

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH (COURT-II)**

**(IB)-1506(ND)2019**

**IN THE MATTER OF:**

**M/s Aurotech Infraprojects Pvt. Ltd.  
203, Second Floor, 120 Mathura Road,  
Udyog Sheel Mahila Sekhari Samiti Ltd.  
New Delhi-110076**

**...Operational Creditor**

**VERSUS**

**M/s Garg Heart & Multispeciality Hospital Pvt. Ltd.  
8, AGCR Enclave, Karkardooma  
Delhi-110092**

**... Corporate Debtor**

**Section: 9 of IBC, 2016**

**Judgement Delivered on: 16.01.2020**

**CORAM:**

**SMT. INA MALHOTRA, HON'BLE MEMBER (J)  
SHRI. L. N. GUPTA, HON'BLE MEMBER (T)**

**PRESENT:**

For the Petitioner : Mr. Venkat Rao & Mr. Remya Ronald, Advocates  
For the Respondent : Mr. Sanjay Bhatt, Advocate



(IB)-1506(ND)2019

M/s Aurotech Infraprojects Vs M/s. Garg Heart and Multispeciality Hospital Pvt. Ltd.

## **JUDGEMENT**

### **PER SHRI L. N. GUPTA, MEMBER (T)**

The present petition is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by M/s. Aurotech Infraprojects, through its Authorized Representative Sh. Hitesh Sharma, who is authorized vide Board Resolution dated 10.06.2019 (for brevity 'Operational Creditor'), with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Garg Heart and Multispecialty Hospital Pvt. Ltd. (for brevity 'Corporate Debtor').

2. The Corporate Debtor namely, M/s. Garg Heart and Multispecialty Hospital Pvt. Ltd. is a Company incorporated on 06.02.2012 under the provisions of Companies Act, 1956 with CIN No. U85100DL2012PTC231067, having its registered Office at 8, AGCR Enclave, Karkardooma, New Delhi-110092.

3. The Authorised Share Capital of the Corporate Debtor is Rs.50,00,00,000 and Paid up Share Capital of the Company is Rs.40,00,00,000 as per the Master Data of the Company annexed.



4. It is the Petitioner's case that they had applied for tender issued by the Corporate Debtor for construction of structural work of M/s. Garg Hospital Pvt. Ltd. (Crest Hospital), situated at Vasundhara, Ghaziabad. It is stated by the Petitioner that the scheduled completion date of the work was 31.05.2017. It is further submitted by the Petitioner that the work was initially delayed since the Corporate Debtor was unable to release payments. Therefore, the date of completion of work was extended till 01.07.2018 by the Corporate Debtor vide their Letter dated 01.07.2017.

5. That the Petitioner used to issue R.A. Bills to the Corporate Debtor as required under the letter of award. On account of retention money of various RA bills retained and the balance amount of some of the RA bills not paid, the total liability of the Corporate Debtor comes to the tune of Rs.1,52,52,527 including interest @ 18%.

6. That the Petitioner submits that it had sent a Demand Notice dated 30.04.2019, under Section 8 of IBC 2016 vide Speed Post at the Registered Office of the Respondent, as per which *"the total amount payable by the Corporate Debtor is Rs. 1,86,11,538"*. It further states that the Corporate Debtor is also liable to pay an interest @ 8% per annum on the amount due and payable. It is further submitted by the Petitioner that the Respondent had replied to the Demand Notice vide their Letter dated 17.05.2019.



7. That the Operational Creditor has annexed the reply sent by the Corporate Debtor and has also filed their Affidavit under Section 9(3)(b) of IBC 2016, as per which, inter alia, neither the payment of the Operational Debt nor an existence of dispute has been brought to the notice of the Applicant by the Corporate Debtor. The Corporate Debtor has not submitted a copy of the Certificate from the Financial Institution/Bank maintaining account of the Operational Creditor confirming that there is no payment of an unpaid Operational Debt in compliance of Section 9(3)(c) of IBC 2016 or statement of its account duly certified by the Bank.

8. That the Corporate Debtor has filed its reply on 26.08.2019 and has opposed the admission of the petition mainly on the following grounds :

- (a) There is a pre-existing dispute between the Parties in terms of defects in the work pointed out from time to time, cancellation of contract and Email dated 02.02.2019.
- (b) The Corporate Debtor has not done his work properly within the stipulated time.
- (c) The Corporate Debtor had terminated the Contract vide its Letter dated 17.01.2019.
- (d) Work done by the Applicant was unsatisfactorily and not in accordance with the terms of the agreement, which was time and again communicated to the Applicant. Hence, no



certificate of completion of work was ever issued to the Applicant.

(e) The application lacks specific authorization to initiate CIRP.

9. It is stated by the Corporate Debtor that its Project Management Consultant vide their Reports dated 25.04.2018 and 01.05.2018 has pointed out various deficiencies in the work done by the Operational Creditor under the Agreement. The relevant extract of one such report dated 25.04.2018 is reproduced below :

*“REPORT OF VISIT DATED 25<sup>TH</sup> APRIL 2018*

*Dear Sir,*

*With reference to our today's site visit, we have observed few points as mention below;*

- A) As already suggested Service floor roof curing should be done by water pounding system but still normal sprinkling curing is going on required immediate action as suggested.*
- B) Cracks are seen on many locations on newly casted service floor, slab, because of inadequate curing or shrinkage as suggested curing should be done min. 10 days immediate action require.*
- C) As suggested cover blocks should be placed properly in beam/slab but still few mistakes seen in today's reinforcement checking time of Ground floor (backside area)*
- D) In Ground Floor (Backside area), undulation observed in shuttering of slab (as plate seems bent), also proper levels, gap, fillings etc. may be checked as suggested.*
- E) Minor mistakes also suggested to rectify.*

*Note; May please inform us one day before for slab/beam Reinforcement checking, it would be better to complete in all respect from your end like checking of Reinf. of beam/slab as per drawing, levels checking of shuttering and gaps etc. As we seen that chairs, covers blocks checking of shuttering levels were in progress during checking.”*

10. It is further submitted by the Corporate Debtor that its Project Management Consultant had communicated these deficiencies noticed in the work done vide its email dated 25.04.2018, 08.05.2018, 20.10.2018 to the Corporate Debtor.

11. It is stated by the Corporate Debtor that in order to monitor the progress of the work under the Agreement, parties agreed to hold weekly progress review meetings. The Corporate Debtor has placed the minutes of the such review meetings dated 16.04.2018, 26.04.2018, 10.05.2018, 19.05.2018 depicting that the work was not completed by the Operational Creditor within the timelines.

12. It is stated by the Corporate Debtor that as per Clause 3.4.1 of the Agreement, the Applicant was required to raise Running Account Bills every month for the work done. Further, the payment was to be released only after due verification of the Bills made by the Project Management Consultant.



13. It is averred by the Corporate Debtor that :

*“viii. That it is further pertinent to mention here that as per clause 9.3.1 of the Agreement, retention money was required to be deducted @ 5% of the value of work done from each RA Bill raised by the Applicant. As per the said clause, the liability of the Respondent to release the said retention money to the Applicant shall arise only after the completion of the Defect Liability period. It is stated that as per Clause 15 of the LOA, the Defect Liability period is 12 months commencing from the certified date of completion of the work. Further, as per Clause 2.7 of the Agreement, the Certificate of Completion of Work shall be issued only when the work under the contract has been substantially completed in accordance with the terms of the Agreement. It is stated that the work done by the Applicant under the Agreement was unsatisfactory and not in accordance with the terms of the Agreement, which was time and again communicated to the Applicant. Hence, no certification of completion of work was ever issued to the Applicant under the Agreement”.*

14. It is further submitted by the Corporate Debtor that due to slow progress, poor quality and inordinate delay in completion of work under the contract, the Respondent was compelled to terminate the Contract Agreement dated 31.05.2016 on 17.01.2019 intimating, inter alia, the Petitioner that all their civil works bills are under scrutiny by 3rd party (PMC). The Letter of Corporate Debtor dated 17.0.12019 terminating the Agreement is reproduced below :

"To,

Date: 17<sup>th</sup> Jan 2019

*Aurotech infra projects Pvt Ltd.  
Udyog Sheela Mahila sehkari Samiti ltd.  
203, 22<sup>nd</sup> floor, 120 Mathura road,  
New Delhi- 110076, India*

*Sub:- Construction of Hospital building SH: Structure, Brick Work  
& Plaster Work at sector-4, Vasundhra, Ghaziabad (U.P.)*

*Ref:- Letter Awarded 31 May 2016 & contract agreement ref No  
GHMSH/HO/WO/001 dated 31.05.2016.*

*Kind Attention: Mr. Hitesh Sharma*

*It is conveyed to you that management has decided to stop the  
construction work of site which was assigned to you with  
immediate effect.*

*This may please be treated as notice of separation. You are  
advised to take all your measurement etc. within 7 days from  
issuing of this letter for preparation of statement of work etc. On  
expire of 7<sup>th</sup> day from the date of issue of this letter the contract  
will be treated as terminated.*

*As intended to you over the email dated 15<sup>th</sup> jan 2019, it is  
reiterated for your information that presently all your civil work  
bills are under scrutiny by 3<sup>rd</sup> party (PMC).*

*You may please note that contract has already expired and  
management does not wish you to carry out any more work at it  
site with immediate effect.*

*Yours truly,*

*For M/s Garg Heart and Multi-Specialty Hospital"*



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15. The Operational Creditor has relied upon an E-mail communication between the Parties dated 29.12.2018 and 01.01.2019, which are reproduced below :

*"29.12.2018*

*Dear Sir,*

*We would like to request you, kindly arrange to release the following overdue payments:*

- 1. Rs 20.00 Lacs payment against security.*
- 2. Rs 14.00 lacs against Cement is pending since from the last one year.*

*Further to the above, you are hereby requested to release the above payment immediately.*

*We would also like to bring to your kind attention that payment against our submitted bills is also pending. Kindly arrange to release the same ASAP.*

*We are now awaiting your reply to the above.*

*With best regards*

*Hitesh Sharma  
Director"*

*"01.01.2019*

*Dear Mr. Hitesh G,*

*With reference to trail mail, reply mentioned against each point-*

- 1. Rs 20.00 Lacs payment against security- as discuss and agreed upon us, you will get your 30 Lacs security in 3 equal installments in next 3 months. 1<sup>ST</sup> 10 Lacs already released to you in last month and next 10 Lacs you will get in the month of Jan 2019 and so on.*
- 2. Rs 14.00 Lacs against cement is pending since from the last one year – as you know that you have not submitted cement rates during casting and rates and amount is not verified till date so it is under scrutiny and will closed after discussion with you and all board of directors in the month of Jan 2019.*



*We would also like to bring to your kind attention that payment against our submitted bills is also pending. Kindly arrange to release the same ASAP- your submitted RA dated 11-12 Dec18 AD-HOC 70% amount already paid to you, balance payment you will get in time after final assessment of your submitted RA.*

*Regards  
Vikash Tyagi*

16. On the other hand, the Corporate Debtor has relied upon the Email dated 02.02.2019 to establish the pre-existing dispute between the parties:

*“M/s Aurotech Infraprojects Pvt. Ltd.  
Udyog Sheela Mahila Sehkari Samiti Ltd.  
203, 2nd Floor, 120 Mathura Road,  
Opp. Apollo Hospital,  
New Delhi, Inida-110076,*

*Kind Attention: Sh. Hitesh Sharma, Director*

*Subject: Regarding Closure of Contract, your demobilization from Project site and final payment for the work completed.*

*Sir,*

*This is with reference to your mails/letters dated 10<sup>th</sup> Jan 2019, 22<sup>nd</sup> Jan 2019 and 25 Jan 2019. We would like to give our response as below :*

*1.Regarding termination of Contract: As per the agreement clause 20.0 Termination, 20.1 quote “Upon Contractor’s failure to carry on the construction work with due diligence e.g. late commencement of work, low progress, sub-standard work, non-adherence to agreed time frame schedule etc. causing inordinate delay in completion of the work, or if contractor commits a breach of any of the terms and conditions of agreement, GHMSH shall be entitled to terminated the said agreement by giving 15 days’ notice to contractor. “GHMSH” shall; arrange to get the balance work completed through some other agency or agency (ies) at Contractor’s risk and cost” unquote. The work quality, response to the required corrective actions/measures and work progress was found unsatisfactory and the same was intimated to you time to time. The third-party quality check reports and their*

recommendations were also not complied with by you. The extra-ordinary slow progress has delayed the project and has caused severe damages to us financially. You were communicated appropriately time to time. The Contract agreement had already expired and due to continuous poor performance of compliance of the agreement, our mail of 17<sup>th</sup> Jan 2019, was to re-confirm the termination giving you sufficient time of 7 days for you to removed your resources from the site.

2. The work was awarded to you on 31.05.2016 and partial work was done up to Jan 2017. By this period, RA bills were being paid and but could not verified fully. Up to that period security amount of Rs 30,96,957 was being considered as per the RA bills, however, with the verification of the RA bills for the measurements, recovery of approx. 15 lakhs has already been established up to that period work as communicated by the third party, while checking is still in progress. As the verification is being done by a third party, the facts would be established as per the contract. Regarding release of security, as per the agreement, 12 months defect liability is from the certified date of completion, however, the project is yet not complete. As per our understanding, no certification was ever given as 'work completed' for works up to Jan 2017 or till works done up to last month.

Reference to your 12 RA Bill, 70% amount has already been paid. The bill measurement is under verification by third party and balance amount would be paid on confirmation/ recommendation of the same.

4. With reference to the cement consumption payment, please not that we have already conveyed you many a times to submit the details of rate-difference and Cement Consumption for the item number 2.01. May also note that basic rates of cement bag as defined in item 2.01 only would be considered for payment as per the agreement/BOQ. May please submit the details so that payment, if due, can be released.

5. You are requested to submit your final bill (consolidated) for verification so that final amount payable to you may be certified by the third party. Based on the recommendation on your final bill, we would be glad to close the agreement by paying your payments.

It is also to mention that at certain locations, work defects have been found and communicated to you in last 6-7 months, but



*appropriate actions were not taken by you. We would have to get those rectifications at your cost (the rectification work amount would be deductible from your final certified amount of the work measurement).*

*You are requested to have patience and cooperate for the verification of the measurement of RA bills and Final bill, so that justified payable amount as per agreement can be paid to you. We would work out, if we can relax or not, the clause 7 of the agreement which deals with the compensation for delay or liquidated damages.*

*Yours Truly,*

*Vikash Tyagi  
Head Project"*

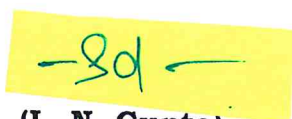
17. After hearing submissions of both the parties, this Bench is of the view that the Corporate Debtor has placed sufficient material on record vide Report of Architect dated 25.04.2018, its Letter of Termination dated 17.01.2019 and Email dated 02.02.2019 to establish the pre-existing disputes between the Parties. Further, it is observed that the total amount due and payable mentioned in the Demand Notice sent on 30.04.2019 by the Operational Creditor to the Corporate Debtor is Rs.1,86,11,538 along with an interest @ of 8% per annum, which is at variance with an amount of Rs. 1,52,52,527 along with an interest of 18% per annum mentioned in the Part IV of the Petition. We are of the opinion that these disputes require adducing of further evidence and proper investigation into the claims, which can be adjudicated only under Civil Proceedings by the Competent Court.



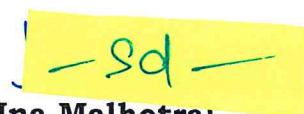
18. It may be worthwhile to refer to the Judgement in the matter of **Mobilox Innovations Private Limited vs. Kirsua Software Private Limited**, where the Hon'ble Supreme Court has observed that :

“It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage 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 unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application”.

19. In the light of the facts and circumstances of the case, the Petition is rejected.



**(L. N. Gupta)**  
**Member (T)**



**(Ina Malhotra)**  
**Member (J)**