell due on 20.07.2015, the recovery if any would ought, to have initiated by the Operational Creditor within the time limit provided by law. The present Company Petition has been preferred in October, 2018 which is almost after an period of 3 years from the date the debt fell due. While preferring the present Company Petition, the Operational Creditor ought to have preferred an application seeking condonation of delay. Further submitted that the present Company Petition is barred by the provision of law including the law of limitation.

   b. The Statutory Notice dated 06.09.2018 issued by the Operational Creditor was received by Marvel Realtors and Developers Ltd and same was reply by Marvel Realtors and Developers Limited on 19.09.2018 then thereafter the Statutory Notice dated 26.09.2018 was issued by the Operational Creditor to the Marvel Edge Realtors Private Limited/Corporate Debtor on 19.09.2018. The Statutory notice which was issued to Marvel Edge Realtors Private Limited had same averments/contains are stated in the prior Statutory Notice issued to Marvel Realtors and Developers Limited; since both the sister companies and its directors are carrying on the business of Real Estate Developers and Builder, and that the said Notice issued to Marvel Realtors and Developers Limited was already replied, the Corporate Debtor did not feel necessary to reply to the Statutory Notice issued to Marvel Edge Realtors Private Limited as dispute was already communicated to Operational Creditor.

c. The Corporate Debtor are promoters of commercial complex to be known as "Marvel Edge" (hereinafter "Marvel Edge" shall be referred as "the said Project") situated at Survey No. 207 Hissa No. 1A situate, lying and being at village Lohegaon and land bearing Survey No. 33 Hissa No. 2A/1 situate, lying and being at village Vadgaonsheri within the registration Sub-District of Taluka Haveli, District- Pune and within the limits of the Municipal Corporate of Pune. The Operational Creditor has intentionally suppressed from this tribunal relevant communications between the parties which specifically mentioned about the disputes raised by the respondent during the execution of the work. The Corporate Debtor further submitted that during the execution of the work the Corporate Debtor complaint to the Operational Creditor about the delay in installing performing scope of work for façade and glazing work was mention in Annexure -1 of letter of award dated 01.03.2013 of the Corporate Debtor project. The interest free retention amount of 5% of running bill value was retained by the Corporate Debtor and also have eligible for performance Guarantee as agreed by the Operational Creditor. The petitioner cannot be held eligible for payment from the

Corporate Debtor till the defect liability period was over for that purpose and accordingly the Operational Creditor though at some instance for raising the bill claimed that 100% of the work has been done as per the letter of award in the Corporate Debtor projects but after inspection it was found by Corporate Debtor that the said work was an incomplete work; and merely for the purpose of raising the bills the Corporate Debtor has falsely stated that the work was done 100%.

d. The Corporate Debtor further submitted that for final payment, the Operational Creditor has to submit bill within 90 days after receiving virtual completion certificate along with supportive measurements documentation including tests certificate 3 sets of as built drawing etc complete. Such final bill was never raised by the Operational Creditor as the said Operational Creditor has "Stopped all his work activities" and work to be perform by the Operational Creditor remain incomplete from the year 2015 till date the Operational Creditor has never performed his work as per the "LOA" and he was failed to complete the scope of work as within agreed time schedule of work due to that respondents only who has suffered loss and which was resulted in to slow down the progress of Project and only Corporate Debtor has suffered loss and which resulted in delay in delivery of possession to unit holders who has booked the units in the said project and due to which cases were filed by the unit holders before Maharashtra Real Estate Tribunal and in some of cases the Authority held liable the Respondents for delay and order to pay compensation along with interest to the unit holders. It reflect that the Respondent only has suffered due to Non Performance of work by the petitioner even though Respondents had release more amount than rquired. I say that the petitioner delayed in the execution of work and the Respondent on several occasions raised the grievance about the same with the petitioner and the same could be reflected from the mail communications. The respondent further submitted that as per Section 5(6) of the Code, the disputes including quality of goods or services and therefore the present dispute raised by the respondent regarding the execution of work/services being provided by the petitioner comes with the ambit of definition "dispute".

e. The petitioner has failed to file a certificate from financial Institutions maintaining the accounts of the petitioner confirming that there is no payment of unpaid operational debt by the Respondent. Respondent submitted that the filing of a certificate from the institution is a mandatory aspect and therefore non-filing of the certificate goes to the root of the matter and on this count alone the present petition is liable to be rejected. The Respondent further submitted that as per Section 9(5)(i)(d) of the Code, the petition is admitted if no notice of dispute has been received by the petitioner. In the present case, from day one, during the execution of work, the respondent was not at all satisfied with the way of the execution of work was carried out by the petitioner.

f. The respondent submitted that the petitioner has failed to furnish along with present petition an affidavit to the effect that there is no notice given by Corporate Debtor relating to the dispute of the unpaid Operational Debt. In the present case, the dispute was raised by the respondent by replying to the statutory notice issued by the petitioner to Marvel Realtors and Developers Limited and further even during the execution of the work it could be seen through that for the part performance of the respondent can be possible only wherein the completion of the work by the petitioner as per the 'LOI' and herein the petitioner also liable for the penalty as per the clause no. 11 of the LOA dated 01.03.2013 and email communication between the parties that the dispute was raised by the respondent.

g. For the reason set out, the respondent submits that the present petition under section 9 of the Act shall be dismissed against respondent in interest of justice.

FINDINGS

1. The present petition filed under Section 9 of Insolvency and Bankruptcy Code, 2016 relates to claim for an amount due and payable by respondent under a Letter of Award to the petitioner. The petitioner mentioned that it has raised 24 invoices for a sum of Rs. 11,54,47,203/- against which the respondent had paid Rs. 10,20,85952/-. Therefore, the petitioner due is for a total sum of about Rs. 1.33 crores. The petitioner has also claimed interest and has mentioned that the petitioner is an MSME and as per the MSME Act, the respondent has liability to pay the interest on the principal debt.
2. The Bench notes that the respondent has shared its ledger statement with petitioner in relation to reconciliation of account on 09.10.2015 from where it is clear that the respondent has a liability to the petitioner. In the ledger statement of the petitioner appearing in the books of account of the respondent, the balance amount payable is shown as Rs. 61,08,875/- and retention amount withheld is shown as Rs. 56,99,345/-.
3. The Bench notes that the email dated 19.10.2015 sent by the respondent to the petitioner is without any reservation and on own violation. Similarly, vide an email dated

22.03.2017, after completion of work the respondent through its authorised representative has shared its ledger statement with the petitioner. Again, in that ledger is statement reflecting position up to 12.01.2017 and the sum of balance amount and retention amount payable is Rs. 61,08,875/- as reflected in the earlier mail dated 19.10.2015.

4. The Bench notes that the respondent has not challenged the authenticity of its email. In fact, at para 9 of the reply the respondent has again stated, which is reproduced as under:

   "…I say that as per the books of accounts maintained by the Respondent, an amount of Rs. 56,99,345.12/- is retained by Respondent as per the LOA and amount of Rs. 1,80,744/- towards debit note debited by the Respondents towards unsatisfactory work by the Petitioner and amount of Rs. 10,22,63,125/- was paid towards the work performed by the petitioner till date on 22.07.2014 <u>and in case if any amount is payable to petitioner, the same will be the Balance amount and Retention amount of Rs. 1,18,08,221/-</u> subject to deduction of penalties and liquidated damages of 10% amount towards default LOA dated 1st March 2013…"

5. The Bench notes that the sharing of ledger account in the ordinary course of business amounts to an unequivocal admission of its liability to the other party.

6. The respondent has contended that there exists an ongoing dispute between the parties. In support of this contention, the respondent has relied on email dated August 2014 and October 2014. These emails relate to "removing chipped sliding door from C-Core and exchanging it with D-Core,

since it looks very ugly. Total estimated cost Rs. 7,500/-." The second email on October 2014 related to "sliding door, door-closers not working".

7. The Bench also notes that vide an email dated 09.08.2014 the petitioner's representative provided cost of exchanging C-core doors with D-Core doors to Rs. 75,00/- and thereafter no complaints was raised by the respondent. Similarly, vide email dated 11.10.2014, the petitioner's representative provided contact details of person allocated by the petitioner to fix the *Doorma* door-closers and thereafter no complaints were raised by the respondent. It is very clear from the above that certain complaints raised during the execution of the contract, however, these complaints are attended to and thus extinguished. The bench is also aware that as per law laid down by Hon'ble Supreme Court in the case of *Mobilox Innovations V. Kirusa Software (2018) 1 SCC 353,* para 51, this Tribunal must ascertain whether a dispute exists at the time of filing of the present petition. And if such dispute exists, it is not a patently feeble legal argument or assertion of fact that it is unsupported by fact.
8. The bench, therefore, is of the view that minor defects which have arisen during the completion of project were adequately attended to by the petitioner and no dispute existed at the time of the filing of the petition.
9. Regarding the claims being barred by law, the respondent mentioned that the debt was due on 28.07.2015 and the company petition was preferred in October 2018, therefore, it is after a period of 3 years, therefore, it is hit by limitation. In this regard, the petitioner has mentioned that

in the running account, the last invoice was raised by the petitioner on 26.06.2015 and ordinarily the limitation period would have expired 3 years from the due date. However, since the respondent had issued two unequivocal admission of its liability by way of sharing respondent's books of accounts on 19.10.2015 and again on 22.03.2017 with the petitioner, it amounts to admission of liability.

10. The bench notes that it is established rule that when a party issues acknowledgment of its liability in writing the period of limitation starts afresh. Therefore, the Bench has no doubt that the respondent unequivocal admission of liability negates the contention of the petitioner that the claim is time barred.

11. In view of this, the Bench is of clear view that there is a debt in terms of Section 5(21) of Code and there is a default in terms of Section 3(12) of Code are clearly established and the debt is also within limitation. Thus, the present Company Petition satisfies all the necessary requirement for admission.

12. Under these circumstances, this tribunal is of the considered opinion that the above company petition is liable to be admitted and accordingly the same is admitted by passing the following:

ORDER

a. The above Company Petition No. (IB) -4028(MB)/2018 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Marveledge Realtors Pvt. Ltd.

b. Since the Financial Creditor has not suggested the name of any person to perform the duties of the Interim Resolution Professional (IRP) in the petition, this Bench is appointing the IRP from the list furnished by the Insolvency and Bankruptcy Board of India (IBBI). This Bench hereby appoints **Mr. Pramod Dattarm Rasam** (pdrasam@gmail.com), Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00722/2017-2018/11259 as the interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.

c. The Operational Creditor shall deposit an amount of Rs.5 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is admitted.

The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-	**Sd/-**
CHANDRA BHAN SINGH **MEMBER (TECHNICAL)**	**H.V. SUBBA RAO** **MEMBER (JUDICIAL)**