

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH – V, NEW DELHI
C.P (IB)/298(ND)2022**

An application under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

SHEKHAR SARAWAGI,

Sole proprietor of M/s Ado
Conmat India, 68A, Sector-6 II E,
Pantnagar, Rudrapur, Faridabad

....OPERATIONAL CREDITOR/PETITIONER

Versus

GHANARAM INFRAENGINEERS PVT. LTD.

Having its registered office at:
8/18, West Patel Nagar,
New Delhi- 110008.

....CORPORATE DEBTOR/RESPONDENT

Order Delivered on: 07.05.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Vishakha Gupta, Adv.

For the Respondent : Adv Ashish Garg

ORDER

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. The instant application is filed by Shekhar Sarawagi, Sole proprietor of M/s Ado Conmat India. (hereinafter referred as 'Petitioner'/'Operational Creditor') on 24.04.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code/IBC') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process ("CIRP") against Ghanaram Infraengineers Pvt. Ltd. (hereinafter referred as 'Respondent'/'Corporate Debtor') for non- payment of Operational Debt of Rs.5,92,95,099/-
2. The Respondent Company Ghanaram Infraengineers Pvt. Ltd was incorporated on 23.04.2013 under the provisions of the Companies Act, 2013 having its registered office situated at 8/18, West Patel Nagar, New Delhi- 110008. Since the registered office of the Respondent/Corporate Debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

Averments of the Applicants:

3. Briefly stated the facts of the present case as averred by the applicant are that the Petitioner and the Corporate Debtor had entered into two Contract Agreements dated 8.12.2011 for supply of equipment and erection of gate hoists as a sub-contract under Construction of Ramganga Barrage, Upstream & Downstream Guide Bund and Main

Canal Head Regulator Under Agreement No. 05/S.E./2011-12. The rates for supply of equipment and installation thereof were provided under the Agreements, along with the payment schedule in clause 7 of the Contract Agreement dated 08.12.2011.

- 4.** Petitioner submitted that as per the said Agreement the Petitioner duly supplied equipment and installed them at the project site and regularly raised invoices to the Corporate Debtor. The Petitioner and the Corporate Debtor shared a cordial professional engagement for years and the Corporate Debtor used to deposit amounts with the Petitioner on a rolling basis instead of a per-invoice basis, excluding the retention amounts.
- 5.** Petitioner further submitted that on 11.07.2017, the Corporate Debtor admitted his total liability against the invoices raised by the Petitioner and provided a statement of account to back the same, with the retention amounts against the invoices. Accordingly, the Petitioner raised a demand to the Corporate Debtor for release of amounts. However, the Corporate Debtor, on one pretext or the other, delayed the payments stipulating that it has to finalize its accounts. In fact, there were a few meetings conducted between the Petitioner and the Corporate Debtor to resolve the issue of balance payments, and the Petitioner informally informed the Corporate Debtor of his intentions to file for corporate insolvency resolution process if the payments are not released.
- 6.** Petitioner submitted that on 11.09.2018, the Corporate Debtor, in a transparent effort to thwart the Petitioner's efforts under the Code, abruptly denied its liability towards the Petitioner without any reasonable basis. Therefore on 03.12.2021, the Petitioner issued a

legal notice to the Corporate Debtor, followed by a statutory notice on 27.12.2021, duly received by the Petitioner on 04.01.2021.

7. Petitioner further submitted that the Corporate Debtor has sent a reply dated 07.01.2022 creating a false and frivolous narrative of a dispute against the demand of the Petitioner in an attempt to counter the instant Petition.
8. It is submitted by the the Petitioner that a bare perusal of the reply dated 07.01.2022 reveals that the same is mendacious and misleading and while not withdrawing its statement sent on 11.07.2017, is attempting to recover costs of some alleged acts of the Petitioner pursuant to 11.07.2017.
9. Petitioner submitted that the purposes of this Petition, the debt and default of the Corporate Debtor was crystallized on 11.07.2017 by the Corporate Debtor's own admission, and the same is an undisputed liability.
10. Further, the Petitioner through the present petition prays that the instant Petition be allowed and the corporate insolvency resolution process of the Corporate Debtor be initiated.

Reply of the Respondent/Corporate Debtor:

11. Per contra, the respondent through his reply submitted that all averments, statements, submissions, grounds, contentions or allegations made by the Applicant are baseless, misconceived and false, and hence, are denied in entirety. Respondent submitted that the claim of the Petitioner in present petition does fall within the ambit of the provisions of section 9 of the Code, the Petitioner is neither a "Operation Creditor", nor the amount being claimed is "Debt" and nor

there is any "default" and nor Operation Creditor has any "claim" as defined under IBC.

- 12.** The Respondent submitted that the last invoice is dated 24.06.2017 whereas the statutory demand notice was issued dated 27.12.2021 by the Operation Creditor which was duly replied on 07.01.2022 by the Corporate Debtor and the present petition has been filed on 21.2.2022, therefore, clearly barred by limitation.
- 13.** The Respondent further submitted that the parties were entered into two sub-contracts agreement dated 8/12/2011 and 16/12/2011 with i.e.(1) Shekhar Sarawagi Sole Proprietor M/s Ado Conmat India i.e. i.e. the OC and (2) a sister concern of the Operation Creditor i.e Kay Iron Works. Both the sub-contract agreements were to repair/ replacement/construction of a Hydro Mechanical works for construction of 30 vertical steel gates, out of which vide agreement dated 08.12.2011 the Operation Creditor was given work of 17 vertical lift steel gates. However, the Operation Creditor as well as other sub-contractor failed to complete the contract within the time stipulated i.e. 31/12/2013 though time being essence of the contract, but despite time was extended, both the sub-contractors miserably failed to complete the work in the extended period as well.
- 14.** Respondent further submitted that since the Operation Creditor has failed to perform the work assigned to it by the Corporate Debtor as agreed between the parties in the Contract Agreements dated 8.12.2011 and 16.12.2011 on account of which the sub- contract was terminated on 13.2.2018, which fact has been malafide/deliberately concealed by Operation Creditor from this Adjudicating Authority. Further the Respondent submitted that the Corporate Debtor on various occasions have made demand for the refund of excess payment

of Rs.2,12,35,200/- along with interest taken by the Operation Creditor by misrepresentation and had failed to perform the work which fact also has been concealed by the Operation Creditor.

- 15.** The Respondent submitted that pursuant to the said termination letters dated 13.02.2018, public offers were sought from general public, pursuant thereto M/s 'Hoisto Structure & Equipment's Pvt Ltd' made an offer vide letter dated 17.2.2018 for completion thereof under both the contracts. A copy of the offer letter issued by M/s Hoisto-Structure & Equipments Pvt Ltd dated 17/02/2018 is annexed as Annexure R-5 with the present reply.
- 16.** Respondent further submitted that the Operational Creditor had only done work for a sum of Rs.18,76,79,023.00, and against which had received total payment of Rs 20,89,14,223.00 i.e. in excess of Rs. 2,12,35,200/- therefore the Respondent vide email dated 11.09.2018 demanded the above mentioned excess amount which has not been paid/refunded by the Operational Creditor till the date. A copy of the email dated 11.09.2018 is annexed as Annexure R-9 with the present reply.
- 17.** The Respondent submitted that pursuant to the email dated 11.09.2018, the Operational Creditor on 17.09.2018 proposed to have a joint inspection done and finalized the outstanding, if any. A copy of the email dated 17.09.2018 is annexed as Annexure R-10 with the present reply.
- 18.** Respondent submitted that the demand made by the Operational Creditor does not come under the purview of "operational debt" as defined under section 5(21) as no amount is due and payable. The present petition is a

clear case of breach of trust/ deliberate failure to perform the obligation under the agreement within the time stipulated.

Rejoinder by the Applicants

- 19.** The Operational Creditor through its rejoinder has submitted that the Reply filed by the Corporate Debtor is totally false, frivolous and vexatious and is devoid of any merit. Further the Applicant submitted that the Petitioner was performing supply and construction services for the Respondent under duly signed contract agreements between the parties which is undisputed. Further submitted that the Respondent has brought on record a purported termination letter dated 13.02.2018. However the Petitioner has never received the purported termination letter.

- 20.** It is submitted by the Petitioner that the date of the last invoice raised by the Petitioner is 24.06.2017 and the last payment made by the Respondent to the Petitioner against the work done is on 07.06.2017. Therefore, the default arose in 2017 itself and as such, the section 9 Petition filed by the Petitioner on 23.02.2022 is well within limitation, in light of the judgment of the Hon'ble Supreme Court dated 10.01.2022 in Cognizance for extension of limitation, *In Re, (2022) 3SCC 117*. Where the Hon'ble Supreme Court has by way of its judgment dated 10.01.2022 has excluded the period between 15.03.2020 till 28.02.2022 from computation of limitation. By date of the last invoice, the three year limitation period as per section 238A read with Article 137 of the Limitation Act, 1963, shall expire on 24.06.2020. As such, the present case is squarely covered within the purview of the judgment of the Hon'ble Supreme Court. The objections raised by the Respondent that the instant petition is barred by limitation are meritless and without any basis.

- 21.** Petitioner further submitted that the Operational Creditor supplied the required material of the gates under the Corporate Debtor scope in the Project, pursuant to which, the Respondent decided to terminate the arrangement with the Petitioner without any formal intimation. Petitioner submitted that the gates and all embedded parts were completed in F.Y. 2018-2019. A copy of the letter issued by Department of Irrigation, Govt. of Uttar Pradesh annexed as Annexure A-2 with the instant Rejoinder to establish that the gates and all embedded parts were completed in F.Y. 2018-2019 by the Petitioner.
- 22.** Petitioner submitted that the Respondent has raised a concern with respect to the uncompleted work on the Project, and the operational creditor is requesting to pay for the work already completed. However, the uncompleted work has nothing to do with the operational debt of which the default is being claimed by the Petitioner, and the same relates to admitted, undisputed, and partially paid invoices.
- 23.** The Petitioner further submitted that as per the execution of the contract agreements between the parties, the Petitioner duly supplied materials and installed the same at the project site and regularly raised invoices to the Corporate Debtor, which is undisputed. It is submitted that the Operational Debt in default is the debt owed to the Petitioner against the invoices for supply of goods and materials and installation thereof, the delivery of which has been admitted by the Corporate Debtor. As such, the debt clearly falls within the definition of Operational Debt, and the default is clear from the deficit payments made against the said invoices and also, there is no pre-existing dispute with respect to the unpaid operational debt i.e. the retention money, and the contents of the Respondent are mere bald averments without any basis.

Analysis and Findings

- 24.** We have heard Ld. Counsels for the applicant as well as the Ld. Counsel for the Respondent and perused the averments made in the application, counter affidavit and rejoinder. The relevant documents annexed with the submissions have also been examined.
- 25.** Before examining the other aspects it would be appropriate to examine whether there is a Pre-existing dispute with respect to the amount claimed to be due in the present petition or not.
- 26.** The Ld. Counsel for the Respondent to substantiate the existence of a Pre-existing dispute between the parties and deficiency in service has referred to various email dated 11.09.2018 and 17.09.2018 exchanges pointing that the services provided by the Operational Creditor were deficient as the Operational Creditor failed to complete the work as agreed between the parties. Corporate Debtor has also referred to email exchanges in which Corporate Debtor demand the excessive amount received by the Operational Creditor from Corporate Debtor.
- 27.** The various correspondence between the parties shows that there was a dispute with respect to work on various counts. Also there were payment issues between them. In one of the email dated 11.09.2018, wherein the it was mentioned as below;
- “In ref. to your, it is inform you that after a site verification, it has been found that you have done work only for Rs.18,76,79,023.00 (statement enclosed) against which we have already paid Rs20,89,14,223.00 i.e. in excess payment of Rs2,12,35,200.00 has already been released to you. As such. Request you to please refund our excess amount immediately. It is also mentioned that if there is any confusion we may feel free to write to us so that meeting may be fixed according with all concerned officials.....”*

- 28.** Pursuant the above mentioned email dated 11.09.2018, the Petitioner through the email dated 17.09.2018, responded that “..Now you have sent the account statement modified as per your wish to reduce the total outstanding value (in some item you have mentioned 65% payment and in some item it is 100%) which is not as per our agreement...”
- 29.** At this stage, it is important to refer the case of **Mobilox Innovations Private Limited v. Kirusa Software Private Limited Civil Appeal No. 9405 of 2017** wherein the Hon’ble Supreme Court in paragraph 40 held as under:
- It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires 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 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.*
- 30.** We observed that the Operational Creditor, in its rejoinder as Annexure A-2, sought to establish that the Applicant had completed

the agreed work by filing Letter No.176 dated 08.06.2022, issued by the Department of Irrigation, Govt. of Uttar Pradesh. However, the Executive Engineer of Flood Division, Bareilly (UP), has lodged a complaint against the Operational Creditor regarding the alleged 'forged Letter No.176' dated 08.06.2022. Furthermore, the Corporate Debtor has alleged that the said Letter is fake and that the actual Letter No.176 is dated 22.01.2022, which was issued in a different transaction unrelated to the present case.

- 31.** We also observed that the Sub-Contract Agreement dated 05.03.2018 outlines the 'payment schedule,' stating that only 85% was payable initially, with the remaining 15% to be payable after completion/commissioning of the work. However, it is admitted that the Operational Creditor never completed/commissioned the work, having allegedly finished only 11 gates out of the 17 required. Consequently, the Corporate Debtor terminated the above said Agreements on 13.2.2018 with the Operational Creditor and instead invited M/s 'Hoisto Structure & Equipment's Pvt Ltd' through an offer letter dated 17.2.2018 to complete the remaining work for the Corporate Debtor.
- 32.** In the instant case, exchanging the email and the concern arose between the parties in respect to the Agreement dated 8.12.2011 established the status of debt as disputed.
- 33.** It is well-settled law that if the Corporate Debtor raises a plausible contention about a pre-existing dispute, which is not just a moonshine or feeble legal argument, it would suffice for the Adjudicating Authority to reject the application filed under Section 9 of the Code.
- 34.** On the basis of the attached document, it can be observed that there were agreed-upon tasks which remained incomplete, and disputes

regarding the payment amount existed prior to issue the Demand Notice by the Petitioner to the Respondent in the instant case.

- 35.** Considering the above mentioned facts, the submissions of parties and rulings cited, it is clear that the Petitioner has failed to prove the ingredients required for initiation of Corporate Insolvency Resolution Process under section 9 of IBC against the respondent.
- 36.** Accordingly, the present petition i.e, C.P (IB)/298/ND/2022 is dismissed and disposed off.

Sd/-

**(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)**

Sd/-

**(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)**