

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-III
NEW DELHI**

IB-1562/(ND)/2018

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

M/s. Ansal Properties & Infrastructure Limited
115, Ansal Bhawan,
16, Kasturba Gandhi Marg,
New Delhi - 110001

..... Applicant / Operational Creditor

Versus

M/s. MGF Developments Limited
4/17-B
MGF House, Asaf Ali Road,
New Delhi -110002

..... Corporate Debtor

Coram:

**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**DEEPA KRISHAN
Hon'ble Member (Technical)**

Counsel for the Petitioners: SHRUTI MUNJAL AND AMIT MEHTA
(ADVOCATE)

Counsel for the Respondents: MR. JAYANT MEHTA AND MR. AKHIL
SACHAR, Ms. SUNANDA TULSYAN
(ADVOCATES)

ORDER

DELIVERED ON: 17.07.2019

1. The above petition has been filed under the provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity IBC,2016) by M/s. Ansal Properties & Infrastructure Limited (for brevity "Operational Creditor/ Applicant"), under section 9 of the Insolvency and Bankruptcy Code, 2016 for initiating corporate insolvency resolution process for M/s. MGF Developments Limited (for brevity "Corporate Debtor") having CIN: U74899DL1996PLC081965.

2. It is represented by the Operational Creditor that it is engaged in construction business. The corporate debtor and the operational creditor were handed over the Delhi Metro Rail Corporation (DMRC) site at Netaji Subhash Place (Wazirpur) metro Station, Delhi under the Concession agreement dated 02.09.2004 to a Consortium, on lease for a period of 12 years from DMRC. Further an escrow agreement dated 22.06.2005 was executed between the applicant and the respondent. That the purpose as mentioned by the applicant, of the agreements was to sub-let the shops/ available space to third parties by the Operational Creditor and the Corporate Debtor jointly, and the revenue generated was to be divided between the Operational Creditor and the Corporate Debtor in the ratio of 50:50.

3. The applicant represents that pursuant to the aforementioned Escrow Agreement, the corporate debtor opened and operated the Escrow Account and the TDS deducted by the third party tenants, was deposited in the name of the Corporate Debtor. The Operational Creditor requested the Corporate Debtor to transfer the amounts and its shares, and only part payments were made. Since the payment was not coming, certain oral reminders were made and notices dated 10.03.2018, 07.04.2018 and 04.07.2018 were sent demanding the amount of Rs 4,86,22,654/- on 31.03.2018 being the 50% shares towards the rentals.
4. Since after reminders no payment was initiated by the Corporate Debtor therefore the Operational Creditor issued Demand Notice dated 24.08.2018 under section 8 of IBC, 2016, demanding the outstanding dues to the tune of Rs. 4,86,22,654/- alongwith 18% interest p.a. i.e. Rs. 3,44,48,292.- which is due and payable since 22.06.2005 till date. A reply dated 12.09.2018 was received by the applicant.
5. An additional affidavit is also filed on behalf of the operational creditor vide diary no : 071012023472018 dated 18.01.2019, and represents that the operational creditor retrieved an email dated 11.12.2017 sent by the corporate debtor, which is annexed to the said additional Affidavit, with an affidavit under section 65 B of the Indian Evidence Act, 1972, the said email reads as follows:

“

Dear Sharma ji,

As per our books of accounts, the outstanding balance as on 31.03.2017 is Rs. 3,8,19,346.84.

Thanks,

K C Agarwal

“

6. Pursuant to the directions of this Tribunal dated 13.12.2018, a notice of hearing was issued, further from the order dated 21.01.2019 it is evident that the respondent who was represented by a counsel was given time to file reply.
7. The respondent has filed a detailed reply vide diary no. 0710102023472018/9 dated 15.02.19 and has made the following objections:
 - a. That the claim purported by the applicant arises out of the Memorandum of agreement dated 08.07.2004 where the corporate debtor has agreed to bid as a consortium for the tender issued by Delhi Metro Rail Corporation (DMRC) for the property development at NS Place (Wazirpur) MRT Station, in which the corporate debtor was nominated as a lead member. That the applicant and the alleged corporate debtor entered into a concession agreement dated 02.09.2004 with DMRC. The MOA dated 08.07.2004 shows that neither any goods nor any services have been supplied by the Applicant to the alleged Corporate Debtor.
 - b. That there are pre-existing disputes with DMRC, which is substantiated by the letter dated 20.08.2018 issued by DMRC where DMRC has

sought recovery of a sum of Rs. 2,56,97,476/-, stating that the area allotted was handed back in an allegedly damaged condition for which assessment of damage is quantified. The letter dated 20.08.2018 was received before the issuance of the demand notice dated 24.08.2018 issued by the applicant. The concession agreement between the applicant, the alleged corporate debtor and DMRC is in dispute, as DMRC on 20.09.2017/21.09.2017 invoked the bank guarantee no. 6001IPEBG150004 dated 13.03.2015 for a sum of Rs. 49,45,292/- and Bank guarantee No. 45/24 dated 02.09.2004 of a sum of Rs. 39,02,000/- which was increased to Rs. 46,00,000/- on 15.05.2008 even after the expiry of the concession agreement.

- c. The consortium parties were embroiled in litigation since the licensees were not vacating their respective premises despite the agreement with DMRC have expired. The suit was instituted by Ms. Bala Rani being CS No 692/2017 was withdrawn as settled vide order dated 09.04.2018.
- d. That the petition is barred by limitation, as the claims sought to be made are from 2005 which is beyond the statutory limit of 3 years.

8. The respondent has annexed the copy of the letter dated 22.9.2016 , 21.06.2017 issued by the DMRC , copy of the order dated 30.08.2017 passed by the Ld. Trial Court. Copy of letter dated 18.9.2017 and 22.09.2017 exchanged between the consortium and DMRC qua the disputes regarding invocation of bank guarantee. Copy of the letter dated 20.08.2018 sent by DMRC to the consortium, and the copy of the

response dated 29.08.2018 sent by the alleged corporate debtor on behalf of the consortium.

9. The operational creditor has filed a detailed rejoinder to the objections made by the respondents in its reply, vide diary no; 071012023472018/2 dated 19.03.2019 and has denied all the objections made by the respondent , and submits that the application is well within limitation as the corporate debtor vide email dated 11.12.2017 has given the balance confirmation to the operational creditor.
10. The operational creditor as well as the Corporate debtor has both filed their written submissions as directed by the Tribunal, on 01.05.2019 and 22.04.2019 respectively.
11. Taking into consideration the decision of this Tribunal in IB-200/ND/2017 dated 06.10.2017 in the matter of Jindal Steel and Power Limited vs. DCM Industries Limited Jindal Steel has held as follows:

" Thus any amount claimed as due by a person representing as 'Operational Creditor' should demonstrate firstly that the said amount in default falls within the definition of 'claim' as defined in Section 3(6). Such a claim, secondly should be capable of being treated as a 'debt' as defined under Section 3(11) of IBC,2016 and finally the 'debt' should fall within the confines of Section 5(21) of IBC,2016 (i.e.) it should be capable of being treated as an 'Operational Debt' and such an operational debt must be

owed by the Corporate Debtor to a creditor who can then be considered as an Operational Creditor as defined under Section 5(20) of IBC,2016. "

(Underline supplied)

12. Thus from the facts and the circumstances of the instant case the concession agreement as submitted by the applicant, is disputed as represented by the corporate debtor , according to the letter dated 20.08.2018 issued by DMRC annexed as Annexure O of the reply. According to the concession agreement entered by the applicant and the respondent together with DMRC, the services were provided by the Parties to DMRC, and no services were provided by the Operational Creditor to the alleged Corporate Debtor. This tribunal does not express any opinion on the merits of the claims advanced but only reiterates that these claims must be tested at only a trial.

13. Since the basic onus is upon the person approaching this tribunal under section 9 of IBC, 2016 to establish the claim and that it is 'Operational Debt' falling within the definition of Section 5(21) of IBC,2016 and that such a debt is due on the part of the Corporate Debtor and that there is a relationship of an 'Operational Creditor' and 'Corporate Debtor' and since the Operational Creditor had failed to discharge the requirements of section 9, IBC,2016 and also in any case a dispute in existence, even if it can be considered as an operational debt, taking into consideration the representations made by the corporate

debtor, which brings it within the realm of 'Plausible Contention' as held by the Hon'ble Supreme Court in Mobilox Innovations Private Limited v Kirusa Software Private Limited in (2018) 1 SCC 353, this tribunal is of the view the petition is not maintainable.

14. Therefore, this tribunal, in view of non-existence of an 'operational Debt' as defined under section 5 (21) of IBC,2016 and the relationship as between the petitioner and respondent cannot be considered as that of an Operational Creditor and Corporate Debtor hence holds this petition as not maintainable under section 9 of IBC 2016, and is hence constrained to dismiss the petition, however without cost.

-Sd-

(DEEPA KRISHAN)
MEMBER (TECHNICAL)

U.D.Mehta/K

-Sd-
17/07/2019
(R.VARADHARAJAN)
MEMBER (JUDICIAL)