NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD

SPECIAL BENCH - COURT 1 (URGENT HEARINGS THROUGH VIDEO CONFERENCE)

PRESENT: HON'BLE SHRI K ANANTHA PADMANABHA SWAMY – MEMBER JUDICIAL

HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI - MEMBER TECHNICAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 18.01.20201 AT 10:30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) No. 691/9/HDB/2019
NAME OF THE COMPANY	Prajay Properties Pvt Ltd
NAME OF THE PETITIONER(S)	Omega Elevators
NAME OF THE RESPONDENT(S)	Prajay Properties Pvt Ltd
UNDER SECTION	9 of IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

The petition is rejected vide separate order.

MEMBER (TECHNICAL)

MEMBER (JUDICIAL)

Karim

IN THE NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH, HYDERABAD

CP (IB) No.691/9/HDB/2019

Under section 9 of IBC, 2016 read with Rule 6 of I & B (AAA) Rules, 2016.

In the matter of
M/s Omega Elevators
(A proprietary concern of
Mr.Kumar Manharlal Desai)
Rep. by its Branch Manager & PoA,
Mr. NKV Narasimha
(Regd. MSMED Enterprise under prov.
Of MSMED Act, 2006)
Office: 5/C, Archana Industrial Estate
Opp. Ajit Mills, Rakhial
Ahmedabad – 380 023.

Petitioner/
Operational Creditor

Versus

Prajay Properties Private Limited
[CIN: U70102TG2007PTC053296]
1-10-63 & 64
5th Floor, Prajay Corporate House
Chikoti Gardens, Begumpet
Hyderabad – 500016.

... Respondent
Corporate Debtor

Date of order : 18.01.2021

Coram:

HON'BLE SHRI K. ANANTHA PADMANABHA SWAMY,
MEMBER (JUDICIAL)
and
HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI,
MEMBER (TECHNICAL)

Parties / counsels present:

For the Petitioner:	Shri K. Rajendran and Shri Rahul Asoorya, Advocates.
For the Respondent:	Shri M. Ramana Reddy, Practising Company Secretary.

Per: SHRI VEERA BRAHMA RAO AREKAPUDI, MEMBER (TECHNICAL)

Heard on :
21.02.2020, 19.03.2020, 21.12.2020, 23.12.2020 and 04.01.2020.

AVERMENTS

This petition is filed by Messrs Omega Properties Private Limited, which is the Operational Creditor, stating that an operational debt of **Rs.30,83,828/-** (Rupees thirty lacs eighty three thousand eight hundred and twenty eight only) has become by virtue of Agreement to Pay dated 30.10.2018. Hence this petition is filed under section 9 of Insolvency and Bankruptcy Code, 2016, read with Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

2. The averments made in the petition are as follows:

2.1 It is stated that the Operational Creditor is an old and established business of design, supply, installation and maintenance of lifts and elevators. The Corporate Debtor is a company engaged in the business of building construction and real estate development.

2.2 It is averred that the Corporate Debtor had placed Purchase Order dated 26.04.2017 on the Operational Creditor for supply, erection and installation of eight lifts at their site at Prajay Megapolis as stated in para 4 of the petition. It was agreed between the parties that 80% of supply value plus taxes to be paid against supply and balance 20% plus installation charges including taxes on completion of installation. The Operational Creditor had completed supply and installation of lifts as ordered by Corporate Debtor and raised invoices totalling to Rs.2,30,32,872/-. Out of the said amount a sum of Rs.1,84,68,413/- was paid. Resultantly, a balance of Rs.45,64,459/- remained outstanding as on 30.10.2018.

2.3 It is submitted that the Corporate Debtor had executed Agreement to Pay Money dated 30.10.2018 (page 7-10), whereby the Corporate Debtor had agreed to pay the amount outstanding, viz. Rs.45,00,109/-

by way of 7 post-dated cheques (page 9 of the petition). First three post-dated cheques issued by the Corporate Debtor, as per the above Agreement to Pay, were honoured. However, the remaining post-dated cheques were dishonoured. Consequently, an amount of Rs.27,64,459/- has become due, which incur interest on the delay. A copy of Ledger Extract is at pages 11-14.

2.4 It is further submitted that the outstanding amount and interest accrued thereon as on 05.06.2019 stood at **Rs.30,83,828/-**, with further interest accruals till the date of payment/ realisation.

2.5 It is averred that the Operational Creditor had issued Demand Notice in Forms 3 & 4 under the I&B Code dated 05.06.2019, by Speed Post, demanding the said amount of **Rs.30,83,828/-.** Speed Post Receipt and Track Consignment Sheet are at pages 21-14 of the petition. The said Track Sheet indicates "Item Delivery Confirmed".

3. COUNTER DATED 24.02.2020/ 26.02.2020 FILED BY THE CORPORATE DEBTOR.

3.1 By way of preliminary objections the Corporate Debtor has raised the following issues:

(i) The Operational Creditor has failed to produce copies of invoices, its acknowledgements and proof of service and completion of installation of lifts either with Form-3 or with Form-5. To substantiate its claim the Operational Creditor has neither produced receipt copies nor any material in support of its claim.

(ii) There was pre-existing dispute between the parties as per e-mail communications placed at pages 13-16 to the Counter.

(iii) The Corporate Debtor has pointed out discrepancies in the amount claimed by the Operational Creditor as due and payable, at different paras of the petition, as under:

- Page 2, Part-IV of the petition :
  Rs.30,83,828/- as per Agreement to Pay dated 30.10.2018.
- Page 5, para 7 of the petition:
  Rs.45,64,459/- as on 30.10.2018.

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- Page 5, para 10 of the petition:
  Rs.30,83,828/- as on 05.06.2019.
- Page 8 of the petition:
  Rs.45,00,109/- as on 30.10.2018. (Agreement to Pay)

3.2 The Corporate Debtor has relied on a clause contained in the Agreement to Pay Money dated 30.10.2018 (page 10 of the petition), which reads as under:

> *"May it be noted that after the execution of this agreement, party on the second part undertakes to repair, maintain and service the installed no.9 lifts from time to time as per requirement on the project site."*

It is alleged that the said undertaking has been breached by the Operational Creditor and the Corporate Debtor was constrained to address letter dated 19.02.2019 (page 18 of the Counter) to the Operational Creditor asking them to hold the cheques for deficiency in service on the part of the Operational Creditor. Notwithstanding such request to hold the cheques, the Operational Creditor had presented the cheques and had filed two cases under section 138 of the Negotiable Instruments Act at Ahmedabad.

3.3 The Corporate Debtor has relied on the decision of the Hon'ble Supreme Court in the matter of **MOBILOX INNOVATIONS PVT LTD Vs. KIRUSA SOFTWARE (P) LTD,** (2017) 1 SCC OnLine SC 353, wherein it was held that,

> *"Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
>
> *(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)*
>
> *(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
>
> *(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*
>
> *If any one of the aforesaid conditions is lacking, the application would have to be rejected."*

4. WRITTEN SUBMISSIONS DATED 26.12.2020/ 29.12.2020 BY THE RESPONDENT/ CORPORATE DEBTOR.

4.1 The Corporate Debtor has contended that no case is made out by the Operational Creditor under the provisions of the I&B Code inasmuch as neither invoices nor Purchase Order are attached with the Demand Notice. On the point of 'relationship of Corporate Debtor and Operational Creditor', the following decisions are relied on:

(i) Order dated 22.07.2020 of the NCLT, New Delhi in ***M/s Brand Reality Services Ltd. v. M/s Sir John Bakeries India Pvt. Ltd.*** [IB 1677 (ND)/ 2019], and

(ii) Order dated 14.05.2019 of the NCLT, Allahabad in Company Petition (IB) No.343/ ALD/ 2018 in M/s Delhi Control Devices (P) Ltd Vs. M/s Fedders Electric and Engineering Ltd.

4.2 The Corporate Debtor has reiterated its submission made in the Counter that the clause enjoined in the Agreement to Pay Money dated 30.10.2018 (page 10 of the petition) requires the petitioner to repair, maintain and service the installed lifts from time to time. The Corporate Debtor had honoured 3 out of 7 cheques issued by them. Since the petitioner did not fulfil the said requirement and did not pay heed to e-mail communications voicing grievances of users, the Corporate Debtor had asked the Operational Creditor to hold fourth cheque onwards vide letter dated 19.02.2019. However, the Operational Creditor went on producing the remaining cheques. When such cheques got bounced, the Operational Creditor had preferred Criminal Case before the Hon'ble Metropolitan Magistrate, Ahmedabad.

<u>OBSERVATIONS</u> :

5. We have heard the learned counsel for the Operational Creditor as well as the Corporate Debtor. We have perused the documents. By way of the present petition under section 9 of Insolvency and Bankruptcy Code, 2016, the Operational Creditor has claimed an operational debt of Rs.30,83,828/- by virtue of Agreement to Pay dated 30.10.2018. When we examine the facts of the present case, it is based on Agreement to Pay dated 30.10.2018 (pages 7-10 of the petition). The petitioner has not produced any invoices for the goods or services provided. The petitioner's

claim is only based on breach of terms of the above Agreement to Pay dated 30.10.2018.

6. We observe that prior to filing of the present petition the Operational Creditor had sent Demand Notice in Forms 3 & 4 under the I&B Code dated 05.06.2019, by Speed Post, demanding the said amount of Rs.30,83,828/-, which was delivered on 12.06.2019 to the Corporate Debtor, as per the Track Consignment Sheet of India Post (page 23-24). There appears to be neither reply given by the Corporate Debtor to the said Demand Notice nor any dispute raised by the Corporate Debtor under section 8(2) of the I&B Code.

7. From the record we observe the following:

(i) That the said Agreement to Pay dated 30.10.2018, provides that the Operational Creditor undertakes to repair, maintain and service the installed lifts from time to time. We find from the e-mail communications enclosed at page 13 of the Counter filed by the Corporate Debtor that there are complaints from the users of elevators about functioning of elevators. Relevant Clause of the Agreement reads as under:

> *"May it be noted that after the execution of this agreement, party on the second part undertakes to repair, maintain and service the installed no.9 lifts from time to time as per requirement on the project site."*

Said e-mail communications reveal that the Operational Creditor has not carried out its obligation to repair, maintain and service the lifts leading to inconvenience of the customers/ users. It amounts to breach of one of the conditions of the Agreement.

(ii) That the said Agreement to Pay Money dated 30.10.2018 (page 7-10), the Corporate Debtor had agreed to pay the amount outstanding, viz. Rs.45,00,109/- by way of 7 post-dated cheques (page 9 of the petition). However, the Corporate Debtor could honour only first three post-dated cheques and the remaining post-dated cheques were dishonoured. Consequently, an amount of Rs.27,64,459/- has become due, which incur interest on the delay. That the Corporate Debtor addressed letter dated 19.02.2019 (page 18 of the Counter) to the Operational Creditor asking them to hold the cheques for deficiency in service on the part of the Operational Creditor. Instead of resolving the issues related to maintenance which is part of the Agreement to Pay, the Operational Creditor had presented the cheques and had filed two cases for dishonour under section 138 of the Negotiable Instruments Act before the Court of the Hon'ble Metropolitan Magistrate, Ahmedabad (Copies of plaints are at page 51 onwards of the Counter).

(iii) That the Corporate Debtor had honoured 3 out of 7 cheques issued by them and had asked the Operational Creditor to hold fourth cheque onwards vide letter dated 19.02.2019, on the issues related to maintenance of lifts, which is one of the conditions enjoined in the Agreement to Pay. However, the Operational Creditor went on producing the remaining cheques. When such cheques got bounced, the Operational Creditor had preferred Criminal Cases before the Hon'ble Metropolitan Magistrate, Ahmedabad.

8. In order to find out whether the petitioner's claim comes under the definition of 'operational debt' we would like to refer to the following definitions of the I&B Code, 2016:

Section 5(21) :

"Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

Section 3(11) :

"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3(12) :

"default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;"

The present petition is filed by the petitioner for initiation of CIRP for default in payment of amount under the Agreement to Pay in question. In order to initiate proceeding under section 9 of I&B Code, Operational

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Creditor is required to establish a default for non-payment of operational debt as defined under section 5(21) of the Code. We are of the opinion that the Agreement to Pay on the basis of which the present petition is filed by the petitioner does not come under the definition of operational debt. On this point, Order dated 14.05.2019 of the NCLT, Allahabad in Company Petition (IB) No.343/ ALD/ 2018 in the matter of **M/s Delhi Control Devices (P) Ltd Vs. M/s Fedders Electric and Engineering Ltd.** is relevant. It is held in the said order that:

> *"12. Further, unpaid instalment as per the settlement agreement cannot be treated as operational debt as per section 5(21) of IB Code. The failure or breach of settlement agreement cannot be a ground to trigger CIRP against Corporate Debtor under the provision of IBC 2016 and remedy may lie elsewhere not necessarily before the Adjudicating Authority."*

9. In light of the above decisions and provisions, we are of the view that the case of the petitioner is governed by the aforesaid decisions and that default in payment of instalments according to Agreement to Pay in question entered into between the parties does not come within the definition of operational debt. Besides, there was pre-existing dispute on the issue of 'maintenance of lifts' between the parties as seen from the e-mail communications of the users of elevators. Simultaneously, parallel proceedings have been initiated for dishonour of cheques under section 138 of the Negotiable Instruments Act. All the above prove that this Tribunal has no jurisdiction to entertain this petition under section 9 of the I&B Code, 2016. We are, therefore, not inclined to admit the petition.

ORDER :

10. In view of the above the petition is hereby rejected.

18/01/21

VEERA BRAHMA RAO AREKAPUDI
MEMBER TECHNICAL

K. ANANTHA PADMANABHA SWAMY
MEMBER JUDICIAL

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