

IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, BENGALURU
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
(through Web-Based video conferencing)

CP (IB) No.76/BB/2022
U/s. 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

J Rajendra Naidu.

No. 20, 2nd Floor, (202), 5th Cross,
Prakruthi Vihar, Teacher's Colony,
Nagashettyhalli,
RMV 2nd Stage,
Bangalore – 560 094.

... Petitioner/Operational Creditor

Versus

M/s Amma Construction India Private Limited,

Registered Office at:
No. 595, Balaji Nivas,
Anand Nagar, 1st Main Road,
Bangalore- 560 024.

Operating at:
3rd Floor, Iskcon foot hills,
149/A, R Block,
WOC Road, Rajajinagar,
Bangalore- 560 010.

... Respondent/Corporate Debtor

Order delivered on: 08th September, 2023

Coram: Hon'ble Justice (Retd) T. Krishnavalli, Member (Judicial)
Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Shri S Vivekananda
Shri Gokul R

For the Respondent : Ms. Smita

ORDER**Per: Manoj Kumar Dubey, Member (Technical)**

1. The present petition is filed on 28.03.2022 under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 6 of the I&B (Application to Adjudicating Authority) Rules 2016, by J Rajendra Naidu (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process against M/s. Amma Construction India Private Limited (hereinafter referred as 'Corporate Debtor/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. 1,41,31,275/- (Rupees One Crore forty-one lakhs thirty-one thousand two hundred and seventy- five Only).
2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner are as follows:
3. The Corporate Debtor, Amma constructions India Private Limited had entered into a sub contract agreement dated 1.10.2017 with HEC India LLP inter alia for installation of fence and other works in the plant of KIA Motors, India situated at Pennakonda Ananthpur District, Andhra Pradesh. The corporate debtor further subcontracted the said work to Operational Creditor, vide subcontract agreement dated 23.02.2018.
4. Subsequently work order dated 12.09.2018 was placed for the Petitioner for providing and fixing of fence work at KIA work site. In accordance with sub-contract agreement the operational creditor had to raise running invoices on work completion basis and the Corporate Debtor had to make the payment as and when the invoices were raised.
5. Accordingly, the Petitioner raised the first RA bill on 15.11.2018 for Rs. 16,28,261/-. The Respondent made the payment of Rs. 15,00,000/- leaving the balance of Rs. 1,28,261/-. The second RA bill was raised on 19.01.2019 for Rs. 29,50,289/-. However, no payment was made against the said invoice. Further, the 3rd RA bill was raised on 21.02.2019 for Rs. 23,98,777/-. However, no payment was made against this invoice also. Subsequently, the 4th RA bill dated

07.05.2019 for Rs. 24,91,627 and 5th RA bill dated 31.05.2019 for Rs.11,12,322/- were raised. However, no payment was made.

6. The Petitioner served notice dated 22.06.2019 on the Respondent and was called upon to make the balance payment. However, the Corporate Debtor neither responded to the said notice nor made the payment. Subsequently, reminder notice dated 17.09.2019, 17.12.2019, 06.04.2021 and 21.07.2021 were served on the Corporate Debtor. Further, demand notice dated 11.08.2021 was sent to the corporate debtor and its directors. The demand notice sent to corporate debtor returned with endorsement "addressee left".
7. Further, the Operational Creditor sent demand notice to the address where the corporate debtor was operating from. The said demand notice was received on 09.02.2022. However, no response has been received.
8. The Learned Counsel for the Respondent filed its objection dated 05.01.2023 vide diary No. 110, interalia submitting as under:
 - (i) It is submitted that the petition is barred by Section 4 (1) of IBC, 2016 and thus liable to be dismissed in limine. It is further submitted that the bills alleged by the Petitioner as per 2nd RA bill, 3rd RA bill, 4th RA bill and 5th RA bill are wrongfully raised for the work which is not done. The said bills are neither approved by the Corporate Debtor nor they have been raised as per the terms of the Subcontract Agreement dated 23.02.2018.
 - (ii) Moreover, the Petitioner had further sub contracted the said work to Raj Infra and Developers without the knowledge and consent of Corporate Debtor. The act on the part of Petitioner is unauthorized and against the contractual terms of subcontract Agreement dated 23.02.2018 which requires the prior written consent to subcontract to be taken from the Main Contractor. Also, section 20 of the Subcontract Agreement dated 23.02.2018; mandates that no assignment shall be binding without the prior consent of Main contractor.
 - (iii) Further, on considering the urgency of completing the work and on the request of the petitioner the work was entrusted to Raj

- Infra and Developers. Thereafter, Raj Infra and Developers has continued the work at site and raised II RA Bill dated 19.07.2019 for Rs. 76,42,072/- which the Corporate Debtor has certified. Also, the corporate debtor has sent its invoice dated 19.07.2019 to HEC India LLP for grand total of Rs. 95,72,770/
- (iv) The Respondent submits that, there was an agreement between Raj Infra and Developers and Corporate debtor for direct payment from HEC India LLP according to which the Bill amount of Rs. 38,25,283/- was directly paid from HEC India LLP to Raj Infra and Developers. The agreement for direct payment dated 19.07.2019 is attached along with the petition. Further, the corporate debtor along with the petition has also produced the Ledger Account maintained for the period 01.04.2018 to 18.02.2020 in the name of Raj Infra and Developers and copy of KIA voucher dated 25.03.2019 showing payment through RTGS to Raj Infra for Rs. 10,00,000/-, further copy of statement of account for the period from 01.03.2019 to 31.03.2019 showing payment through RTGS to Raj Infra for Rs. 10,00,000/- and Kia/Gst Vouchers dated 28.03.2019, 15.04.2019 and 15.12.2019 showing bills rose by Raj Infra and Developers.
- (v) It is submitted that, as per the terms of Agreement for Direct Payment dated 19.07.2019 Raj Infra and Developers was getting payment directly from main Contractor, HEC India LLC for the work being done. The petitioner is wrongfully claiming the alleged bills for the work not done by him. It was Raj Infra and Developers which has done the work thereafter and submitting the bills which have been cleared. Further, due to careless act on the part of petitioner, respondent suffered loss which made them to invoke Bank Guarantee. Further, respondent is hereby making a set off of the balance amount under 1st RA Bill for Rs. 1,28,261/- towards the loss suffered due to Bank Guarantee revocation.
9. The learned Counsel for the Petitioner filed its rejoinder dated 20.02.2023 vide diary No. 977 interalia stating the respondent had

itself admitted that there is amount pending to the extend to Rs. 1,28,261/-, hence it is partial acceptance of the actual balance amount of Rs. 1,41,31,275/-. Further, the statement regarding contract or subcontract between the corporate debtor and any third party is not relevant.

10. On 03.11.2022 this Tribunal directed the Petitioner to file clarification as to how limitation is satisfied and the compliance to the same is filed vide diary no. 975 dated 20.02.2023 submitting that the invoices raised are running bills and the last bill was raised on 31st May 2019 bearing invoice no. 5 with an amount due of Rs. 11,12,322/- . as such the total amount due as on 31.05.2019 was Rs. 1,16,33,591/-. An amount of Rs. 15,00,000/- was paid by the Corporate Debtor to the Operational Creditor and the balance would be Rs. 1,01,33,591/-. As such the amount due along with interest (interest Rs. 40,00,000/-) would be Rs. 1,41,33,591/- as on 31.07.2021.
11. Heard the counsels for both the parties and perused the records available.
12. The present petition is filed by the operational creditor under section 9 against M/s Amma Constructions India Private Limited for a sum out outstanding amount of Rs. 1,41,33,591/-.
13. It is pertinent to point out that in accordance with Section 9 (3)(a) of IBC; filing of invoices with the application is a mandatory condition. We have perused the Form No. 5 along with the five invoices which have been attached with the Petition. On the direction from this Tribunal dated 09.01.2023, the petitioner filed revised Form No.5 vide diary No. 976 dated 20.02.2023. The explanation for meeting the threshold requirement was also filed vide diary No. 975 dated 20.02.2023.
14. On perusal of the documents available on record including the Form No. 5 and the invoices filed with the Petition, it was observed by this Tribunal that a total of five invoices dated 15.11.2018, 19.01.2019, 21.02.2019, 07.05.2019 and 31.05.2019 were raised by the Petitioner. It is the contention of the petitioner that the total amount in default arising out of the above five invoices is exceeding Rs. 1 crore.

15. It is seen from the invoices that the balance due for the 1st Invoice amounts to Rs. 2,00,951/- 2nd Invoice amounts to Rs 31,08,340/-, 3rd Invoice amounts to Rs. 25,27,283/-, 4th Invoice amounts to Rs. 26,25,106/- and 5th Invoice amounts to Rs.11,71,911/-. These amounts are slightly more than the amounts mentioned in respect of these same invoices at para 5 of this order, in which the figures have been taken from the main petition, due to GST having been added in the invoices. However, when the outstanding amounts (inclusive of GST) with regard to these invoices are added; the total amount is Rs. 96,33,591/-, which is below the threshold requirement.
16. It is further pointed out that the calculation given by the Petitioner vide diary No. 975 dated 20.02.2023 for arriving at the threshold limit, is as follows:

Sl.No.	Invoice No.	RA Bill No.	Net Amount	Security Deposit	Amount Received	Balance amount
1	15.11.20218	1	16,28,261	72,690	15,00,000	2,00,951
2	19.01.2019	2	29,50,289	1,31,709	0	31,08,340
3	21/02.2019	3	23,98,777	1,07,088	0	25,27,283
4	07.05.2019	4	24,91,626	1,11,233	0	26,25,106
5	31.05.2019	5	11,12,322	49,658	0	11,71,911
	Total		1,10,81,275	4,72,378	(15,00,000)	1,01,33,591

However, it is noticed that the petitioner has wrongly calculated the total of the balance amount as Rs. 1,01,33,591/- instead of Rs.96,33,591/-. Hence the Principal amount is less than 1 crore.

17. Further, an amount of Rs. 40,00,000/- is claimed as interest by the petitioner, which is added to the Principal amount. However, on examination of the Sub-Contract agreements, Work order and Invoices attached along with the petition, there is no mention of any interest being chargeable on the Principal amount.
18. In fact, on a perusal of the main Sub-Contract agreement between HEC India LLP and the Corporate Debtor, it is noticed that under 'Terms of payment', it is clearly mentioned as under:

"No interest will be paid to SUBCONTRACTOR on any sum retained or on any delayed payment to SUBCONTRACTOR according to the

inevitable situations arising from the delayed payment from the EMPLOYER inclusive of any controversial matters to be settled.”

Also, in the subsequent Sub-Contract agreement between the Corporate Debtor and the Operational Creditor (Petitioner), there is no mention whatsoever of any interest to be charged.

19. It is relevant to point out that interest cannot be clubbed with the Principal amount for the purpose of threshold requirement under Section 9 unless there is an express provision for such addition in the Agreement, Work order or the Invoices. This has been affirmatively decided by various Authorises as follows: Hon’ble NCLAT order in *Mr. Prashant Agarwal v. Vikas Parasrampuriah in Company Appeal (AT) (Ins) No. 690 of 2022 dated 15.07.2022*; NCLT, Kolkata Bench in *M/s Plastofab Vs. Electroteknica Switchgears Pvt. Ltd. dated 20.02.2022 (2022) ibclaw.in 358 NCLT*, and order dated 25.05.2023 of this Tribunal in *North West Carrying Company, LLP Vs. Metro Cash and Carry India Pvt. Ltd. (2023) ibclaw.in 237 NCLT*.
20. Accordingly this Tribunal is of the considered opinion that this petition is not a fit case for admission, since the threshold limit stipulated u/s 4 of the Code is not met. Since this application has been disposed of on non-fulfilment of threshold requirement, therefore other issues have not been considered,
21. In light of the above discussion the Company Petition bearing **CP (IB) No 76 of 2022 is hereby dismissed.**

-Sd-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

-Sd-

**(T. KRISHNAVALLI)
MEMBER (JUDICIAL)**