



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
COURT No. V, MUMBAI BENCH**

**C.P. No. 482/I&B/2022**

Under section 8 & 9 of the IBC, 2016

In the matter of

**New Consolidated Construction Company  
Limited**

Marathon Innova, B- 1, 101, 1<sup>st</sup> Floor, Opp.  
Peninsula Corporate Park, Off Ganpatrao  
Kadam Marg, Lower Parel, (w), Mumbai  
400013.

**.... Petitioner / Operational Creditor**

V/s.

**Xrbia Developers Limited**

Office No.125/126, Patil Plaza, Mitramandal  
Chowk, Parvati, Pune-411009

**.... Corporate Debtor**

**Order Dated: 05.01.2024**

**Coram:**

Hon'ble Ms. Reeta Kohli, Member (Judicial)

Hon'ble Ms. Madhu Sinha, Member (Technical)

**Appearances (Physically):**

For the Petitioner: Adv. Joshua D'souza

For the Corporate Debtor: Adv. Akshay Petkar a/w Adv. Pranav Shah &  
Adv. Aditya Nair



**ORDER**

***Per: - Madhu Sinha, Member (Technical)***

1. This Company petition is filed by New Consolidated Construction Company Limited (hereinafter called “**the Petitioner**”) seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Xrbia Developers Limited (hereinafter called “**Corporate Debtor**”) alleging that the Corporate debtor committed default in making payment to the Petitioner. This petition has been filed by invoking the provisions of Section 9 Insolvency and bankruptcy code (hereinafter called “**Code**”) read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor had failed to make payment of Rs. 7,27,03,898/- having Principal amount of Rs. 6,77,40,000/- and interest of Rs. 49,63,898/- charged at 18% p.a. from the date of settlement i.e. 04.09.2021 till 31.01.2022.

**The submissions by the Operational Creditor: -**

3. The Corporate Debtor approached the Operational Creditor for the construction of (G+8 & G+6) multi-story buildings at Xrbia – Smart City, Warai. Accordingly, the Corporate Debtor issued a work order dated 30.08.2016 bearing number XDL/WARAI/SWO/01 to the Operational Creditor. Thereafter, the Corporate Debtor also issued another work order dated 07.09.2016 bearing number XDL/MDAP/SWO/01 to the Operational Creditor for the construction of 2-BHK & 3-BHK sky villa duplex Apartments at Xrbia – Xpresscity, Madap.
4. Subsequently, the Operational Creditor raised several invoices on the Corporate Debtor from 01.09.2016 till 01.02.2021 to the tune of Rs.102,67,74,985/- for the work done. Against the said Invoices, the Corporate Debtor made an aggregate payment of Rs.93,45,60,322/-. The remaining outstanding amount of Rs.9,22,14,653/- includes the retention sum of Rs.4,71,43,460/- (as per clause 8 of the Warai Work Order, the Corporate Debtor was bound to deduct 5% retention amount from each bill raised by the Operational Creditor).




5. Thereafter the Operational Creditor called upon the Corporate Debtor to make the outstanding payment and in response the Corporate Debtor assured the Operational Creditor to make the payment. However, in spite of the assurance, the Corporate Debtor failed and neglected to make the payment to the Operational Creditor.
6. Pursuant to the above, on 04.09.2021, the parties arrived at a settlement agreement dated 04.09.2021 wherein the parties agreed to settle the aforesaid dues for total payment of Rs.6,77,40,000/-. The said full and final settlement comprises of (i) Rs.2,07,40,000/- towards outstanding receivables and (ii) Rs.4,70,00,000/- towards retention money lying with the Corporate Debtor. However, the Corporate Debtor failed to honour the terms of settlement dated 04.09.2021.
7. In response, the Operational Creditor and the Corporate Debtor held meeting on 12.11.2021 wherein the Corporate Debtor informed the Operational Creditor that it is facing financial issues and therefor, requested the Operational Creditor to take its office premises situated in Mumbai in lieu of the outstanding settled dues. However, the Corporate Debtor thereafter failed to share its office details.
8. Thereafter, the Operational Creditor vide email dated 06.12.2021 and 12.01.2022 requested the Corporate Debtor to clear the outstanding dues. However, the Corporate Debtor vide email dated 17.01.2022, stated that they are open for barter of flats against part payment and informed the Operational Creditor that they haven't procured the Vendors NOCs.
9. In response the Operational Creditor vide email dated 21.01.2022, requested the Corporate Debtor to pay the admitted dues of Rs.6,77,40,000/- after deducting a sum of Rs.65,08,718/- towards Vendors NOC, in case Corporate Debtor is directly paying to Vendors. However, the Corporate Debtor failed and neglected to make the payments towards the outstanding dues.
10. Consequently, the total outstanding amount as of 31.01.2022, together with interest was Rs.7,27,03,898/-. Therefore, the Operational Creditor through its Advocates served upon the Corporate Debtor a Demand Notice dated 08.02.2022 which was received by the Corporate Debtor on 11.02.2022. However, the Corporate Debtor failed to respond to the Demand Notice dated

08.02.2022 and the payment outstanding dues to the Petitioner.

11. Hence this petition.

**Reply filed by the Corporate Debtor: -**

12. The Corporate Debtor has filed their Affidavit in Reply ("**Reply**") and denied each and every statement, contention and allegation made by the Petitioner.
13. It is submitted that the alleged claim of the Petitioner is based on two (2) Work Orders bearing reference nos. HDL/Warai/SWO/01 ("**Warai Work Order**") dated 30.08.2016 for construction of (G+8 and G+6) buildings at Xrbia Smart City, Warai and HDL/Madap/SWO/01 ("**Madap Work Order**") dated 07.09.2016 for construction of 2 BHK and 3 BHK, Sky Villa Duplex Apartments at Xrbia Express City, Madap.
14. The Corporate Debtor submits that the Petitioner has breached the following terms of the work order:-
- a) Clause 5 of the Warai Work Order, the Operational Creditor was required to complete the entire project within 730 days i.e. 24 calendar months.
  - b) Clause 7 of every bill raised by the Operational Creditor, was mandatorily required to be certified and confirmed from the consultant with respect to the completion of appropriate milestone. The said clause also states that upon satisfactory completion of the awarded work, full and final settlement will be made upon thorough scrutiny.
  - c) Clause 8 of the Warai Work Order, the Corporate Debtor was bound to deduct 5% retention amount from each bill raised by the Operational Creditor. Therefore, the retention amount withheld is to be released only after successful completion of scope of work as determined by the said Work Order and in the event of failure of the Operational Creditor to successfully complete the construction of the project, the entire retention amount shall be either adjusted towards the expenses incurred by the Corporate Debtor to complete the work or forfeited.
  - d) As per clause 12, the Operational Creditor is required to made good all claims arising from the losses / damages



incurred by the Corporate Debtor connected with execution of work under the said Work Order including compensations payable to the sub-contractors.

- e) Clause 19 of the Warai Work Order, in the event of the failure of the Operational Creditor, to complete the work in stipulated time, the Operational Creditor shall be liable to pay liquidated damages to the Corporate Debtor at the rate of 0.5% of the total contract value per week or part thereof subject to a maximum of 5% of the total contract value. Accordingly, the Operational Creditor is liable to pay liquidated damages of Rs. 9,81,33,397/- (Rupees Nine Crore Eighty-One Lakh Thirty-Three Thousand Three Hundred Ninety-Seven Only) to the Corporate Debtor for non-completion of the work in stipulated time.

15. It is further submitted that the Operational Creditor has suppressed the material facts and documents evidencing the existence of dispute between the parties on account of breaches, bad quality and non-performance of the contract by the Operational Creditor.

16. It is submitted that the dispute arose between the parties in August 2019 for poor quality of work and non-completion of the work within stipulated time. The Corporate Debtor vide various meetings and emails dated 08.11.2019, 14.11.2019, 22.11.2019, 02.12.2019, 03.12.2019, 05.12.2019 informed the Operational Creditor that there is massive shortage of labour deployed and availability of material at the Warai Site. The actual manpower required was of 117 labours, whereas the Operational Creditor deployed only 30 to 52 labours. This delayed the project and the Corporate Debtor was constrained to reduce the scope the work of the Operational Creditor at the Warai Site and complete the project on its own.

17. During a review conducted by the Corporate Debtor on 11.05.2019 it was found that there is significant shortfall of 246 workmen as well as material at the Warai site. The same was informed by the Corporate Debtor to the Operational Creditor vide email dated 29.05.2019.

18. On account of inefficiency of the Operational Creditor both the



projects at Warai and Madap were delayed. Therefore, the Corporate Debtor was constrained to directly contact the sub-contractors and/or appoint new contractors. The Corporate Debtor had to directly contact 'AV Engineers and Contractors' to start the work in buildings A9, A10, K7, K8 and K9, issue direct work order to the 'Thyssenkrupp Elevator (India) Pvt. Ltd.' for non-installation of lifts and elevators, contact aluminum contractor to take up the windows work, etc. to avoid further delays.

19. The Corporate Debtor vide email dated 11.04.2021 again indicated that the amounts claimed by Operational Creditor are not certified by Corporate Debtor. The said certification is delayed due to lot of incomplete work, and partial work closure, and work performance issues, and therefore in absence of such certification bills could not be processed.
20. It is submitted that there is a pre-existing dispute with respect to the existence of debt and quality of the services provided by the Operational Creditor to the Corporate Debtor was raised by various events dated 16.04.2018, 15.05.2019, 23.05.2019, 29.05.2019, 26.07.2019, 29.07.2019, 03.08.2019, 05.08.2019, 06.08.2019, 16.08.2019, 05.09.2019, 14.11.2019, 02.12.2020, 10.04.2021, 11.04.2021, 16.06.2021, 13.08.2021, 23.08.2021, 27.08.2021, 08.09.2021 and 15.12.2021. The said dispute is much prior in time to the demand notice dated 08.02.2022.

**Findings:**

21. We have heard the Counsel for the parties and perused the documents available on the record.
22. From a perusal of the record, it is revealed that 2 Work Orders bearing reference nos. HDL/Warai/SWO/01 ("**Warai Work Order**") dated 30.08.2016 for construction of (G+8 and G+6) buildings at Xrbia Smart City, Warai and word order bearing no. HDL/Madap/SWO/01 ("**Madap Work Order**") dated 07.09.2016 for construction of 2 BHK and 3 BHK, Sky Villa Duplex Apartments at Xrbia Express City, Madap was issued by the Corporate Debtor to the Operational Creditor.



23. Subsequently, several invoices totaling to Rs.102,67,74,985/- were raised on the Corporate Debtor from 01.09.2016 till 01.02.2021. A part payment of Rs.93,45,60,322/- was made by the Corporate Debtor against the said Invoices and Rs.9,22,14,653/- remains outstanding.
24. Thereafter, the parties entered into a settlement agreement dated 04.09.2021 for total payment of Rs.6,77,40,000/- comprises of (i) Rs.2,07,40,000/- towards outstanding receivables and (ii) Rs.4,70,00,000/- towards retention money lying with the Corporate Debtor. However, the Corporate Debtor failed to honour the terms of settlement dated 04.09.2021 and vide email dated 17.01.2022 informed the Operational Creditor that they are open for barter of their flats against outstanding balance as per settlement agreement. However, failed to adhere to the same nor made any payment towards the dues of the Operational Creditor. Therefore, the Operational Creditor through its Advocates served upon the Corporate Debtor a Demand Notice dated 08.02.2022.
25. The contention raised by the Respondent is that the Operational Creditor has suppressed the material facts and documents evidencing that the dispute arose between the parties in August 2019 for poor quality of work and non-completion of the work within stipulated time. However, the case of the Petitioner is that they have entered into a full and final settlement dated 04.09.2021, as per which the Corporate Debtor is indebted to the Operational Creditor and there is no pre-existing dispute between the parties. Pursuant to the above, the Respondent raised the contention with respect to the maintainability of a Petition under Section 9 on the basis of Settlement Agreement as clarified by Hon'ble National Company Law Appellate Tribunal in ***Trafigura India Pvt. Ltd. Vs. TDT Copper Ltd. (Company Appeal (AT) Insolvency No.742 of 2020)***.

In view of the above, this Bench is of the considered opinion that the settlement entered into between the parties were primarily based on the work orders themselves. The amount agreed upon may be a lump sum amount based on the wisdom of both the parties but that does not in any way change the substance of the Operational Debt as it had originally existed between the parties. Additionally, Hon'ble NCLAT in ***Priya Kantilal Patel v. IREP***



**CREDIT Capital Pvt. Ltd. and Anr (2023 SCC OnLine NCLAT 51)** held that the existence of Consent Terms between the Corporate Debtor and Financial Creditor and subsequent breach thereof by the Corporate Debtor of the said Consent Terms does not bar the Financial Creditor from initiating a Section 7 Petition under the Code. A breach of the said Consent Terms does not wipe out the nature and character of the original financial debt. Although the said Judgement categorically relates to Section 7 of the Code, it however removes all doubts and ambiguities in relation to Section 9 of the Code as well. Thus in view of the peculiar facts and circumstances of the present case and the settled law, we are of the considered opinion that the debt continues to remain an Operational Debt under Section 5(21) of the Code and the Petitioner is entitled to invoke Section 9 of the Code given the fact that he still remains an Operational Creditor. If we were to hold otherwise stating that after the breach of the settlement terms the operational/financial debt would no longer retain its original cover and would merely become a debt, the same would allow all the unscrupulous elements to first enter into a Settlement Agreement and after paying one/two Instalments, default on the same, taking a plea that on non-adherence to the Settlement Terms, the operational/financial debt is no longer there and in absence thereof Petition is not maintainable. In fact, just for the sake of arguments the Work Orders, Invoices and Terms of Settlement dated 04.09.2021 form a concrete evidence signifying the admittance of liability on part of the Corporate Debtor. Therefore, the existence of **“Operational Debt”**, which is a mandatory ingredient for a Section 9 Petition stands established.

This Bench further observes the email dated 15.12.2021, wherein the Respondent agreed to initiate the payment to vendors on behalf of the Petitioner and in the same email the Respondent is open for Barter of flats in lieu of the part payment to the Operational Creditor. However, failed to make any payment to the Operational Creditor. Therefore, the **“Default”** is established. The extract of the Email dated 15.12.2021 is as under :-



**Email dated 15.12.2021**

Dear Sir,

Kindly refer our 4<sup>th</sup> Sept 2021 meeting , our subsequent mail on 8<sup>th</sup> Sept 2021 and subsequent mail from Mr Niklesh mails regarding bill submission dated 25<sup>th</sup> Oct 2021, 26<sup>th</sup> Oct 2021 Reminder 1 & 13/12/2021 Reminder 2 requesting you to submit final bill Amount of **Rs 2,07,4000/**, but yet not submitted.

During meeting, it was clearly discussed and agreed by you to submit all Vendors NOC's from your end to proceed for further steps. We got only part NOC's from your end. Please submit your balance NOC on priority along with Final bill as required to billing department to process one step ahead. Also we are planning to initiate to pay few vendors balance payment on behalf of you.

Retention will be released as per Contract Conditions.  
We are open for Barter of flats against part payment, Please refer to your mail dated 6th Dec 2021.

Your action on above matter will be highly appreciated.

26. Further, This Bench Observes that the Petitioner vide email dated 21.01.2022 requested the Corporate debtor to pay the admitted amount of Rs. 6,77,00,000/- after deducting the amount towards the vendors NOC. However, the Corporate Debtor did not make the payment and the Demand Notice dated 08.02.2022 was served upon the Corporate Debtor. The Corporate Debtor did not respond to the said demand notice nor made the payment of outstanding dues.

27. Thus, in view of the above stated facts and the settled law, we are of the considered opinion that the Respondent is very much a Corporate Debtor and the Petitioner has successfully demonstrated the existence of **“debt” and “default”** committed by the Corporate Debtor along with absence of any pre-existing dispute between the parties in consonance with the relevant provisions of the Code. Thus, it is concluded that the Company Petition satisfies all legal requirements for admission. Considering the above facts, we are of the considered view that this Petition deserves to be **admitted** under Section 9 of the Code.

28. Accordingly, the above Company Petition is **‘admitted’** by passing the following:



**ORDER**

- a. The above Company Petition No. 482/IBC/MB/2022 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Xrbia Developers Limited.
- b. Since there is no proposal for the name of Interim Resolution Professional by the Petitioner, Kamal Kumar Jadwani having Registration Number IBBI/IPA-001/IP-P-02786/2022-2023/14259 having email Id- kamaljadwani@gmail.com is appointed as the Interim Resolution Professional.
- c. The Petitioner shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.



- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai for updating the Master Data of the Corporate Debtor.
- k. Accordingly, CP 482 of 2022 is **admitted**.

**SD/-**  
**Madhu Sinha**  
**Member (Technical)**  
/Abhay/

**SD/-**  
**Reeta Kohli**  
**Member (Judicial)**