

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

**CP (IB) No. 202/MB-IV/2021**

Under **Section 9** of the I&B Code, 2016;

In the matter of:

**Dhurmisha Infrastructure Private Limited**

...Operational Creditor/Applicant

V/s

**Secura Hospital Private Limited**

[CIN: U85190MH2014PTC253480]

...Corporate Debtor/Respondent

Order Dated: 28.04.2023

*Coram:*

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

*Appearances (via videoconferencing):*

For the Petitioner(s) : Ms. Vibha Joshi, Advocate.

For the Respondent(s) : Ms. Priyanka, Advocate.

***Per: Prabhat Kumar, Member (Technical)***

1. This is an Application being C.P. (IB) No. 202/MB/C-IV/2021 filed on 28.01.2021 by Mr. Ashok Dhirubahi Bhuvu, Managing Director of the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Secura Hospital Private

Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Operational Creditor has filed Board Resolution dated 25<sup>th</sup> August, 2020 in support of authorization in favour of signatory of this Application authorising him to file the present company application on behalf of the Operational Creditor.

2.1 The Operational Creditor in its Part 4 of the Application under the Code has claimed a total of Rs.4,01,50,795/- (Rupees Four Crores One Lakh Fifty Thousand Seven Hundred Ninety Five only) comprising of principle amount of Rs.2,25,42,054/- (Rupee Two Crores Twenty Five Lakhs Forty Two Thousand Fifty Four only) and an interest @ 18% p.a. of Rs.1,76,08,740/- (Rupees One Crore Seventy Six Lakhs Eight Thousand Seven Hundred Forty only) as on 12<sup>th</sup> September, 2020.

2.2 The Operational Creditor submits that the Operational Creditor and the Corporate Debtor entered into an Agreement dated 20<sup>th</sup> November, 2014 pursuant to which the Corporate Debtor requested the Operational Creditor to provide civil works in relation to the proposed hospital being constructed by the Corporate Debtor. The work and services included electrical work, plumbing, internal painting, POP etc. as per the plans, designs etc. finalized by the architects of the said hospital appointed by the Corporate Debtor.

2.3 The parties agreed that the consideration for the works and services provided by the Operational Creditor shall be approx. Rs.4,00,09,092/-calculated at the rate of Rs.731 per sq. ft. The total amount was decided to be as per the certification issued by

the architect with respect to such civil works done by the Operational Creditor.

- 2.4 The Operational Creditor completed the entire work on 4<sup>th</sup> June, 2017 and the building with finished work was handed over to the Corporate Debtor. The Corporate Debtor had assured an upfront payment of Rs.50,00,000/-immediately on handing over the building before any certification by the architect as per the Agreement. Out of the aforesaid amount as well, the Corporate Debtor only cleared Rs.25,00,000/-. The same was also recorded by the Operational Creditor by letter dated 10<sup>th</sup> March, 2018.
- 2.5 The works have been duly performed by the Operational Creditor and there exists no dispute as to the fact of the completion of the work or any other dispute whatsoever in respect of the same. The total amount payable by the Corporate Debtor to the Operational Creditor for the services performed was Rs.10,56,02,184/- (Rupees Ten Crores Fifty-Six Lakhs Two Thousand One Hundred Eighty-Four Only). The Corporate Debtor had made payment of Rs.8,30,60,130/- (Rupees Eight Crores Thirty Lakhs Sixty Thousand One Hundred Thirty only) from time to time as shown in the workings.
- 2.6 The total principal outstanding amount of the Operational Debt is Rs.2,25,42,054/- (Rupee Two Crores Twenty-Five Lakhs Forty-Two Thousand Fifty-Four only) and the same was confirmed and certified by the architect of the Corporate Debtor by endorsing a confirmation on Operational Creditor's final bill dated 12<sup>th</sup> June, 2017 issued to the Corporate Debtor. The

requisite services were duly provided by the Operational Creditor.

- 2.7 The last payment was made by the Corporate Debtor to the Operational Creditor on 28<sup>th</sup> February, 2018. The Operational Creditor issued a Legal Notice dated 28<sup>th</sup> January, 2019 demanding the outstanding amounts. The Operational Creditor states that due to the Covid-19 pandemic, which resulted in enforced lockdowns throughout the Country and the State of Maharashtra since 25<sup>th</sup> March, 2020, the Hon'ble Supreme Court was pleased to extend limitation for all filings of legal proceedings which extension is also applicable to proceedings under the provisions of the Insolvency and Bankruptcy Code, 2016.
- 2.8 The Operational Creditor submits that the Corporate Debtor has not made any payments of the outstanding amount till date and accordingly on 16<sup>th</sup> September, 2020 a Demand Notice was sent to the Corporate Debtor by the Operational Creditor which was received by the Corporate Debtor on 30<sup>th</sup> September, 2020. The Corporate Debtor replied to such notice vide its letter dated 7<sup>th</sup> October, 2020 raising contradictory averments. The Operational Creditor then once again issued a Demand Notice to the Corporate Debtor on 7<sup>th</sup> October, 2020 which has been duly received by the Corporate Debtor on the same day.
- 2.9 The Corporate Debtor has neither replied to the aforesaid demand notice nor has repaid the outstanding amounts of the Operational Debt as demanded by the Operational Creditor under the Demand Notices.

3. The Corporate Debtor in its reply dated 10.12.2021, has denied its liability in toto and raised dispute as to the enforceability of the Agreement allegedly executed between the parties.

3.1 The Corporate Debtor further stated that the Operational Creditor has neither provided audited balance sheet nor duly acknowledged invoices and that the Corporate Debtor has time and again communicated verbally that there is no liability to be paid.

3.2 The Corporate Debtor stated that it was decided between the parties that the Corporate Debtor shall make requisite payments as per the oral instructions of Mr. Ashok Bhuva either in his personal name or in the name of Shakti Trading Corporation or in the name of the Operational Creditor so as to have tax planning and easy convenience for himself. The Corporate Debtor in its reply claims to have made a payment of Rs. 9,28,75,000/- which is more than the alleged agreed amount and gave a detailed table of payments made by it to either of the above 3 parties during the period from 17.06.2014 to 28.02.2018.

3.3 The Corporate Debtor further stated that it has made an excess payment to the Operational Creditor and Mr. Ashok Bhuva without deducting TDS, aggregating to a total of Rs. 4,35,000/- and has orally requested the Operational Creditor to refund the same, however, the same was avoided by the Operational Creditor. The Corporate Debtor stated that as its Directors are qualified medical practitioners, they were busy rendering medical services to patients and could persuade the Operational Creditor to pay the same in writing.

- 3.4 The Corporate Debtor further stated that there is no binding agreement between the party and that the Operational Creditor has forged the said agreement and it is not an original copy and that the alleged final bill relied upon by the Operational Creditor is also fabricated and concocted. The Corporate Debtor further stated that the Operational Creditor has filed the present petition to avoid refund of the said amount and with an intention to extort money from the Corporate Debtor and its Directors. The Corporate Debtor in its reply has requested for forensic examination of the said agreement and the final bill dated 20.11.2014 and 12.06.2017 respectively.
- 3.5 The Corporate Debtor further stated that if the said forged agreement were to be relied upon, then as per the agreement, after expiry of twelve months, the Operational Creditor is liable to pay Rs. 5,000/- per day for delayed completion and so the Operational Creditor is liable to pay the Corporate Debtor a sum of Rs. 28,05,000/-, i.e. from 20/11/2015 to 03/06/2017 (561 days), which is the date on which completion certificate was issued by the Corporate Debtor to the Operational Creditor. The Corporate Debtor therefore claims an amount of Rs. 32,15,000/- as payable to it by the Operational Creditor.
- 3.6 The Corporate Debtor further submits that the Operational Creditor in its Form for filing financial statement and other documents with the Registrar pursuant to Section 137 of the Companies Act i.e. Form No.AOC-4 whereby balance sheet of 2019 is submitted and as per said balance sheet as on 31/03/2019, the corporate debtor is shown as creditor with liability of the operational creditor to Rs.30,50,000/- (In words

rupees thirty lakh and fifty thousand only) to be paid to Corporate Debtor. Similarly, the Operational Creditor has admitted liability to be paid to Corporate Debtor as on 31/03/2020 in its Form No.AOC-4 of Rs.30,50,000/-.

3.7 The Operational Creditor in its audited balance sheet for said periods, has not shown corporate debtor as debtor with alleged liability as claimed in the demand notice and in the present application. Thus, on perusal of unblemished record/accounts of the operational creditor, it is beyond doubt that there is any liability/default of the corporate debtor for alleged action under the Insolvency and Bankruptcy Code.

3.8 The Corporate Debtor further stated that the Operational Creditors' reliance upon aforesaid documents are self-contradictory as the operational creditor has referred to final bill dated 12/06/2017 claiming outstanding of Rs.2,25,42,054/- (In words rupees two crore twenty five lakh forty two thousand and fifty four only). However, by further reliance to Operational Creditor's letter dated 10/03/2018, the Operational Creditor is claiming outstanding of Rs.1,15,00,000/- (In words rupees one crore fifteen lakh only). More-over, vide email dated 07/02/2018, final bill dated 12/06/2017 was served wherein outstanding amount of Rs.1,69,46,024/-, was claimed which also falsifies Operational Creditor demand notice and reliance upon alleged final bill dated 12/06/2017 and hence, prima facie even by operational creditor's own documents, there is triable dispute about alleged liability. That from operational creditor's own documents, it is clear that the dispute in relation to the claim pre-exists; the date

of receipt of demand notice or invoice issued under the Insolvency and Bankruptcy Code.

3.9 The Corporate Debtor has further cited a number of judgements to support its contention on decision of Hon'ble Supreme Court of India in the matter of *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* reported in 2017 LawSuit (SC) 947 held that IBC is not intended to be substitute to a recovery forum. It is also laid down that whenever there is existence of real dispute, the IBC provisions cannot be invoked. It has further relied upon following decisions to support this contention *Anshul Vashistha Shareholder & Director of M/s. Saturn Prefab India Pvt. Ltd. Versus M/s. Jayhind Steel Traders* (2020) ibclaw.in 288 NCLAT. It has also relied upon the decision in case of *M.C.D v. State of Delhi 2005 LawSuit(SC) 813; Meghmala v. G. Narasimha Reddy 2010 LawSuit (SC) 706; Union of India v. Ramesh Gandhi 2011 LawSuit (SC) 1215; Ramjas Foundation v. Union of India 2010 LawSuit SC 809; and Arunima Baruah v. Union of India 2007 LawSuit (SC) 510* to contend the contesting respondent has come to the Hon'ble High Court with unclean hands and withholds a vital document in order to gain advantage on the other side and a person whose case is based on falsehood can be summarily thrown out at any stage of the litigation.

3.10 The operational creditor has claimed recovery of even interest portion of the amount without any agreement to pay interest, which is impermissible under law. Therefore, the corporate debtor is not liable to pay alleged interest, which was never agreed that too when such interest could not be charged as there

is no principal amount outstanding as per audited books of accounts of the operational creditor. Thus, the demand stands vitiated as it is against alleged contract and applicable law. Hence, there is valid dispute. which needs to be adjudicated by regular civil trial consequentially, provisions of the Insolvency and Bankruptcy Code, 2016 cannot be invoked. It has relied upon the decision in the matter of *Krishna Enterprises Vs. Gammon India Ltd.* [2018] ibclaw.in 46 NCLAT to contend that the charging of interest ought to be an actionable claim enforceable under law, which it would be, provided it was supported by cogent admissible evidence, that is, it was properly documented and agreed upon.

3.11 The Corporate Debtor further denies having paid amount vide RTGS to the operational creditor to the extent of Rs.8,30,60,000/- and that the alleged working mentioned in ANNEXURE- K and J wherein last payment received is shown on 18/10/2016 for the ledger account period of 01/04/2014 to 15/01/2021 whereas in para No. Part IV-7 the operational creditor has stated that last payment was received on 28/02/2018. As per the working of the operational creditor submitted at ANNEXURE-J, if last payment is made on 18/10/2016, then the claim of recovery so also the present application is barred by law of limitation.

3.12 The Corporate Debtor further states that the Affidavit under Section 9(3) (b) of IBC allegedly affirmed in month of January, 2021 without containing any particular day of affirmation contains on correct submission in regard non-filing of reply to the demand notice dated 16/09/2020 as the operation creditor

itself has annexed reply to said demand notice dated 07/10/2020 at ANNEXURE-D of the application and that the affidavit in support of application affirmed in month of January, 2021 does not contain any particular day for signing of such affidavit, therefore deficient under law.

4. The Applicant has filed Additional Affidavit dated 28.01.2022 wherein it is submitted that inadvertently an old Board resolution dated 25th August, 2020 authorizing him and Mr. Sanjay Agrawal to issue Demand Notice under Section 8 of the IBC and not the Company Petition was filed alongwith the Application and requested to bring on record the correct Board Resolution dated 2<sup>nd</sup> January, 2021 authorizing Directors to file the present Company Petition before this Adjudicating Authority. The said correct Board Resolution is annexed to the Additional Affidavit. He further stated that there are new facts and findings in this present matter and that the Vidharbha Konkan Gramin Bank published online tender for bidding of the premises of the Corporate Debtor in the matter of *Vidharbha Konkan Gramin Bank, Yavatmal Vs. M/s. Secura Hospital Private Limited*, as result of which the Corporate Debtor went to Hon'ble High Court, Nagpur Bench vide Writ Petition No.781 of 2020, wherein the Hon'ble High Court vide its Order dated 6<sup>th</sup> February, 2020 directed Vidharbha Konkan Gramin Bank to not to take any coercive action against Corporate Debtor and ordered DRT to proceed to hear and decide the matter in accordance with law as expeditiously, on its own merits.
  
5. We have carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

- 5.1. This Bench finds that the Corporate Debtor had responded to the demand notice vide its letter dated 07.10.2010 and informed the Applicant that as per the accounts of the Corporate Debtor, and audited Balance Sheet, the Operational Creditor owed a sum of Rs. 4,10,000/- and has also denied executing any agreement dated 20.11.2014. Further the Corporate Debtor has filed a Reply dated 10.12.2020 stating that it has made payment of Rs. 9,28,75,000/- as against the consideration payable under the contract amounting to Rs. 9,24,40,000/-. The Corporate Debtor has also stated that the payments were made to 3 parties, i.e. the Operational Creditor, Mr. Ashok Bhuva and M/s. Shakti Trading Corporation. The Corporate Debtor further submits that as per the audited Balance sheet of the Operational Creditor as on 31.03.2019 available at [www.mca.gov.in](http://www.mca.gov.in), the Corporate Debtor is stated to be creditor of the Operational Creditor for a sum of Rs. 30,50,000/-. Further, Bill dated 12.06.2017 received through email dated 07.02.2018, the Operational Creditor had shared a statement showing an amount of Rs. 1,69,46,024/- payable by the Corporate Debtor, while in letter dated 10.03.2018, it has claimed Rs. 1,15,00,000/-. It is further stated that the claim for excess additional work is not tenable as no such additional work was done by the Operational Creditor as the area is stated in the Work order matches with the area in Completion Certificate.
- 5.2. From the above discussion, this Bench finds that the claim of Applicant for a sum beyond the contract value requires determination based on the facts of the case and this Bench cannot determine this aspect under Insolvency and Bankruptcy Code, 2016. Further, this Bench notices that there are certain contradictions in the claims of both the parties.

5.3. The Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* held that, in the event there is a pre-existing dispute between the parties, an Application under Section 9 of the Code would have to be rejected.

5.4. In view of the above, we find that the present case is fit for dismissal under Section 9(5)(ii)(d) read with Section 8(2)(a) and Section 5(6) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties with respect to the purported claims. The present case requires adjudication which is beyond the powers vested in this Bench in proceedings arising from an application filed under sec. 9 of the code and deserves to be **dismissed**.

**ORDER**

6. This Application being **C.P. (IB) No. 202/NCLT/MB/C-IV/2021** filed under Section 9 of I&B Code, 2016, filed by Dhurmisha Infrastructure Private Limited, Operational Creditor/ Applicant against Secura Hospital Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed**.
7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar  
Member (Technical)  
/LRA-Akshata/

Sd/-

Kishore Vemulapalli  
Member (Judicial)