

IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
COURT - 2



ITEM No.301
CP(IB)/80(AHM)2022

Proceedings under Section 9 IBC

IN THE MATTER OF:

Mahendra Kumar Verma Proprietor of Mahendra
Construction Company
(Operational Creditor)
V/s
Kalpataru Power Transmission Ltd

.....**Applicant**

.....**Respondent**

Order delivered on 07/11/2023

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)
Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-s/d-

-s/d-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

CHITRA HANKARE
MEMBER (JUDICIAL)



**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
DIVISION BENCH
COURT-2**

CP (IB) NO.80/AHM/2022

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

IN THE MATTER OF:

Mahendra Kumar Verma

Proprietor M/s Mahendra Construction Company,
97 Khatiyani Mohalla Ward No.3,
Taranagar, Dist. Churu (Rajasthan) 331304

...Operational Creditor

VERSUS

**JMC Projects (India) Limited since transferred and renamed
in the name of (Kalpataru Projects International Limited)**

Having its Registered office at:

101, Part III
GIDC Estate, Sector 28,
Gandhinagar - 382928

....Corporate Debtor

Order pronounced on: 07.11.2023

CORAM: Mrs Chitra Ram Hankare, Hon'ble Member(J)

Dr. V. G. Venkata Chalapathy, Hon'ble Member(T)

**APPEARANCE:**

For the Operational Creditor: Mr. Surya Prakash, Advocate

For the Corporate Debtor: Mr. Manish Bhatt, Advocate

ORDER

1. The present application has been filed by the Operational Creditor i.e., M/s. Mahendra Kumar Verma (applicant) under Section 9 of IBC, 2016 with a prayer to initiate Corporate Insolvency Resolution Process against M/s. Kalpataru Projects International Ltd. for the default of Rs.3,61,58,020/- (Indian Rupees Three Crores Sixty One Lakhs Fifty Eight Thousand Twenty Only) . The Operational Creditor is a proprietor of M/s Mahendra Construction Company engaged in the business of construction.
2. The Respondent Company Kalpataru Projects International Limited having CIN: L40100GJ1981PLC004281 incorporated under the provisions of the Companies Act, 1956 is having its registered office situated at 101, Part III, GIDC Estate, Sector 28, Gandhinagar - 382028.
3. Briefly stated the facts of the present case as averred by the applicant are that Work Order No. 4000004199 dated 25.05.2021 for carrying out various works for an amount of Rs.2,83,20,333.00 was issued by JMC Projects (India) Limited (Corporate Debtor) to Operational Creditor at



Lahchura Dam, Tehsil – Kulpahar, District – Mhoba (UP) for project named “Lahchoora Water Supply Scheme” under Project Code 2262 (Namami Gange UP) as per scope of work and specification mentioned in Work Order. The Operational Creditor started the project work but work was delayed due to various reasons and change of location and accordingly a revised work order was issued. The applicant (Operational creditor) is stated to have issued a Bill/ Tax Invoice for 1,98,75,321/- dated 30/07/2021 to the Corporate Debtor and also sent details of extra work and quantity supplied vide email 23.8.2021 along with a reminder on 17.10.2021.

4. It is stated by the respondent Corporate Debtor that there was a discussion on 16.4.2021 for finalising the work order for Rs. 2,45,00,000 which was inclusive of material cost as the scope matrix was included in the contract cost. A confirmation was issued to work order No.4000004199 dated 25.05.2021 and the applicant had accepted for carrying out the intake works at the gross cost of Rs.2,80,20,333 including GST. The respondent has also stated that the work progressed slowly but only until July 2021 and all invoices raised until then were paid in compliance with the work order. By the end of Sept 2021, the Corporate Debtor had paid an amount of Rs.1,35,49,084 excluding GST towards work executed. However, the applicant is stated to have raised claim of extra expenditure during rainy season i.e. August – Oct



2021 without any basis or approval of Project Manager, which was also double than the actual agreed amount. Accordingly after discussions the matter was resolved by issue of revised work order No.4000004811 dated 26.10.2011 for an amount of Rs.1,17,07,228. It is also contended that post issue of work order, the applicant slowed down the work and raised issue of increase in soil cost. After warnings for completion of the work or termination of the order, work was again started by applicant but was not up to the mark. On 22.01.2022 the Corporate Debtor called the applicant for a joint verification meeting to be conducted at site by senior staff managers on 24.01.2022 for verifying the quantity of works actually completed, but the applicant did not attend the meeting and they abandoned the work and disappeared from the site. It is also stated that they have also not returned the material provided by Corporate Debtor worth Rs.21,78,558. The respondent has in his reply stated an amount of Rs 94,261 is due and recoverable by the Corporate Debtor from the applicant. Thereby there is an allegation that apart from syphoning of material worth Rs.21,78,558 an additional amount was recoverable amounting to Rs.94,261.

5. The Operational Creditor issued a Demand Notice in Form-3, demanding a sum of Rs.2,18,62,853/- under the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of Insolvency and Bankruptcy (Application to Adjudicating



Authority) Rules, 2016 which was delivered on 04/02/2022. The Corporate Debtor sent a reply to the said demand notice on 11.02.2022 disputing the amount payable to the Operational Creditor. The respondent stated that there was a “discussion that had taken place between the parties and the matter was resolved by issue of revised work order No.4000004811 dated 26.10.2021 for the balance amount of work. It is also stated that the Corporate Debtor had paid an amount of Rs.1,26,56,841 against the invoices raised by the applicant towards the work that has been completed in accordance with the work order and revised work order dated 26th October 2021 and he has paid an excess payment of Rs.9,54,763. The respondent had also annexed the details of invoices paid on various dates (Annexure R3) and the summary Annexure R4 (Axis Bank statement). Operational Creditor closed the work on 24.01.2022 due to non- payment from the side of the Corporate Debtor. Operational creditor issued generated Bill/ Tax Invoice of 31,75,321/- dated 30/01/2022 to the Corporate Debtor for the work done in excess to the work order and extra work with extra quantity but the same was denied by the Corporate Debtor.

6. The applicant in his rejoinder has denied the stand taken by the Corporate Debtor but has confirmed the payment of Rs.1,26,56,841 in accordance with the earlier work order.



7. The corporate debtor had raised a preliminary objection stating that the present application is barred in terms of Section 10A of IBC and therefore not maintainable as the 'date of default' identified by the Petitioner is 30.08.2021 and the 'initiation date' as defined under Section 5(11) of IBC is 16.03.2022 (registration date is 23.03.2022). Respondent stated that since the default has arisen after 25.03.2020 the present application under Section 9 is maintainable in terms of Section 10A of IB Code. Furthermore, the corporate debtor had raised another preliminary objection stating that the Petitioner has failed to produce a legitimate Affidavit of 'No Dispute' under Section 9(3)(b) of IBC. The Respondent alleged affidavit is defective and inadmissible as it fails to state that there is a pre-existing dispute between the parties. The corporate debtor has placed reliance on various e-mail correspondences dated 05.11.2021, 11.11.2021, 13.11.2021, 14.11.2021, 17.11.2021, 22.01.2022, 24.02.2022, 27.01.2022 and other e-mail correspondences with the operational creditor, wherein the corporate debtor had raised the issue of dispute.
8. Before examining the said application on merits, it is vital to assess the maintainability of the application in light of Section 10A of the Code as raised by the corporate debtor. The provision of Section 10 is reproduced herein verbatim:-
"10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate



insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

9. On a perusal of the provision of section 10 A of the Code, it is apparent that the provision bars the filing of an application in a situation, where the default has occurred during the period from 25.03.2020 to 24.03.2021. On perusing various conversations between the parties, it appears that Tax Invoice was raised on 30.07.2021, extra work mail on 23.08.2021, revised work on 26.10.202 and thereafter. The work measurement was also called on 21.11.2021. Thus it appears that dispute is not between the period from 25.03.2020 to 24.03.2021. In such circumstances, the application is not barred under the provision of Section 10A of the Code.



10. We find it necessary to appreciate and discuss the nature of dispute, to discuss the provision of law including the expression “dispute” as defined in Section 5(6) of the Code, 2016 which is as under:-
- “dispute” includes a suit or arbitration proceedings relating to-
- (a) the existence of the amount of debt;
 - (b) **the quality of goods or service**; or
 - (c) the breach of a representation or warranty;”
11. On a perusal of the above definition of the term “dispute”, inference can be drawn that the dispute should not be a patently weak legal argument or an assertion of fact but must be well supported by evidence on record. The jurisprudence regarding the pre-existing dispute is settled in cantena of judgments that mere mentioning in the notice or reply that the dispute is in existence between the parties, in relation of the impugned debt is not sufficient. The dispute should be pre-existing i.e., prior to the receipt of the demand notice, which fact the corporate debtor has to establish in the present case.
12. The Hon’ble Supreme Court in the decision Transmission Corporation of **Andhra Pradesh Limited V/s. Equipment Conductors and Cables Limited reported in (2019) 12 SCC 697**, categorically laid down that IBC was not intended to be a substitute to a recovery forum and that whenever there was existence of a real “Dispute”, IBC



provisions could not be invoked. The object of the Code, at least in so far as Operational Creditors are concerned, was to initiate Insolvency Process against the Corporate Debtor only in clear cases where a real “Dispute” between the parties as to the debt owed did not exist.

13. According to Respondent as per Clause 10 of the Work Order before making payment the work done is to be certified. On 22.01.2022 the Respondent invited the Petitioner for joint meeting but they did not participate in the joint meeting. He further submitted that the Petitioner abandoned the work and disappeared from the site. They also found missing of construction material from the site. Though the Respondent called upon the Petitioner to return the said material or give account of it, they failed. The Petitioner also manipulated the data of work done. The Petitioner submitted that the Respondent has already varied extra work with extra quantity by concern officer but not released their outstanding due. They further submitted that due to change in location project cost was increased. According to Petitioner though the Respondent called them for joint meeting on 22.01.2022 for re-verification of work, the Petitioner was present but copy of verification report was not supplied to them. There were various correspondences between the Petitioner and Respondent regarding these facts, which shows there is pre-existing dispute between them. From the pleading of the parties it



is clear that there is dispute between the parties on various issues.

14. The Respondent relied upon **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd 2018 (1) SCC 353**, in which the relevant portion of Para 51 is produced below:

The adjudicating authority at this stage is whether there is a plausible contention which requires further investigation and the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

The court does not need to be satisfied that the defence 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. On the same line he has also relies upon following rulings **M/s. Sumilon Polyester Pvt. Ltd. Vs. M/s. Parikh Packaging Pve. Ltd., Company Appeal (AT) (Insolvency) No. 695 of 2020; Sangeeta Goel Vs. Roidec India Chemicals Private Ltd. 2020 SCC OnLine NCLAT 312; Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conductors and Cables Limited – (2019) 12 SCC 697.**

15. On the basis of the facts and averments made in the application and the reply affidavit filed by the Corporate Debtor and after hearing the arguments of both the parties, it is observed that there is a dispute and payments have



been done by the corporate debtor for the satisfied work done based on the initial work order which was revised. In service contracts, the operational creditor cannot claim dues, when disputed and when the work was stated to have been abandoned. This has not been disproved with evidence by applicant.

16. In the instant case, we are of the considered view that there is sufficient evidence on record to exhibit a “Pre-Existing Dispute” between the parties prior to the issuance of the Demand Notice under Section 8, IBC, 2016. Further, the defence is not spurious, mere bluster, plainly frivolous or vexatious. Therefore, we are of the consequent view that the ratio of the Judgement of the Hon’ble Supreme Court in the case of M/s. Mobilox Innovations Pvt. Ltd. V/s. Kirusa Software Pvt. Ltd. squarely applies to the facts of the attendant circumstances of the case.
17. Accordingly, the instant petition liable to be dismissed. Hence we pronounced following order:

ORDER

CP (IB) NO.80 of 2022 is dismissed and disposed of.

-s/d-

DR V.G. VENKATA CHALAPATHY **MRS CHITRA RAM HANKARE**
MEMBER (TECHNICAL) **MEMBER (JUDICIAL)**

-s/d-