

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH II
Company Petition (IB) No.-3042/ND/2019**

In the matter of:

The Insolvency and Bankruptcy Code, 2016

AND

In the matter of:

**Sections 9 of the Insolvency and Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and Bankruptcy (Application to the
Adjudicating Authority) Rules, 2016**

AND

In the matter of:

Varun Shuttering Store

Through its Sole Proprietor, Pramod Ahuja
4/19, Sivaji Nagar,
Gurgaon-122001

.....Operational Creditor

VERSUS

Nice Projects Limited

Through
C-56A, Kalkaji,
New delhi-110019

.....Corporate Debtor

Order delivered on:- 12.02.2021

CORAM :

Sh. ABNI RANJAN KUMAR SINHA, Hon'ble Member (Judicial)

Sh. L.N. GUPTA, Hon'ble Member (Technical)

For the Applicant/ Operational Creditor: Advocate Nikunj Hurria

For the Respondent/ Corporate Debtor: Ms. Prachi Johri, adv.
alongwith Mr. Sartaj Ali, AR of the Corporate Debtor

ORDER

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER, JUDICIAL

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule,2016 by the
(IB) No.-3042/ND/2019



Applicant/ operational creditor, i.e. "**Varun Shuttering Store, through its Sole Proprietor**" for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company "**Nice Projects Limited**".

2. Nice Projects Limited (hereinafter referred to as the "Corporate Debtor") is engaged in the business of civil engineering and construction activities.

3. Brief Facts of the case are as follows:

- i. In and around April, 2017, the Corporate Debtor, through an already existing vendor, approached the Operational Creditors that the former was desirous to take shuttering and scaffolding material on rent/lease from the Operational Creditor for the purpose of its construction work at its sites situated at Etawah and Jaipur.
- ii. It was agreed by and between the parties that the operational creditor would supply the scaffolding and shuttering material on the basis of verbal orders from the Corporate Debtor, against which appropriate invoices will be raised by the Operational Creditor. The Operational Creditor at the request of the Corporate Debtor agreed to provide such services mentioned here in above at such rates that were agreed between the parties.
- iii. In pursuance thereof, the operational creditor supplied scaffolding and shuttering material at the abovementioned sites of the corporate debtor.
- iv. The Corporate Debtor accepted the services rendered by the Operational Creditor.
- v. The Operational creditor contended in the Application that the Corporate Debtor has never raised any dispute with regard to the quality or the quantity of the material provided by the Operational Creditors and as such, has used the said material for the abovementioned construction activities.



- vi. The Operational Creditor had raised invoices from time to time. Although the Corporate Debtor had made payment to the Operational Creditor, however, several invoices raised by the Operational Creditor still remain unpaid. The said invoices were raised from April, 2017 to July, 2019 against such services rendered to the Corporate Debtor.
 - vii. The Operational Creditor states that out of the total amount covered under the abovementioned invoices, the Corporate Debtor has only made payment of Rs. 13,00,652/- in part discharge of its total legitimate dues.
 - viii. The Operational Creditor vide email dated 14.09.2018 requested the corporate debtor to clear out standing payment and return the material of Operational Creditor immediately for outstanding payment of Rs. 16,55,125/-. Another email dated 17.11.2018 was sent to Corporate Debtor reminding the corporate debtor for payment and return of shuttering material.
 - ix. Thereafter, the Operational Creditor had served the Corporate Debtor a demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 dated 7.09.2019 demanding payment of an unpaid operational debt due from Corporate Debtor. The said demand notice was also issued through emails.
 - x. The corporate debtor issued a reply to the said demand notice dated 20.09.2019 denying the allegations.
 - xi. Therefore, an amount of Rs. 60,34,306 (Rs. 21,62,115 as principal amount in default + Rs. 3,72,191.79 as interest @18% per annum calculated till 06.09.2019 + 35,00,000 (approx. cost of rental scaffolding/ shuttering material) and further interest @18% till the date of actual realisation is due and payable by the corporate debtor to the Operational Creditor. Due date of default is November, 2017.
4. The Corporate Debtor contended the following in its reply dated 09.10.2020:



- i. In terms of section 8(2)(a) of IBC, 2016, there is pre-existing dispute prior to the receipt of the demand notice regarding the rental rates of scaffolding. Also, there is no written agreement supporting the rate as given in the invoices is available.
- ii. The Respondent in terms of Section 8 (2) (a) of the Code vide its reply dated 20.09.2019 brought to the notice of the Applicant an 'existence of a dispute with respect to the alleged claim of the Applicant vide its demand notice dated 07.09.2019.
- iii. In absence of any prior agreement in writing, the legality of amount claimed to be in default Rs. 60,34,306/- is highly questionable and illogical.
- iv. The receipt of invoices by security guard at gate office of the Respondent/ CD was itself a bona fide act, there was no intention of acknowledgement of amount payable to your client but for the checking & verification of the bills submitted.
- v. Bills/invoices annexed with demand notice are not as per the agreed rates and the payments due has already been made in respect of the amount due, after having detailed discussions with the applicant in various meetings after appraising the applicant of rate disputes pending among the parties. Hence as on date no amount is payable.
- vi. Legality of the amount of Rs. 21,62,115 + Rs. 3,72,191.79 + Rs. 35,00,000 is highly questionable and illogical. The claim of Rs. 35 Lakhs as approx cost of scaffolding / shuttering material is false, vague, vexatious and misleading as scaffolding / shuttering material has already been removed / taken back by the applicant from the project sites of the respondent.
- vii. The applicant has been wrongly claiming payment following bills, as the payment has already been made on 08.02.2019 vide cheque no. 023722 for Rs. 5,00,000/- (including some on account payment and):

S.No.	Invoice No.	Invoice Amount	Invoice Date	Paid Amount after TDS deduction	Remarks
1.	007	96315	30.04.2018	94683	Paid but



					claimed again
2.	018	99525	31.05.2018	97838	Paid but claimed again
3.	084	100215	30.09.2018	98516	Paid but claimed again
4.	029	96315	01.07.2018	16442	Amount partly paid towards satisfaction of all outstanding amount but amount is claimed again
5.	084	99525	01.11.2017	97838	Paid so not claimed again
6.	092	96315	01.12.2017	94683	Paid so not claimed again

viii. There is dispute among the parties with respect to the amount payable:

S. No.	Invoice No.	Invoice Amount	Invoice date	Remarks
1.	083	Rs. 60,282/- as per DEFAULT SHEET but amount as per invoice is	01.11.2017	Bill never provided to the Respondent and no acknowledgement from Corporate Debtor



		Rs. 1,06,361/-		
2.	091	Rs. 76,844/-	01.11.2017	Bill never provided to the Respondent and no acknowledgement from Corporate Debtor
3.	123	Rs. 16,918/-	01.02.2018	Bill never provided to the Respondent and no acknowledgement from Corporate Debtor
4.	124	Rs. 89,894/-	01.02.2018	Bill never provided to the Respondent and no acknowledgement from Corporate Debtor

- ix. The applicant has wilfully delivered the following 6 bills at the security gate of the respondent on 24.07.2019 86 05.09.2019 and without allowing enough time to scrutinize the bills with respect to the rate dispute among the parties, the applicant sent demand notice on 07.09.2019 with malicious intent to recover the amount which was not legally due to the applicant.

S. No.	Invoice Number	Invoice Date	Invoice Amount (Rs.)	Date of Delivery to Respondent
1.	VS-050	01/08/2019	85533/-	05/09/2019



2.	VS-034	01/07/2019	82794/-	24/07/2019
3.	VS-019	01/06/2019	85553/-	24/07/2019
4.	VS-002	01/05/2019	82794/-	24/07/2019
5.	202	31/03/2019	85553/-	24/07/2019
6.	184	01/03/2019	77274/-	24/07/2019

- x. Corporate Debtor has never purchased the scaffolding and shuttering material from the applicant and furthermore, the applicant has already taken back the scaffolding and shuttering material from the respondent.
- xi. The absence of any dispute by the alleged Corporate Debtor is a sine qua non for initiating its corporate insolvency resolution process.
- xii. No operational debt is due in terms of section 5(21) of Insolvency and Bankruptcy Code, 2016.
- xiii. The demand notice attached to this application is sent by the some sole-proprietorship firm i.e. M/s Varun Shuttering Stores, who is not a person under IBC, 2016. Such demand notice is non est in law.
5. We have heard the Ld. Counsel for the applicant as well as respondent and perused the averments made in the application.
6. Ld. Counsel for the applicant, in course of his arguments submitted that there was an oral agreement between the parties regarding the



supply of scaffolding and shuttering material on rent and accordingly, the applicant had supplied the material and raised the invoices. He further submitted that the payment towards some of the invoices have been made but the payments shown in part-IV of the application have not been made as yet. He further submitted that thereafter, a demand notice was sent, which was duly delivered upon the respondent and the respondent has also sent the reply to the demand notice dated 07.09.2019.

7. He further submitted that in reply to the demand notice, the respondent claimed that there was no written agreement and further claimed that the amount claimed is not as per the agreement. He further submitted that for the first time this has been raised by the respondent.
8. He further submitted that even the reply filed by the respondent shows that although the respondent has raised that the amount claimed is not in terms of the agreement but the respondent fails to enclose any document to show that prior to the issuance of demand notice, the respondent has raised any dispute regarding the amount claimed by the applicant.
9. He further submitted that even in the reply, the respondent admits that they have paid the part payment and it is also the case of the applicant that part payment has been made. He further submitted that nowhere in the reply, the respondent has disputed this fact that on the basis of oral agreement, the applicant has provided the services, therefore, the contentions raised by the respondent do not come within the purview of dispute. So, the petition may be admitted.



10. On the other hand, Ld. Counsel for the respondent submitted that there is no prior agreement in writing, the legality of amount and interest claimed is questionable, bills were not provided to the respondent and the dispute is that whether or not amount is payable to the Operational Creditor.
11. He further submitted that after filing the reply, the respondent has also filed the written submissions and in para 3 of the written submissions, the respondent has mentioned that "*that Corporate Debtor withdraws its reply and admit its liabilities towards the Operational Creditor. The respondent is not in a position to clear the debts*".
12. Now, in the light of the submissions raised on behalf of the parties, we consider whether the application filed by the applicant is maintainable or not?
13. We have already referred to the reply filed by the respondent in the aforesaid paragraphs and on the perusal of the reply as well as reply to the demand notice filed by the respondent, which is at page 104 of the paper book. We notice in para (b) of the reply that the respondent has taken a defence of no prior agreement in writing and in para (d) of the reply, the respondent has taken a defence that the bills/invoices annexed with demand notice are not as per the agreed rates and the payment due has already been released but nowhere in the reply, the respondent has made what was the agreed rate and how the invoices raised by the applicant are not in terms of the agreed rates.
14. We further notice that in support of these averments, the respondent has not enclosed any correspondence, which was made between the



parties prior to raising the dispute in reply to the demand notice regarding the rates.

15. At this juncture, we would also like to refer the reply filed by the respondent and we notice that in para 13 of the reply, the respondent has referred to certain bills and admitted that against these bills, the respondent had made the payments which shows that on the oral agreement, both the parties had acted upon. Therefore, in our considered view, the respondent at this stage cannot take a defence that there is no written agreement.
16. We further notice that in para 14 of the reply, the respondent had referred to certain bills and claimed that these bills were never provided to the respondent but they have not denied that on the basis of oral agreement, there was no transaction between the parties and we further notice that in para 15 of the reply, the respondent had referred to certain bills and claimed that these bills were handed over to the security guards and without allowing enough time to scrutinize the bills with respect to the rate dispute among the parties. Again, here the respondent had not raised the issue that material was not supplied rather the dispute is regarding the rates.
17. We further notice that nowhere in the reply, the respondent has claimed that entire amount has been paid rather they admit that the part amount has been paid and that is the case of the applicant.
18. We further notice that by filing the written submissions, the respondent has mentioned that after the verification, it found that the bills are correct and admits the liability.



19. We notice that the respondent in its reply has admitted that against some of the bills, referred in para 13, the payment has been made. These bills are enclosed by the applicant at page 45, 46, 49, 50, 65, 66, 53 and 54 and on perusal of these bills, we further notice that while making the payments of these bills, the respondent has not raised any dispute regarding the rate. Therefore, we hold that for the first time, the respondent has raised the dispute of rate.
20. On the basis of the discussion made in the aforesaid paragraphs, we are of the considered view that the dispute which the respondent has raised by filing reply to the demand notice is not a dispute under Section 5(6) of the IBC.
21. In terms of Section 9(5)(i), when we consider the case in hand, we find that it has been established by the Operational Creditor that the application is complete, there is no payment of unpaid operational debt, the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor, and though the reply has been received but it appears from the reply that no dispute in terms of Section 5(6) of the IBC has been raised by the respondent within 10 days from the receipt of demand notice and there is no record of dispute in the information utility.
22. **Therefore, in terms of Section 9(5)(1) of IBC, we admit the application** and initiate CIRP against the respondent/ corporate debtor. Since the applicant has not proposed the name of the IRP, we appoint Ms. Sunita Umesh, Registration No.- IBBI/IPA-001/IP-P00080/2017-18/10165, Email id: - sunita.umesh@uccglobal.in, Mobile No.- 9810266702 as IRP. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying: -



(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;

(b) transferring, encumbering, alienating or disposing of by the corporate debt or 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;

(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.

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) 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.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

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 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.-.

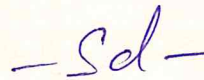
and IRP is also directed to follow the rules and regulations as per Section 15, 16, 17 & 18 of IBC.

23. Operational Creditor is directed to deposit Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.
24. **Registry is directed to communicate the order to the IRP as well to both the parties early.**



L.N. GUPTA

(Member Technical)



ABNI RANJAN KUMAR SINHA

(Member Judicial)