

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA**

C.P (IB) No. 1289/KB/2019

*An application 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:

Krishna Hi-Tech Infrastructure Private Limited [CIN
U45205WB2009PTC139100], a company incorporate under the Companies Act,
1956, having its registered office at 637, Rajdanga Main Road, Kolkata – 700107.

...Operational Creditor

Versus

Bengal Shelter Housing Development Private Limited[CIN
U70101WB2004PLC097716], a company incorporate under the Companies Act,
1956, having its registered office at Eternity Building, DN-1,3rdFloor, Sector-V Salt
Lake, Kolkata – 700091.

...Corporate Debtor

**Date of Hearing: 02.08.2022
Date of pronouncing the order: 12.09.2022**

Coram:

Shri Rohit Kapoor : **Member (Judicial)**
Shri Balraj Joshi : **Member (Technical)**

Appearances (through Video Conferencing/physical hearing)

For the Operational Creditor: Mr. A.K. Shrivastava, Advocate
: Mr. Akash Sharma, Advocate
For the Corporate Debtor : Mr. Joy Saha, Sr. Adv.
: Mr. Reetobroto Mitra, Adv.
: Ms. Jayati Chowdhury, Adv.
: Ms. Sucheta Mitra, Adv.
: Mr. Rajesh Upadhyay, Adv.

ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Ramkrishna Das, Director, Krishna Hi-Tech Infrastructure Private Limited (*'Operational Creditor'*), duly authorised *vide* Board Resolution dated 18 June, 2019¹ for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Bengal Shelter Housing Development Private Limited (*'Corporate Debtor'*).
3. The present Petition was filed on **09 August, 2019** before this Adjudicating Authority. The total amount claimed in default is Rs.1,70,76,158/- (Rupees One Crore Seventy Lakh Seventy Six Thousand One Hundred Fifty Eight only).
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.55,00,00,000/- (Rupees Fifty Five Crore only) with subscribed share capital of Rs. 50,60,00,000/- (Rupees Fifty Crore Sixty Lakh only).
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Operational Creditor is an MSME Unit. The Corporate Debtor had issued two purchase order being, BSHDL/Tech/2017-2018/192/KHIPL/TK dated 14 November, 2017 for Civil Construction works of club house inside HIG periphery situated at Teenkanya Housing Project, AA-IIB, New Town, Rajarhat, Kolkata (*'Purchase Order One'*), and, BSHDL/Tech/2017-2018/199/KHIPL/TK dated 21 November, 2017 for Balance Civil Construction works of MIG-2, (B+G+13) with fire Refuse Slab, Mumpity, Lift Machine Room, Overhead Tank, Basement, Ramp, etc at Teenkanya Housing Project, AA-IIB, New Town, Rajarhat, Kolkata (*'Purchase Order Two'*).

¹Page 31 of the Petition.

- 5.2 It was agreed by the Corporate Debtor that payments will be released within fifteen days on receipt of the bills issued by the Operational Creditor [Page 45 of the Petition]. The said Civil Constructions were to be carried during the period of 2017 to 2018. Accordingly, the Operational Creditor raised Tax Invoices for both the purchase Orders.
- 5.3 For Purchase Order – One , the Operational Creditor received part payment from the Corporate Debtor. Moreover, during the civil construction of the work for Purchase Order-One, the Operational Creditor also executed extra work as per instruction of the engineer-in-charge and, thereby submitted the claims amounting to Rs.2,20,751/- (Rupees Two Lakh Twenty Thousand Seven Hundred Fifty One only).
- 5.4 Further, as per the invoices raised by the Operational Creditor for Purchase Order-One, the aggregate amount is Rs.50,57,661/- (Rupees Fifty Lakh Fifty Seven Thousand Six Hundred Sixty One only). However, the Operational Creditor received only a sum of Rs.23,93,411/- (Rupees Twenty Three Lakh Ninety Three Thousand Four Hundred Eleven only)
- 5.5 For Purchase Order-Two also, the Operational Creditor received part payment from the Corporate Debtor. However, during the civil construction of the work for Purchase Order Two, the Operational Creditor also executed extra work as per instruction of the engineer-in-charge and, thereby submitted the claims amounting to Rs.14,91,920/- (Rupees Fourteen Lakh Ninety One Thousand Nine Hundred Twenty only).
- 5.6 Further, as per the invoices raised by the Operational Creditor for Purchase Order Two, the aggregate amount is Rs.2,58,33,746/- (Rupees Two Crore Fifty eight Lakh Thirty Three Thousand Seven Hundred Forty Six only). Whereas, the Operational Creditor received only a sum of Rs.1,45,06,589/- (Rupees One Crore Forty Five Lakh Six Thousand Five Hundred Eighty Nine only)
- 5.7 As per the terms and conditions stipulated in the Purchase Orders dated 14 November, 2017 and 21 November, 2017, the debt fell due from the fifteen days of the invoices raised by the Operational Creditor.

- 5.8 The last payment was made on 11 February, 2019 of Rs.5,00,000/- (Rupees Five Lakh only) by the Corporate Debtor. Thus, the aggregate amount of dues receivable from the Corporate Debtor after deducting the part payments is Rs.1,39,91,407/- (Rupees One Crore Thirty Nine Lakh Ninety One Thousand Four Hundred Seven only), excluding the interest.
- 5.9 Despite several follow ups and mails, the Corporate Debtor failed and neglected to pay the outstanding dues to the Operational Creditor. A demand notice dated 13 July, 2019 under section 8 of the code was sent to the Corporate Debtor, and the Corporate Debtor replied to the said notice *vide* its reply dated 23 July, 2019.
- 6. Submissions by the Ld. Advocate appearing on behalf of the Corporate Debtor.**
- 6.1 The Corporate Debtor has repeatedly informed the Operational Creditor about the deficiency in their work, including the defective materials and poor management of the craftsmen.
- 6.2 The Operational Creditor handed over an incomplete work to the Corporate Debtor, because of which the Corporate Debtor had to engage third party to complete the construction project. Such engagement of the third party has caused the Corporate Debtor a sum in excess of Rs.1,00,00,000/- (Rupees One Crore only).
- 6.3 The Operational Creditor deliberately avoided their liability. On several occasion the Corporate Debtor wrote to the Operational Creditor to reconcile the accounts between the parties, which forms the part of this Petition. In spite of such notices, the Operational Creditor failed to reconcile its accounts.
- 6.4 There is no proof of the fact the Projects was completed to the satisfaction of the Corporate Debtor. There is no completion certificate issued by the Corporate Debtor in favor of the Operational Creditor. There are pending disputed between the parties, which in terms of the Purchase Order ought to have been referred to arbitration. In view of the disputes which have never been addressed, the question of default does not arise under the Insolvency and Bankruptcy Code, 2016.

- 6.5 Apart from the aforesaid claim, two claim has been foisted again for the Club House project for an aggregate value in excess of Rs.50.57 lakhs of which the Operational Creditor claims outstanding of Rs.26,64,250/-. Such allegations are bald, without particulars, absolutely vain and liable to be rejected. The Operational Creditor had itself contradicted its claim in the application.
- 6.6 Further, the operational creditor has also alleged that the MIG-II project is in excess of Rs.2.58 crore out of which Rs.1,45,66,589/- has already been paid. Thus, contradicting its stand that a sum of Rs.14,91,920/- is only due and payable. It is denied that any excess work was done by the Operational Creditor or that a sum of Rs.1,39,91,407/- or that any amount is due or payable by the Corporate Debtor to the Operational Creditor as alleged.

7. **Issues**

- 7.1 Is there any Pre-existing dispute?

Analysis & Findings

8. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.
9. Upon perusal of the record placed before us, we rely on ***Innoventive Industries Ltd. v. ICICI Bank and Anr.***,² where the Hon'ble Supreme Court while explaining the provisions of Sections 7 or 9 observed and held:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the

² (2018) 1 SCC 407

moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

*29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is preexisting- i.e. before such notice or invoice was received by the corporate debtor. **The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.**”*

10. Further, in *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited*³ it was opined by the Hon’ble Apex Court that;

“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on nonpayment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with

³2017 (1) SCC onLine SC 353

Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”

11. The Hon’ble Supreme Court in *Mobilox (Supra)* has also observed that all that the Adjudicating Authority has to see at ‘the stage of Admission’ is *whether there is a plausible contention which requires further investigation and that the ‘Dispute’ is not a patently feeble legal argument or an assertion of fact or a moonshine defence unsupported by tangible materials/evidence.*

12. In this context it is pertinent to mention that the disputes raised by the Corporate Debtor can categorically be divided into three parameters;

(i) First, was with respect to the *‘Deficiency in the Work’* – (Page 29 of reply affidavit), e-mail dated 26th April, 2018; (Page 35 of reply affidavit), e-mail dated 25th May 2018 for reduction of labour strength; (Page 48 of reply affidavit), e-mail dated January 18, 2019 for incomplete rectification work and deficiency of work).

(ii) Second, was with respect to the *‘Slow Progress in the Work’* – (Page 13 of reply affidavit) e-mail dated 26th February, 2018; (Page 15 of reply affidavit) e-mail dated 3rd March 2018; (Pg 17 of reply affidavit) e-mail dated 13th March 2018; (Pg 18 of reply affidavit) e-mail dated 14th March 2018; (Pg 29 of reply affidavit) e-mail dated 26th April 2018 and (Pg 33 of reply affidavit) e-mail dated 25th May 2018.

(iii) Third, was with respect to the *‘Defective Materials’* – (Pg 18 of reply affidavit), e-mail dated 13th March, 2018; and (Pg 27 of reply affidavit), e-mail dated 6th April 2018.

13. In light of the above noted facts and circumstances, we are of the view that the defence is not spurious or plainly frivolous or vexatious. The dispute very much

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existed between the parties way before the demand notice was sent by the Operational Creditor i.e., 13 July, 2019. Hence, the Petition being C.P. (IB) No. 1289 /KB/2019 is *dismissed*.

14. Needless to say that the Corporate Debtor is at liberty to resort to other remedies that may be available to it under any other law.
15. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 12th day of September, 2022

SA [LRA]