

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP No. 1426/IBC/NCLT/MB/MAH/2017

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

M/s. DBM Geotechnics & Constructions
Private Limited

..... Operational Creditor
(Petitioner/Applicant)

v.

M/s. West Quay Multiport Private Limited

..... Corporate Debtor
(Respondent)

Heard on : 30.11.2017

Order delivered on : 20.04.2018

Coram :

Hon'ble M. K. Shrawat, Member (J)

Hon'ble Bhaskara Pantula Mohan, Member (J)

For the Petitioner :

Mr. Dinyar Madon, Senior Counsel a/w. Mr. Kanwar Vivswan i/b. Khaitan & Co. – Advocate for the Petitioner/Applicant.

For the Respondent :

Mr. Krishnava Dutt a/w. Mr. Ranjit Shetty and Mr. Rahul Dev i/b. Argus Partners – Authorised Representative for the Respondent.

Per: Bhaskara Pantula Mohan, Member (J)

ORDER

1. 'M/s. DBM Geotechnics & Constructions Private Limited' (hereinafter as **Operational Creditor**) has furnished Form No. 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the capacity of "Operational Creditor" on 22.09.2017 by invoking the provisions of Section 9 of the Insolvency and Bankruptcy Code (hereinafter as **Code**).
2. In the requisite Form, under the Head "Particulars of Corporate Debtor" the description of the debtor is stated as, 'M/s. West Quay Multiport Private Limited' (hereinafter as **Debtor**) having registered address at, #3, C Wing, 2nd Floor,



Amerchand Mansion, 16, Madame Cama Road, Colaba, Mumbai, Maharashtra – 400039.

3. Further under the Head “Particulars of Operational Debt” the total amount in default is stated as ₹ 4,26,23,703/- which includes the Principal Amount of ₹ 3,72,48,787/- and Interest Amount of ₹ 53,74,916/- @ 24 % p.a.

Background of the Case :

4. On 31.07.2010 the Debtor had been awarded with the work, of Planning, Engineering, Designing, Finance, Construction, Development, Operation and Maintenance, of West Quay – 6 Berth in the Northern Arm of the Inner Harbour of Visakhapatnam Port for handling Dry Bulk Cargo, by the Vishakhapatnam Port Trust.
5. The Debtor had issued a Notice inviting Tender for the aforesaid work and consequentially thereupon the Operational Creditor, being the qualified Tenderer, has been awarded with the aforesaid work as a Contractor. This subsequent contract had been executed between the Operational Creditor and the Debtor on 10.04.2012.
6. Consequentially thereupon the Operational Creditor has raised RA Bills upon the Debtor and the said amount so raised in those RA Bills, is not paid by the Debtor.
7. Hence, feeling aggrieved, the Operational Creditor has issued a Demand Notice U/s. 8 of the Code demanding the Outstanding Amount on the Debtor on 29.06.2017. The said Demand Notice has been received by the Debtor on 04.07.2017 and subsequently the Debtor has replied to the said notice on 12.07.2017.
8. As the reply sent by the Debtor constitutes a Dispute relating to the claimed amount the Operational Creditor has filed this Application/Petition on 22.09.2017 U/s. 9 of the Code and prayed for the Admission of this Application/Petition.

Submissions by the Operational Creditor :

9. The Learned Counsel for the Operational Creditor has submitted that, the nature of the Debt is the Operational Debt. The Operational Creditor has supplied his services for constructing the ‘West Quay – 6 Berth in the Northern Arm of the Inner Harbour of Visakhapatnam Port’.
10. It is further submitted that, for the said work the Debtor had issued a Notice inviting Tender and the Operational Creditor had submitted the same to the Debtor. The



tender of the Operational Creditor proved to be economically viable hence; the Debtor had awarded the said work to the Operational Creditor.

11. It is further submitted that, during the completion of the Contract the Operational Creditor had issued various RA Bills on the Debtor but the Debtor had not paid the amount raised in those RA Bills.
12. It is further submitted that, the Operational Creditor has also issued a Notice invoking the Arbitration Proceedings against the Debtor relating to the same amount on 14.09.2016.
13. It is further stated that, as the Debtor has failed to make the payment the Operational Creditor has issued a Demand Notice U/s. 8 of the Code. The said notice has been duly served upon the Debtor on 04.07.2017.
14. It is further stated that, as the Operational Creditor had not received a payment within 10 days from the issue of Notice, the Operational Creditor has filed this Petition/Application.
15. It is also submitted that, the Debtor had replied to the said Demand Notice, purporting to be the Notice of Dispute on 12.07.2017, but the same cannot be considered as Notice of Dispute under the Code as it did not talk about the any existing dispute.
16. It is finally argued that, as the Operational Creditor had neither received the outstanding amount nor received the Notice of Dispute this Petition/Application be Admitted and the CIRP may be commenced.

Submissions by the Debtor :

17. The Learned Counsel for the Debtor has submitted that, it is true that the Operational Creditor had been awarded with a work of 'West Quay – 6 Berth in the Northern Arm of the Inner Harbour of Visakhapatnam Port' as a contractor.
18. It is stated that, the Operational Creditor has concealed certain important facts from this Tribunal while filing this Petition/Application.
19. The Learned Counsel firstly and fore-mostly placed reliance on the existing dispute between the Operational Creditor and the Debtor. It is submitted that, the Debtor had exchanged number of letters with the Operational Creditor stating that the work done by the Operational Creditor is of poor workmanship and it is below the construction standards. Copies of all the letters are annexed with the reply to the Demand Notice



and the same has been annexed by the Operational Creditor with this Petition/Application.

20. It is further submitted that, as the work carried out by the Operational Creditor was of poor workmanship and below the construction standard the Debtor had entered into a MoU with the Operational Creditor which inter-alia talks about the rectification of defects in the work carried out by the Operational Creditor.
21. It is further submitted that, in that same MoU the Operational Creditor had acknowledged his defects in the work and agreed to rectify them. Further that, the Operational Creditor had also agreed to pay an amount of ₹ 6,15,080/- to the Debtor which was incurred by the Debtor to complete certain works which was left incomplete.
22. It is further stated that, in the said MoU it was agreed between both the parties that the rectification work will be carried out at the Operational Creditor's own risk and expenses. The copy of the said MoU is Annexed with the reply to the Demand Notice. The same has been Annexed by the Operational Creditor along with this Petition/Application.
23. It is further submitted that, though the MoU had been executed, the Operational Creditor has failed to comply with the provisions of the MoU which constrained the Debtor to invoke the Bank Guarantee issued by the Operational Creditor in favour of the Debtor. But the Operational Creditor had filed the Arbitration Suit in the Hon'ble High Court of Bombay for restraining the said invocation of Bank Guarantee. But the Hon'ble Bombay High Court had dismissed the said Suit vide an order dated 30.08.2016. It is also stated that, the Operational Creditor had not challenged the said order hence it attained the finality.
24. It is also submitted that, the Operational Creditor had also issued a Notice invoking Arbitration Proceedings on 14.09.2016 but thereafter had not persuaded those proceedings and kept stoic silence till the issuance of the Demand Notice under the provisions of the Code. Copy of the said notice has been annexed with the reply to the Demand Notice and the same has been Annexed by the Operational Creditor along with this Petition/Application.
25. It is finally argued that, as the Operational Creditor has concealed all the aforesaid facts from this Tribunal, on the existence of Dispute between the Operational Creditor and the Debtor, this Petition/Application may be dismissed. It is also stated that, the



Debtor is very much solvent company and no other Insolvency Petition/Application has been filed by any of the Creditor except this.

Findings :

26. We have gone through the Facts of this case and submissions made by both the parties. We have also perused the pleadings on record and before coming to the conclusion we want to draw attention towards certain facts.
27. That, the Debtor has replied to the Demand Notice issued by the Operational Creditor within the stipulated time prescribed by the Code.
28. Further that, the Debtor has reiterate that reply in his oral arguments and had neither filed any reply to this Petition/Application separately nor seek any liberty from this Bench to do so.
29. Further that, while going through the reply of the Debtor we came to know that there are certain facts are brought on record by him which had not been dealt by the Operational Creditor in his Petition/Application.
30. That, the Operational Creditor has neither uttered out word about the Proceedings which had been filed by him in the Hon'ble Bombay High Court nor about the Order passed in the same.
31. Further that, there are number of letters had been exchanged between the Debtor and the Operational Creditor regards to quality of the work done by the Operational Creditor. The Operational Creditor had knowledge of those letters as said letters had been duly received by him. But those have not been brought on record by the Operational Creditor.
32. Further that, the Operational Creditor and the Debtor had also entered into a MoU for rectification of defects in the work done by him, but, the Operational Creditor had also remained silent about that MoU. We have gone through the said MoU and it came to our notice that, there is a clause which inert-alia speaks that the rectification has to be done by the Operational Creditor on his own risk and expenses.
33. Further that, there is nothing on record from the side of the Operational Creditor which proves that the said rectifications, according to the terms of MoU, had been carried out by the Operational Creditor.
34. We have also gone through the Agreement entered between the Operational Creditor and the Debtor, dated 10.04.2012, and found that the 50% of the Retention Amount

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had to be released with the Provisional completion certificate and the remaining 50% Retention Amount had to be released with the Final completion certificate of the project. But while going through the record it came to our knowledge that, neither the provisional nor the final completion certificate has been issued by the Debtor to the Operational Creditor, rather, the Debtor reiterated that for the rectification of the defects in the work be done.

35. Considering the above facts and circumstances we came to conclusion that the Operational Creditor not only failed to establish that the nature of the Debt is an Operational Debt as defined U/s. 5 (21) of the Code but also failed to establish any Default by the Debtor as defined U/s. 3 (12) of the Code.
36. Further that, we have also gone through the various letter correspondences exchanged between the Operational Creditor and the Debtor and came to the conclusion that the Debtor had time and again raised a valid Dispute regarding to the quality of work done by the Operational Creditor. Hence, to conclude it can be said that the Debt involved in this Petition/Application has an essence of a Dispute; therefore, this Petition/Application can't be Admitted for the CIRP and deserves **Rejection**.
37. Further that, before the finally concluding remark we want to place reliance on the decision given by the Hon'ble Supreme Court of India in the case of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* (Civil Appeal No. 9405 of 2017) which is reproduced as follows :

40. 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

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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.

38. Hence, after gone through the submissions made by the Learned Counsel for the Debtor it is our humble opinion that the Dispute raised by him is neither just to defend his case nor a hypothetical or illusory but it is a pre-existed real dispute between the Operational Creditor and the Debtor. There were number of letters exchanged between them to reiterate the same and further the Operational Creditor has knowledge of this Dispute. Hence, it is our conscientious view that this Petition/Application **is not fit** for commencement of CIRP.

39. Hence, for the reasons cited above this Petition/Application is **Dismissed**. However, in the facts and circumstances of the case there is no order as to cost. The Operational Creditor is at liberty to seek any other legal remedy available to him.

40. Ordered Accordingly. To be consigned to Records.

Sd/-

BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)

Sd/-

M. K. SHRAWAT
MEMBER (JUDICIAL)

Dated : 20th April, 2018

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