IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
COURT – IV

Item No. 101
IB/511/ND/2021

IN THE MATTER OF:

Chemi Tech Engineers Pvt. Ltd. ... Applicant

Versus

NBCC (India) Ltd. ... Respondent

Order under Section 9 of IBC, 2016.

Order pronounced on 17.10.2023

CORAM:
MR. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)

ORDER

Order pronounced in open Court vide separate sheets.

C.P.(IB)/511/ND/2021 stands dismissed.

Sd/- **Sd/-**

DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)

MANNI SANKARIAH SHANMUGA SUNDARAM
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV

Company Petition No.(IB)-511(ND)/2021

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:

M/s. Chemi Tech Engineers Private Limited

.... Applicant/
Operational Creditor

Vs.

M/s. NBCC (India) Limited

.... Corporate Debtor

CORAM:

SH. MANNI SANKARIAH SHANMUGA SUNDARAM, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

Order Delivered on:17 .10. 2023

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

The instant application is filed by M/s. Chemi Tech Engineers Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. NBCC (India) Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor') for defaulting the payment of Rs.19,36,89,351/- (Rupees Nineteen Crore Thirty Six Lacs Eighty Nine Thousand Three Hundred Fifty-One Only) including interest.

2. The Respondent Company M/s. NBCC (India) Limited having CIN: L74899DL1960GOI003335 incorporated under the provisions of the Companies Act, 1956 is having its registered office situated at NBCC Bhawan, Lodhi Road, New Delhi-110003. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. Succinctly stated facts of the present case as averred by the applicant are that the on 30.12.2009, the Corporate Debtor had awarded work order to the Applicant vide contract for construction of external services such as sewerage, water supply, drainage and roadwork etc. for CRPF Group, Greater Noida (U.P), vide letter of award no. NBCC/CGM-RBG (E&I)/CRPF/2009/7654 dated 30.12.2009.

4. The Applicant submitted that during the period 2010 to August 2014, the applicant had carried out work as per contract, which was delayed due to circumstances created by Corporate Debtor and other hindrances, and accordingly extensions were granted from time to time by Corporate Debtor, however, bills till 22nd RA bill were also paid by Corporate Debtor. The Applicant further submitted that on 24.09.2014, 23rd RA bill was submitted with Corporate Debtor. The said Bill was processed, TDS was deducted by Corporate Debtor, but payment of net amount was, though credited to the account of Applicant, but not released by Corporate Debtor.

5. Furthermore, the applicant on 25.11.2014, had submitted the 24th RA bill with Corporate Debtor, which was processed, TDS was deducted by Corporate Debtor, but payment of net amount was, though credited to the account of the Applicant, but not released by the Corporate Debtor. On 18.11.2015, the 25th RA bill was submitted by the applicant with Corporate Debtor, however, the Corporate Debtor did not release the payment to the Applicant.

6. The Applicant in the year 2016, had filed a suit for recovery of outstanding bills before Hon'ble Delhi High Court, wherein the Corporate Debtor took a defence that since CRPF has not made payment to the Corporate Debtor therefore, the Applicant is not entitled to payment. According to the Applicant, there was no such condition in the letter of award. The Applicant sought production of relevant documents, but Corporate Debtor did not produce the same and stated that documents are "not traceable". The Hon'ble Delhi High Court duly noted this position in its order dated 11.07.2018.

7. Furthermore, during 2020, the Applicant learnt that payment has been received by Corporate Debtor from CRPF but Corporate Debtor is not releasing payment to the Applicant.

8. On 28.06.2021, the Applicant had issued statutory notice of demand u/s 8 of the Code to the Corporate Debtor and on 15.07.2021, the Corporate Debtor replied to the notice of demand by raising frivolous pleas completely un supported by any evidence and a moonshine dispute was attempted to be created. Accordingly, the applicant prayed for initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor.

9. The list of documents as relied by the Applicant to prove the existence of its debt are as follows:-

   a) Copy of the letter of award no. NBCC/CGM – RBG (E& I)/CRPF/2009/7654 Dated 30.12.2009.
   b) Copy of plaint in CS (Comm.) No. 676 of 2016.
   c) Copy of Written statement of Corporate Debtor in CS (Comm.) No. 676 of 2016.
   d) Copy of order dated 11.07.2018 of Hon'ble Delhi High Court
   e) TDS certificate issued by the Corporate Debtor.

10. Per Contra in the reply filed by the Corporate Debtor, the Corporate Debtor submitted that the Applicant had miserably failed to perform its part of the agreement and has breached the terms of the agreement. The Corporate Debtor submitted that by no stretch of imagination the alleged amount of ·Rs. 19,36,89,351/- can be due or payable by the Respondent herein at any point of time. The total work awarded was Rs. l9,72,07,512/- and out of the same, payment of more than a sum of Rs.17,00,00,000/- approximately (Rupees seventeen crores only) had already been made to the Applicant and other amounts have been deducted in terms of the agreement on account of breaches and defaults on part of the Applicant. No amount is due and payable to the applicant under any head whatsoever and the present application is· liable to be dismissed.

11. Further, the Corporate Debtor submitted that the present case of the Applicant is based on the alleged Running Bill Nos. 23 and 24 andthe 25th RA Bill claimed to be the Final Bill. It is submitted that as per the TDS details filed by the Applicant, the deductions on the payments till 19.03.2015 have been mentioned whereas the alleged Final Bill No. 25· though undated, however, it records the alleged measurement till 30.06.2015 which establishes that the said Bill is submitted much after the said date and therefore the deduction of TDS on the RA Bills or the

advance payments before submission of the Final Bill cannot be termed to be any admission of the Respondent and therefore the same cannot be looked into.

12. Moreover, the Corporate Debtor submitted that the amount shown as due and payable under the 25th RA Bill/ Final Bill is Rs.1,52,51,337/-.(Rupees One crore fifty two lakhs fifty one thousand three hundred and thirty seven only) whereas in the suit filed by the Applicant before the Hon'ble High Court of Delhi, the amounts are totally in contradiction and new amounts have been introduced and claimed in the present application.

13. The Corporate Debtor submitted that the entitlement of the Applicant and the dispute between the parties is presently sub judice before the Hon'ble High Court of Delhi· in CS (COMM) No. 676 of 2016. The said suit was· filed for recovery of Rs. 11,76,29,352/- and the Corporate Debtor had duly filed its written statement to the said suit and the matter is presently at the stage of Evidence. Hence, there is a pre-existing dispute between the parties and there are serious doubts on the entitlement of the Applicant to receive any amount and as such the present application cannot be entertained and is liable to be dismissed.

14. On behalf of the Applicant, Rejoinder has been filed to the reply filed by the Corporate Debtor, wherein the submissions of the Corporate Debtor are rebutted and it was submitted that the Corporate Debtor itself in the letter dated 01.11.2021 had admitted that a sum of Rs.25,35,000/- was approved against RA Bill number 25, as against the total bill amount of Rs. 1,52,51,337/-. Further, the minutes of meeting dated 16.11.2021 between the Applicant and Corporate Debtor, which are self -explanatory proves that the Corporate Debtor did not act fairly and never attempted to fairly settle the bills or even to verify the content of the 25th RA Bill.

15. We have heard the Ld. Counsels for the parties and perused the averments made in the application, reply, rejoinder and written submissions filed by the parties. The relevant documents annexed with the respective submissions have been perused.

16. From the submission of the parties, the short point for consideration for this Adjudicating Authority is whether there is any discernible pre-existing dispute surrounding the debt claimed by the Applicant to be due and payable by the Corporate Debtor.

17. Adverting to the factual matrix of the present case, it is an undisputed fact that the Corporate Debtor awarded work order to Operational Creditor vide contract for construction of external services such as Sewerage, water supply, drainage and roadwork etc. for CRPF Group Centre, Greater Noida(UP), vide letter of award no. NBCC/CGM – RBG (E& I)/CRPF/2009/7654 Dated 30.12.2009. The relationship between the parties is governed by the Agreement dated 10.02.2010 and the terms thereof are binding upon the parties, however, the applicant had not placed on record the said agreement dated 10.02.2010. Further a recovery suit i.e., CS (COMM) No. 676 of 2016 of Rs.11,76,29,352/- arising out of the same award no. NBCC/CGM – RBG (E& I)/CRPF/2009/7654 dated 30.12.2009 filed by the Applicant against the Corporate Debtor is pending before the Hon'ble High Court of Delhi.

18. The Hon'ble Supreme Court in **Mobilox Innovations Private Limited Vs Kirusa Software Private Limited [Civil Appeal No. 9405 of 2017 para 34,** have categorically laid down what the Adjudicating Authority has to examine in an Application under Section 9, which is as follows:-

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs 1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational Debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."

19. We find that the Corporate Debtor in its reply dated 15.07.2021 to the statutory demand notice issued under Section 8(1) of the Code, 2016 had disputed the existence of operational debt and also indicated the deficiencies in respect of discharge of contractual obligations by the Operational Creditor. It will be pertinent at this stage to peruse the reply dated 15.07.2021 of the Corporate Debtor in response to the demand notice dated 28.06.2021. The relevant para of the same is extracted below: -

"2. That it is unfortunate that your client has not disclosed the complete facts in the notice. It would be relevant to point out that your client has instituted a commercial suit against my client claiming a sum of Rs.11,76,29,352/- along with interest @ 18% p.a. It is not understood how that claim made by your client increased to Rs.19,36,89,351/-. These demands have been raised under various heads like payment towards alleged work done, KID account, security deposit, claim for money deducted under Clause 28 of GCC, alleged loss incurred due to prolongation of contract, alleged extra expenditure in material and labour due to prolongation of contract, alleged extra expenditure incurred in site establishment and T & P due to prolongation of contract. My client has filed its written statement and documents in support of their case and has disputed each and every claim made by your client. Suffice it to state that no amount is payable by my client to your client on any account whatsoever.

3.********

4. That my client reiterates the stand taken in the written statement that no amount is due or payable to your client and in fact your client did not even complete the work awarded under the contract. The payment of work done till date, after making necessary deductions in terms of the contract already stands paid to your client. Various irregularities on the 23'd and 24th Bill were pointed out by my client and the owner of the project, CRPF due to quality concerns and the work which was executed by your client was not as per specification. Whatever amount was payable to your client has already been paid by my client. No amount is now due and payable to your client. In fact your client is yet to rectify the defects pointed out by my client in various works executed by your client which remain unattended till date. My Client through communications inter-alia letters dated 23.2.20L5, 19.07.20L5, 14.10.2015, 27.12.2014 and 14.06.2014 had called upon you to rectify the defects, which your client has failed to do so."

20. The Hon'ble Supreme Court in their judgement in **<u>Transmission Corporation of Andhra Pradesh Limited V/s. Equipment Conductors and Cables Limited reported in (2019) 12 SCC 697,</u>** categorically laid down that 'IBC was not intended to be a substitute to a recovery forum and that whenever there was existence of a real 'Dispute', IBC provisions could not be invoked'. The object of the Code, at least insofar as Operational Creditors are concerned, was to initiate Insolvency Process against the Corporate Debtor only in clear cases where a real 'Dispute' between the parties as to the 'debt owed' did not exist.

21. In the instant case, we are of the considered view that there is sufficient evidence on record to exhibit a 'Pre-Existing Dispute' between the parties prior to the issuance of the Demand Notice under Section 8, IBC, 2016. Further, the defence is not spurious, mere bluster, plainly frivolous or vexatious. Therefore, we are of the consequent view that the ratio of the Judgement of the **Hon'ble Supreme Court in the case of M/s. Mobilox Innovations Pvt. Ltd. V/s. Kirusa Software Pvt. Ltd.** squarely applies to the facts of the attendant circumstances of the case, wherein it is held that if the Corporate Debtor raises a plausible contention about the existence of a prior dispute, it would suffice for the Adjudicating Authority to reject the Section 9 application, it is not necessary for the Adjudicating Authority to determine as to whether the Corporate Debtor will be successful in respect of the dispute raised or not.

22. On-going through the submissions made by the parties and keeping in mind the provisions of law laid down in the Code and the Judgments cited supra, it is amply clear that there exists a pre-existing dispute with respect to the existence of amount of debt as well as deficiencies in the work executed which would require further investigation for proper determination. The Recovery Proceedings between the parties regarding the alleged claim of the operational Debt is pending before the Hon'ble High Court of Delhi where pleadings and counter claims are submitted by the Corporate Debtor. Since, the proceedings before us are of summary nature, no such determination is possible by the Adjudicating Authority. In view of the above factual and legal position, the instant application cannot be proceeded with as far as initiation of proceedings by the Applicant against the Corporate Debtor is concerned.

23. Accordingly, the instant petition (IB-511(ND)/2022) stands **dismissed** with no order to costs.

Let copy of the order be served to the parties.

Consign the file to the record room.

Sd/-

(DR.BINOD KUMAR SINHA)
MEMBER (T)

Sd/-

(MANNI SANKARIAH SHANMUGA SUNDARAM)
MEMBER (J)