

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

**CP (IB) No. 1273/MB-IV/2020**

Under Section 9 of the I&B Code, 2016

In the matter of:

**M/S. BARBRIK PROJECT LIMITED**

[CIN: U70101CT2008PLC020626]

...Operational Creditor/Applicant

**V/s**

**M/S. PATEL ENGINEERING LIMITED**

[CIN: L99999MH1949PLC007039]

...Corporate Debtor/Respondent

**Order Dated: 13.10.2023.**

*Coram:*

Mr. Prabhat Kumar  
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli  
Hon'ble Member (Judicial)

*Appearances:*

For the Petitioner(s) : Mr. Yahya Batatawala, Ld Counsel.

For the Respondent(s) : Ms. Prerana Wagh a/w Ms. Archana Munj  
and Mr. Hunaut Singh.

**ORDER**

*Per: Prabhat Kumar, Member (Technical)*

1. This is an Application being C.P. (IB) No. 1273/MB/C-IV/2020 filed on 21/05/2020 by M/s. Barbrik Project Limited, the Operational

Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against M/s. Patel Engineering Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

- 1.1. The total amount claimed by the Operational Creditor as specified in the Part 4 of the Company Petition is Rs. 5,30,51,290/- is due and payable by the Corporate Debtor. The date of default is 29.03.2018.

**Submissions of the Operational Creditor**

2. Patel Engineering Limited (hereinafter referred to as "PEL") obtained a contract for construction of 'Kalma Barrage' with vertical lift gates and other appurtenant works across the 'Mahanadi River' including operation and maintenance for a period of two years after completion in Janjgir-Champa C.G from Chief Engineer, Water Resources Department, Bilaspur. (hereinafter referred to as the 'Work') vide agreement dated 17.02.2011.

- 2.1. PEL entered into an agreement with Rithwik Projects Private Limited (hereinafter referred to as "RPPL") to undertake execution of the aforementioned work vide agreement dated 03.03.2011. Subsequently, RPPL outsourced the said work to Barbrik Projects Limited (hereinafter referred to as the "BPL") vide agreement dated 08.02.2012 followed by a supplement agreement dated 28.04.2012.

- 2.2. PEL, RPPL and BPL entered into a Tripartite Agreement on 03.11.2012 to establish common terms and conditions including the escrow mechanism for payment towards work done, deduction towards caution deposit (in the form of FD), interest on such FD, retention money to be released after completion etc.

- 2.3. As per the said agreement, BPL is to execute the work in terms of the agreement dated 17.02.2011 on the basis of which, the work contract was awarded to PEL. Accordingly, the work was executed by BPL and completed on 29.03.2018. The work completion certificate was issued in favour of PEL.
- 2.4. The amount due and payable by PEL to BPL against work done, refunds due towards caution money along with interest (FD rate), Retention money, EMD amount total amounting to Rs 5,30,51,290/- and the same due since 29.03.2018 i.e. date of completion of the work.
- 2.5. The breakup of the debt due amount of Rs 5,30,51,290/- is as follows:
- A. Rs. 79,79,512 is due towards the work done portion as per RA bill raised and the same is further confirmed by the reconciliation statement provided by PEL received dated 22.11.2019.
  - B. Rs. 2,25,22,031.00 is due for caution money deposit @ 1.25% of the gross contract value as per tripartite agreement.
  - C. Rs. 1,60,39,383.00 for accrued interest on caution deposit (as per the tripartite agreement caution deposit shall be converted in to FD and will be released with accrued interest after completion of project.) till the date of receipt of claimed amount by the Operational Debtor.
  - D. Rs. 65,10,364 is for Security deposit (retention money) as confirmed by the reconciliation statement provided by PEL received dated 22.11.2019.
- 2.6. In addition to default of debt of Rs 5,30,51,290/-, a sum of Rs. 50,00,000.00 towards EMD which shall be paid by PEL to BPL after the release from the Employer.
- 2.7. As the aforesaid amount due and payable by PEL to BPL was not paid since the date of default i.e. 29.03.2018, under such compelling circumstances, it

was incumbent on the part of the Operational Creditor to send a demand notice in Form 3 on 3.01.2020. The said notice was replied the Corporate Debtor denying each averments contention raised by the Operational Creditor.

**Submissions of the Corporate Debtor**

3. The Corporate Debtor through its affidavit in reply dated 08.03.2021 states that, there is no privity between the Petitioner and the Respondent in the sense that there is no payment which is required to be made by the Corporate Debtor to the Operational Creditor.

3.1. That out of an aggregate claim of Rs.5,30,51,290/-. there is a pre-existing dispute to the extent of Rs.2,48,22,828/- and for which the Corporate Debtor has a complete answer even on the aspects of untenability and lack of merits in those claims. The same has been bonafidely raised and amply borne out by the contemporaneous correspondence exchanged between the parties, including prior to the issuance of the statutory Demand Notice; that the portion of the claims i.e. a sum of Rs.2,82,28,462/- has been paid by the Corporate Debtor by having made a payment of Rs.3,15,10,452/- to the Petitioner on 5th July 2023 and as recorded in its Order dated 5th July 2023. The amount of Rs.3,15,10,452/- consist of full payment of RA bills amounting to Rs.79,79,512/-, refund of caution deposit amounting to Rs.1,37,29,576/- and security deposit amounting to Rs.65,10,364/-. Further, the remaining amount of Rs. 2,48,22,828/- due as on today is disputed.

3.2. If at all, and without prejudice it is submitted, only an amount towards the caution deposit if at all can be considered. The annexures to the application would show that there are no documents or invoices which are required to

be paid by the corporate debtor. In fact, the claim itself shows that it is only the caution deposit if at all and without admitting the same which is even claimed.

- 3.3. The sub-contract annexed to the present application would show that payment is required to be paid by the sub- contractor (Rithwik) to the applicant (Barbarik.).
- 3.4. The tripartite agreement dated 3rd November 2012 which is relied upon is in fact an agreement to settle disputes between the applicant and the sub-contractor. That does not cast any liability upon the corporate debtor except (without admitting) in respect of caution deposit if at all.
- 3.5. The caution deposit claimed by the applicant is also disputed. Any payments from the corporate debtor are required to be made only in the event of the employer releasing amounts which has not happened. There are still amounts due from the employer.
- 3.6. The Petitioner has provided the Bank Statement and not the Bank Certificate as mandatory under the Bankruptcy and Insolvency Code, 2016. Hence the present Petition is defective for want of appropriate documents and deserves to be dismissed.
- 3.7. The Petition does not contain the necessary affidavit in support regarding notice of dispute as prescribed. The necessary record from an information utility is also not provided. The alleged amounts claimed in Part-IV of the Petition are themselves in dispute there exists a pre-existing dispute and the payments are subject to reconciliation of accounts between the parties and hence the present Petition is not maintainable under the Insolvency and Bankruptcy Code, 2016.

**Findings**

4. We heard the counsel and perused the material on record
5. It is the case of the Corporate Debtor that a sum of Rs.87,92,455/- is payable to the Petitioner after receipt of release of caution money by the client; a sum of Rs. 1,60,39,383/- being claimed as interest is not payable because the principal amounts were never put in FD's as envisaged and as such no undue benefit was derived out of this by the Corporate Debtor.
  - 5.1. Per contra, the petitioner submitted that out of Rs.3,15,10,452/- paid by the Corporate Debtor during pendency of the present petition, the amount of RA bills and Retention money can only be appropriated against this amount, leaving a sum of Rs.1,70,29,576/- remaining due and payable. Accordingly, after deducting the amount appropriated the remaining amount to be paid by Corporate Debtor is Rs.3,85,70,414/-. It is a case of the petitioner the same cannot be deemed to have been appropriated in any manner other than what the Corporate Debtor wishes to. In this regard, reliance was placed on Sections 60 & 61 of the Indian Contract Act, 1872. Such submission is of no useful purpose since both sides unequivocally admit that an amount of Rs. 1,44,80,876/- has been paid towards RA Bills of Rs. 79,79,512/- and Retention money of Rs. 65,01,364/-. In so far as other two heads of the Operational Debt is concerned, whichever way the remaining paid amount of Rs. 1,70,29,576/- is appropriated, it will lead to the same result, i.e. an amount of unpaid Operational Debt of Rs.2,15,40,838/-.
  - 5.2. We find from the Sub-Contract Agreement dated 08.02.2012 between M/s. Rithwik Projects Private Limited and Barbrik Project Limited that the CD has sub-contracted the total scope of work on 100% back to back to Rithwik Projects Pvt. Ltd. i.e. First Party herein vide Sub-Contract agreement dated

03.03.2011. The original contract was awarded to the CD by Water Resources Department Chhattisgarh vide Agreement dated 17.02.2011. Further, the Clause 9.2.2 provides that the total retention money so recovered from the running bills will be released after the Employer releases to the First Party and after completion of defect liability period or as per the procedure laid down in the Contract Agreement between Employer and Patel.

5.3. We also find from the Agreement dated 3.11.2012 amongst the CD, M/s. Rithwik Projects Private Limited and Barbrik Project Limited that Clause 6 thereof provides that the CD shall retain 1.50% of gross contract value towards a caution deposit and shall be converted into FDs and out of this retained amount 1.25% of the gross contract value shall be paid after successful completion of the project to the third party remaining 0.25% shall be released to the Second Party with the accrued interest, if not used for any necessary contingencies that arise to utilize for Project Completion. We find that CD has submitted that this amount of caution was not converted into FDR hence no interest had accrued thereon. In view of this, we are of the view that the issue 'whether interest on the amount of caution money can be awarded to the petitioner' is a matter requiring adjudication and cannot be dealt with in the proceeding under section 9.

5.4. Further, clause 17 of the Agreement dated 03.11.2012 provides that the CD shall pay to the petitioner or Rithwik for the work done at the agreed terms and conditions only after receipt of the payment from the Employer for that work. The Cd has categorically stated that no amount has been received from Water Resources Department Chhattisgarh, accordingly the claim for remaining amount of Rs.87,92,455/- is pre-mature because the CD is not denying its obligation that this debt is owed however it is the case of the Cd

this amount has not fallen due hence there cannot be any question of default having taking place. In the alternate we find the argument of the counsel for CD that even if the amount of Rs.87,92,455/- is considered to be an undisputed debt and due for payment to the Petitioner, the said amount is less than the threshold limit prescribed in section 4 of the Code. In both the cases the petition is not maintainable qua this component of debt.

5.5. In view of above we find that the present petition is not maintainable on the ground of pre-existing dispute; absence of default; and the threshold limit as explained in preceding paras.

5.6. In view of the above, we find that the present case is fit for dismissal.

### **ORDER**

6. The petition bearing CP (IB) No. 1273/MB-IV/2020 filed by M/s. Barbrik Project Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) in the matter of M/s. Patel Engineering Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process is **Rejected**.
7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Sd/-

**PRABHAT KUMAR**  
**MEMBER (TECHNICAL)**  
**13.10.2023.**

**KISHORE VEMULAPALLI**  
**MEMBER (JUDICIAL)**