

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-821(ND)/2020

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 ANP Atelier & Associates Company Private Limited
Having its office at:-
A/A 1106, Vasant Kunj
New Delhi- 110070

...Operational Creditor/Petitioner

Versus

M/S Pluto Software Private Limited
Having its Registered office at: -
B-231, Greater Kailash-I,
New Delhi 110048.

...Corporate Debtor/Respondent Company

Order Delivered on:01.04.2021

Coram:

Shri. P.S.N. PRASAD
Hon'ble Member (Judicial)
DR. V.K. SUBBURAJ
Hon'ble Member (Technical)

For the Applicant: Mr. Rakesh Kumar, Mr. Vinod Khanna, Advocates.

For the Respondent: Mr. K Sunil with mr. Akash Ojha, Advocates.

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ORDER

As per P.S.N. PRASAD, Hon'ble Member (Judicial)

1. This is a petition filed by M/S ANP Atelier & Associates Company Private Limited (the petitioner/operational creditor) seeking to initiate CIRP against the Respondent company /Corporate Debtor M/S Pluto Software Private Limited, under Section 9 of IBC 2016 for the alleged default on the part of the Corporate Debtor in settling the amount of Rs. 97,79,049/- towards the goods supplied.
2. The Operational Creditor (Civil Contractor) has filed this petition because the Corporate Debtor has lost its substratum and is unable to repay outstanding amount of Rs. 99,69,776/- with interest in respect of work done for 2nd floor and Rs. 86,49,232/- for work done of 5th Floor aggregate amount to Rs. 1,86,19,008/- at Noida U.P. The Copy of the bill along with the ledger is annexed along with the petition.
3. The Operational Creditor has further submitted that since, the work of 2nd Floor and 5th Floor, Tower-A, Windsor IT Park at A-1, Sector-125, Noida (U.P.) was satisfactorily completed therefore, a certificate of completion dated 14.02.2019 in respect of execution of work at 2nd floor and completion

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certificate in respect of 5th floor of the original application were counter signed by the Architect i.e., M/S Plumb Design appointed by the Corporate Debtor.

4. Further it is contended by the Operational Creditor that since the Corporate Debtor failed to made payments of outstanding dues of Rs. 99,69,776/- in respect of 2nd Floor, the Operational Creditor has issued the demand notice dated 17.01.2020 which was also replied by the counsel for the Corporate Debtor vide reply dated 27.01.2020.
5. Further the Operational Creditor has submitted that the Corporate Debtor did not paid the final amount of the Operational Creditor in respect of the 2nd Floor of Rs. 97,79,049/- therefore, finding no other remedy the Operational Creditor has filed the present petition.
6. The operational-creditor on 17.01.2020 sent a demand Notice to the Corporate-debtor to pay outstanding debt amount a sum of Rs.97,79,049/-. On 27.01.2020 the Corporate Debtor has replied to the said demand notice.
7. The Corporate debtor (respondent) has filed its reply to the main petition and raised certain objections against the claim of the applicant. The following objections have been raised by the respondent:
 - i. That the application under Section 9 of IBC, 2016 must comply with the Section 8 of IBC, 2016 which mandates that for initiating CIRP, operational creditor is under compulsion to serve demand notice,

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whereas no demand notice has been served for the invoice dated 02.03.2020 amounting to Rs. 86,25,632/-

- ii. That two work orders have been issued, first work order is of 26.11.2018 in respect of renovation/ interior work for second floor and the second order is of 11.07.2019 in respect of renovation/interior work for fifth floor and the two work orders have different cause of actions and cannot be alleged to be clubbed in a manner as is sought to be done.
- iii. That the operational creditor has also made wrong averment in the affidavit that the alleged corporate debtor has not disputed the alleged claim of the alleged operational creditor. The alleged operational creditor did not point out various correspondence disputing the alleged claim of the alleged operational creditor in as much as did not mention about the correspondence dated 14.12.2019, at 10:49 A.M., 14.12.2019 at 3.31.P.M., 26.06.2019, 18.06.2019 and various other correspondence which believe the alleged claim of the alleged operation creditor. The alleged operational creditor has illegally tried to show that the alleged claim is allegedly finally determined or agreed or have been calculated as per the fact mentioned above, which in fact not correct. The alleged invoice is not as per the agreed rate and the dispute/objection has been



raised. The discount agreed has not been taken into consideration in the alleged invoice.

- iv. The 2nd floor work was to be completed on or before 10.01.2019. The self-serving forged and fabricated certificate of completion was manufactured by none other than the operational creditor for themselves but can only be issued by Corporate Debtor. Architect has not signed and the signature appearing is not of the architect. The respondent has also alleged that the petitioner did not follow the raising of bills on the basis of measurement recorded in presence of both the parties. The word used in the certificate are “substantial completion” and ‘defect rectification work in progress’ clearly show that the certificate is fabricated. Similar is the case with the work order relating to 5th floor and the word appearing are same but there is no signature of contractor. The alleged substantial completion is shown to be 29.09.2019 but once again the final bill on the basis of measurement recorded in presence of both the parties are missing.
- v. That if the two alleged invoices on the basis of which the Operational Creditor has filed the present application, the alleged invoices do not show the measurement and do not reflect the quantum of work and

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quantity of materials used. There is no corresponding supporting bills through which the materials have been affixed in the work contract.

- vi. That the alleged Operational Creditor has further concealed the very fact that he has received a sum of Rs. 60 lakhs and Rs. 55 lakhs by disposing the stocks and giving credits of old interior from 2nd floor & 5th Floor respectively which has not been reflected on his account or has made submission in this behalf but has duly been reflected in the books of accounts of the Corporate Debtor. However, it is brought on record that credit of payment of Rs. 60 lakhs are already admitted to have been received by the alleged Operational Creditor and as such the alleged Operational Creditor cannot deny that a sum of Rs. 60 lakhs have not been received.
8. The petitioner has filed its rejoinder and has submitted that the contents of reply should not be deemed to be admitted for non-traverse. The Operational Creditor has submitted that the Corporate Debtor has never raised any notice of dispute in terms of Section 5(6) of the IBC Code with respect to the outstanding amount, prior to the issuance of the demand notice dated 17.01.2020 by the Operational Creditor.
9. Heard the parties and perused the case records.



10. The claim of the applicant is not admitted by the respondent in fact there are certain issues which should be adjudicated before ascertaining the claim of the applicant.

11. As per the email dated 14.12.2019 there is some dispute raised by the Corporate Debtor regarding the rate. The same has been reproduced below:

This is in reference to your mail regarding the approval of rates. It has been observed from the mail from HO that the rates submitted by you are those which were approved. There is a discount of 20% on those. Beside there is an observation that the rates are not matching with those originally approved for 2nd floor.

Also, the scope was reduced to just a renovation job for all the vendors. There is an error of more than 10 lacs in the total. You may kindly submit the MB with the measurements of only those items which are executed at site by you and thereafter it will be checked by me and your authorized person.

Architects representatives has no authorization to check and verify the bill.

An early action would be appreciated.

Regards,

Vijay Khokha.



12. In respect of definition of “dispute” in the Code, Hon’ble Supreme Court has held in the case of Mobilox Innovative Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. 2018 1 SCC 353 *inter-alia* that:

“Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which required further investigation and that the ‘dispute’ is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so 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 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.” (emphasis given).

13. It is the case of the respondent that there has been pre-existing dispute between the parties prior to the issuance of the alleged demand notice, wherein, the applicant had issued demand notice dated 17.01.2020 under section 8 of the Code, 2016 and corporate debtor has replied on 27.01.2020.



However, the documents on records show that the respondent raised its dispute much before issuance of demand notice.

14. In the factual background it is seen that there has been no admission of operational debt by the respondent. In fact, there has been a dispute regarding the approval of rates and bill as issued by the operational creditor against the Corporate Debtor. Further the corporate debtor on 14.12.2019 vide an email already intimated the applicant regarding the approval of the rates which are not matching with those as originally approved which clearly shows that the invoices were not acknowledged by the Corporate Debtor. There was existence of dispute much prior to the issuance of notice under Section 8 of the Code. Respondent has raised dispute with sufficient particulars. The amount of claim raised by the applicant clearly falls within the ambit of disputed claim. The claim of dispute suggests the need of elaborate investigation. In the facts it is reiterated that existence of genuine dispute in the present case cannot be ruled out.

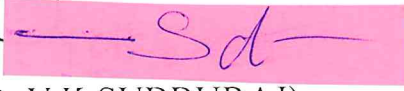
15. As per Section 9 (5) (ii) (d) of the Code provides that adjudicating authority shall reject the application if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility.

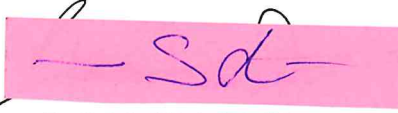
16. For the reasons stated above this petition fails and the same is rejected.



17. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant application.

Let the copy of the order be served to the parties.


(DR. V.K.SUBBURAJ)
MEMBER (TECHNICAL)


(P.S.N PRASAD)
MEMBER (JUDICIAL)