

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

C.P. (IB) No. 459/KB/2018

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process 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.

And

In the matter of:

Subrata Sarkar, a sole proprietorship concern, through its sole proprietor Mr. Subrata Sarkar, having office at 52A/1A, Nazir Lane, Kidderpore, Kolkata-700023.

...Applicant/Operational Creditor

And

In the matter of:

M/s. Megacity Apartments Private Limited, a Company within the meaning of the Companies Act, 1956 having its registered office at 70, Lake East, Sixth Road, Ground Floor, Santoshpur, Kolkata-700075.

...Respondent/Corporate Debtor

Sd/-

Sd/-

Coram: Shri Jinan K.R., Hon'ble Member [Judicial] &
Shri H.C. Suri, Hon'ble Member [Technical]

Counsels on Record:

1. Mr. Shaunak Mitra, Advocate]
2. Mr. Sayantak Das, Advocate] For Operational Creditor

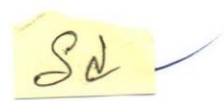
Date of pronouncement of Order: 30/08/2019

ORDER

Per Shri Jinan K.R., Member (J):

1. This is an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 [hereinafter referred to as the "I & B Code"] by **Subrata Sarkar** [hereinafter referred to as the "Applicant"] for initiating Corporate Insolvency Resolution Process [hereinafter referred to as "CIRP"] against **Megacity Apartments Private Limited** [hereinafter referred to as the "Corporate Debtor"] as the Corporate Debtor is unable to pay Rs. 9,86,634/- (Rupees Nine Lakhs Eighty Six Thousand Six Hundred and Thirty Four Only).
2. It is stated in the application that the Corporate Debtor had issued a work order dated 06.11.2014 in favour of the Operational Creditor for carrying out external sewage, drainage and water supply works. In terms of the said work order, the Operational Creditor carried out works for a value aggregating to Rs. 37,22,300/-. That the running





account bills had been raised and were duly certified by the Corporate Debtor.

3. Out of the said amount, only a sum of Rs. 28,33,249/- was paid by the Corporate Debtor from time to time. A ledger of account has been annexed as **Annexure E** to the Petition. That balance work could not be carried out because the Corporate Debtor defaulted in paying the outstanding dues despite repeated reminders and requests.
4. That the principle sum of Rs. 7,39,051/- remains outstanding since 01.10.2016. In addition, retention money amounting to a total of Rs. 59,125/- is also due and payable. TDS has also been deducted by the Corporate Debtor on the amount of Rs. 37,22,300/-. The Operational Creditor also issued a demand notice dated December 6, 2017 in Form 3, however, no reply was received to the said notice and neither has the corporate debtor neither has the Corporate Debtor paid any part of the outstanding debt.
5. The Corporate Debtor has proposed the name of Mr. Ram Ratan Modi and as the Resolution Professional who had initially given his consent in Form 2. However, the said professional withdrew his consent vide a letter dated 15.10.2018 filed before this Tribunal.
6. The notice of application was issued, reply was filed by the Corporate Debtor wherein the Corporate Debtor has denied every allegation and submitted as follows:

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- a) That by a work order amounting to Rs. 85,00,000/- dated 06.11.2014, the Corporate Debtor engaged the Operational Creditor. The Operational Creditor had failed to do the work according to the Scope of work (hereinafter, SOW). It is submitted that work performance shall form part of the order and shall form basis of calculation of liquidity damages. In case the contractor fails to complete the work within stipulated time frame, then liquidity damages will be imposed on him @0.5% of the contract value per week of delay subject to the maximum of 5% of the total contract value of work.
- b) That the retention money @ 5% of the contract value shall be deducted from each running bills of the Contractor and shall be released after defect liability of period of 18 months.
- c) That the performance of the contractor is far from satisfactory; the Corporate Debtor herein had vide email dated 22.07.2015, intimated to deploy adequate manpower since no manpower was deployed at the site on and from 14.07.2015 but the Operational Creditor failed to do so which resulted in inordinately delay causing immense loss and distorted the Goodwill of the Company. That the Operational Creditor requested to increase the rate and accordingly the Corporate Debtor intimated the revised rates through e-mail and requested the Operational Creditor to complete the job within time period considering urgency and nature of job involved which had a profound impact on the Goodwill of our Company. Despite

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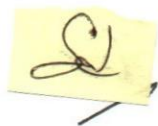
the aforesaid initiative on the part of the Corporate Debtor, the Contractor (Operational Creditor) preferred to remain silent and did not take any initiative to resume the incomplete job.

- d) That under the said circumstances, the Corporate Debtor had to complete the undone work by engaging another contractor owing to which additional costs were incurred.
- e) The Corporate Debtor had submitted running bills to the tune of Rs. 37,22,300/- out of which, the Corporate Debtor had paid an amount of Rs. 28,33,249/-.
- f) That the Corporate Debtor had no intention to withhold the outstanding dues in favour of the said Operational Creditor nor to get the work done by another contractor through replacing the said contractor. Our expectations of getting a positive feedback from the said contractor was belied owing to the Petitioner herein reluctance in undertaking the unfinished work. The said reluctance has caused the Corporate Debtor immense irreparable losses.
- g) That neither of the parties to this Petition has been declared insolvent or bankrupt, therefore this Petition cannot be entertained. As per clause 03.31 of work order, any dispute arising out of or in connection with the Contract or carrying out works shall be referred to and Settled by the Arbitrator as per Arbitration and Conciliation Act, 1996.


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7. A Rejoinder to the said Reply was filed by the Operational Creditor wherein the Operational Creditor has denied every submission except which are matter of records and has submitted that the Affidavit in reply is not affirmed or verified in accordance with law or rules or regulations. There is no stamp or signature of a Notary on it. That the Operational Creditor has no defence and has made vague, baseless and false allegations with ulterior motive.
8. The Operational Creditor has referred to and relied upon Copies of Work Orders issued by the Corporate Debtor annexed and marked to the application as **Annexure-C**; Copies of bills raised from time to time as certified by the Corporate Debtor annexed and marked to the application as **Annexure-D**; A copy of the ledger account showing the extent of the outstanding dues marked and annexed as **Annexure-E** to the application; Copies of TDS Certificates marked and annexed as **Annexure-F** to the application; Notice along with track report obtained from the website of Department of Posts, Government of India evidencing receipt of the notice by the Corporate Debtor marked and annexed as **Annexure-G** to the application; Bank Statement marked and annexed as **Annexure-H** to the application and various emails annexed to the rejoinder. The Corporate Debtor has filed copies of work order and the email dated 22.07.2015 marked and annexed as **Annexure- A and B** to the Reply.



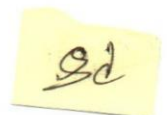
9. We heard learned counsel appearing for the Operational Creditor and have perused the records. The Corporate Debtor did not appear on 19.07.2019 when the matter was fixed for hearing, the Corporate Debtor again chose not to appear on 26.08.2019, therefore the case was heard in their absence.
10. It is observed that the Affidavit in reply filed by the Corporate Debtor is indeed not notarised. The Corporate Debtor in its reply has raised a dispute that the Corporate Debtor had vide email dated 22.07.2015 intimated the Operational Creditor to deploy adequate manpower since no manpower was deployed at the site on and from 14.07.2015. However, it is apparent from the records that even after 22.07.2015, the bills raised were signed and acknowledged, it is also clear from the document that after the abovesaid date, the payments were also made on several occasions.
11. It is evident from the record that the Operational Creditor has been persistently demanding for his dues to be paid however, no reply or objection was made or raised by the Corporate Debtor on the prior occasions of demand by the Operational Creditor. The Corporate Debtor did not reply or object to the Demand Letter dated 06.12.2017.
12. The Corporate Debtor had various opportunities to raise such disputes however, it is only at the belated stage that he is raising dispute that man power was not deployed. Had that been the case, the





Corporate Debtor would not have made further payments to the Operational Creditor.

13. If the Corporate Debtor had any dispute about the claim he ought to have replied to the Statutory Demand Notice. It is not denied by the Corporate Debtor that the Demand Notice was not received by the Corporate Debtor, moreover, there is record to show that the Demand Notice has been received by the Corporate Debtor.
14. In view of the evidence on record, it is seen that the amount became due and payable on 01.10.2016. The present application has been filed within the period of Limitation.
15. In view of the aforementioned circumstances and evidence on record, we hold that the defence taken by the Corporate Debtor is not at all tenable. The Operational Creditor has proved the debt as well as its default by the Corporate Debtor. Notice under Section 8 of I & B Code, has also been sent by the Operational Creditor and received by the Corporate Debtor. The Operational Creditor has filed one Affidavit stating that he did not receive any dispute from the Corporate Debtor before filing this claim. For all the above reasons, we allow this application and admit the Corporate Debtor in Corporate Insolvency Resolution Process by the following order:



ORDER


- i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Megacity Apartments Private Limited, is hereby **admitted**.
- ii) I hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - a) 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;

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- b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- c) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- v) The services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.



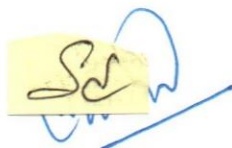


- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x) **Mr. Uday Narayan Mitra**, of 72/1, Dawnagazi Road, Bally, Howrah – 711201, a Resolution Professional registered with the Insolvency and Bankruptcy Board of India, having Registration No. IBBI/IPA-001/IP-P00793/2017-2018/11360, E-mail ID: udaynarayanmitra@yahoo.co.uk, Mobile No. 9433532994 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan, subject to production of written consent within one week from the date of receipt of this order.
- xi) The Operational Creditor is directed to deposit 2,00,000/- (Rupees Two Lacs Only) in the ESCROW Account in SBI to be operated through the Registrar NCLT, Kolkata Bench for the purpose of meeting the preliminary expenses for initiating the CIRP by the Interim Resolution Professional within One week of the date of this order.

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- xii) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xiii) Registry is hereby directed under section 9(5) of the I & B Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through email.
- xiv) List the matter on **01.10.2019** for filing of the progress report.
- xv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(Harish Chander Suri)
Member (T)



(Jinan K.R)
Member (J)

Signed on this 30th day of August, 2019.

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