

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

IB-243(ND)/2022

Order 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:

M/s. MODI INFOSOL PRIVATE LIMITED

..... Operational Creditor

VERSUS

M/s. ANP ATELIER & ASSOCIATES COMPANY PRIVATE LIMITED

..... Corporate Debtor

Order Delivered On: 06.12.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mrs. Suruchi Mittal, Mr. Shubham Soni, Advs.

For the Respondent : Mr. Vinod Khanna, Adv.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This Application has been filed by M/s. Modi Infosol Private Limited, the Applicant/Operational Creditor on 21.03.2022 before this Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), declaring moratorium and for appointment of Interim Resolution Professional ("IRP"), against M/s. ANP Atelier & Associates

IB-243(ND)/2022

Date of Order: 06.12.2023



Company Private Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding principal amount of a sum of Rs. 2,48,81,797/- (Rupees Two Crore Forty Eight Lakh Eighty One Thousand Seven Hundred and Ninety Seven Only) and Rs. 1,66,87,043/- (Rupees One Crore Sixty Six Lakh Eighty Seven Thousand and Forty Three Only) as interest @18% p.a., totalling to Rs. 4,15,68,840/- (Rupees Four Crore Fifteen Lakh Sixty Eight Thousand Eight Hundred and Forty Only). As per the Form-5, Part-IV, the date of default in the present application is 23.07.2018.

2. Submission of the Applicant/Operational Creditor:

- i. It is the case of the Applicant that the Corporate Debtor approached the Operational Creditor/Applicant for supply of goods and rendering services including Networking & Installation works of UPS & PAC at various sites from time to time.
- ii. The Corporate Debtor purchased the goods/services as mentioned in the invoices from Operational Creditor for the period from 05.02.2014 to 09.10.2017 which were duly supplied by the Operational Creditor and no complaint was raised by the Corporate Debtor regarding the goods/services at the relevant time.
- iii. The invoices provided a credit period of 21 days for making payment, which if not adhered to by the Corporate Debtor, attracted a liability of the Corporate Debtor to pay interest @24% p.a. to Operational Creditor. Notwithstanding, the Operational Creditor in the Application filed under Section 9 of the Code, has claimed interest only at the rate of 18% per annum from the date of overdue payment.
- iv. The Corporate Debtor has defaulted in making payments to the tune of Rs 2,48,81,797/-. The business dealings between Operational Creditor and the Corporate Debtor has ceased with the last supply made by Operational Creditor to Corporate Debtor vide invoice dated 09.10.2017 and the last payment received from Operational Creditor on 23.07.2018.



- v. The Operational Creditor served upon Corporate Debtor a statutory Demand Notice dated 17.09.2019 under Section 8 of the Code to the Corporate Debtor demanding payment of outstanding amount to the tune of Rs. 4,15,68,840/- including interest calculated @18% p.a. as mentioned therein within 10 days from the date of receipt of said Demand Notice. It was submitted by the Applicant that the Corporate Debtor filed a reply to the demand notice on 03.10.2019 without showing any existence of dispute, the record of the pendency of suit or arbitration proceeding filed before the receipt of said notice or invoice in relation to such dispute.
- vi. Hence, the Operational Creditor has filed instant Application under section 9 of the Code to initiate insolvency proceedings against the Corporate Debtor as it failed to make payment of the outstanding principal amount of Rs. 2,48,81,797/- and Rs. 1,66,87,043 as interest @18% p.a., totalling to Rs. 4,15,68,840/-.

3. **Submission of the Respondent/Corporate Debtor:**

- i. The Respondent/Corporate Debtor has filed a reply affidavit denying the allegations made by the Applicant. The Respondent had awarded the work to the Operational Creditor to carry out the installation work of network cables along with necessary accessories such as cable trays, raceways and also installation works for UPS & PAC with necessary allied works as part of the scope of works for projects at Delhi, Gurgaon, Uttar Pradesh and Mumbai, as the Corporate Debtor is engaged in providing architectural and civil services to their clients. The contract value of the said installation work was around Rs. 2,85,00,000/- (Rupees Two Crore Eighty Five Lakh Only).
- ii. The Operational Creditor was obligated to execute the above stated scope of works within a stipulated time frame of 3 months from the date of provisional invoices being raised by alleged Operational Creditor along with requisite project plan and working drawings for approval. However, Operational Creditor has failed to perform their duties.



- iii. It is the Case of the Corporate Debtor that the Operational Creditor has not provided any kind of services either to the Corporate Debtor or other party on behalf of the Corporate Debtor under the 6 (six) invoices raised to the tune of Rs. 2,85,80,000/-, as the same is evident from the fact that details of services as well as any project detail have not been mentioned in those six invoices intentionally.
- iv. The Corporate Debtor has also sent an e-mail dated 11/01/2019 to the Operational Creditor in which the alleged Corporate Debtor has mentioned all the 6 (Six) service invoice's and has stated that no services have been executed according to the invoices by the Operational Creditor and asked to refund the advance money.
- v. The Corporate Debtor has sent another e-mail dated 14/01/2019 to the Operational Creditor wherein, stating that no services have been provided by the Operational Creditor and the Corporate Debtor has also asked for refund of the advance made of Rs. 35,00,000/- (Rupees Thirty Five Lakh Only) from the Operational Creditor.
- vi. It was submitted by the Corporate Debtor that the present Application filed under section 9 is barred by Limitation. It is evident that the last (6th Invoice) Invoice dated 31.12.2015 fell due on 20.01.2016. Further, the Operational Creditor has filed the present application on 25.12.2021 which is beyond the three years provided under the Article 137 of the Law of Limitation i.e. the Limitation Act, 1963.

4. **Analysis and Findings:**

- i. We have heard the Ld. Counsels appearing for both parties. We have also perused the documents on record.
- ii. The main dispute in this application is whether the present application is within the Limitation period to initiate the CIRP against the Corporate Debtor or not.
- iii. As per law laid down by the Hon'ble Supreme Court, in the case of **B.K. Educational Services Pvt Ltd versus Parag Gupta and Associates** in *Civil Appeal No. 23988 of 2017*, Law of Limitation i.e., Article 137 of the Limitation Act 1963 is applicable to Application filed



under section 9 of the Code. Article 137 of the Limitation Act provides a 3 (Three) year of Limitation Period from the date when “Right to Apply” accrues. “The Right to Apply”, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act.

- iv. In the present case, the Applicant has claimed to have raised last unpaid invoice on 09.10.2017. However, no such invoice dated 09.10.2017, has been placed on record by the Operational Creditor. Rather it is seen from the records that the last unpaid invoice is dated 22.05.2017. Further, as per the Applicant’s case, 21 (Twenty One) days credit period was granted to the Respondent/Corporate Debtor to make payment, as stipulated by the terms and conditions of the invoice dated 22.05.2017. Accordingly, the Limitation for filing the present Section 9 Application starts from the date of default i.e., 12.06.2017 (21 days from 22.05.2017). Limitation Period of 3 (Three) years, if calculated from the date of default i.e., 12.06.2017, shall expire on 12.06.2020. However, it is the Applicant’s case that the last payment was received from the Operational Creditor on 23.07.2018, which has been corroborated by the Bank Statement annexed with the Application. As per Section 19 of the Limitation Act 1963, a fresh limitation period begins to run from the date of part payment towards an acknowledgment of liability. In view of the aforesaid provision, limitation period of 3 (Three) years as calculated from date of part payment i.e., 23.07.2018, shall expire on 23.07.2021. We find that the date of default as mentioned in the Form-5, Part-IV, in the present application is 23.07.2018 which is without any basis. Whereas the present Application under section 9 of the Code has been filed on 21.03.2022 which is beyond the period of limitation and hence, the Application filed under section 9 of the Code is barred by the Law of Limitation. Further, it is noted that Operational Creditor/ Applicant has failed to explain the delay.



- v. Hence, in view of the above, we are of the considered view that the present Application under Section 9 of the Code is barred by the limitation and is not maintainable.
- vi. The another main dispute in this application is whether there is a pre-existing dispute with respect to the amount claimed to be due in the application or not.
- vii. It is case of the Respondent/Corporate Debtor that total of six invoices were raised in advance and payment thereto was also paid in advance, however, no goods/services were supplied by the Operational Creditor/ Applicant to the Respondent/Corporate Debtor.
- viii. It is relevant to mention that the Respondent/Corporate Debtor has written two e-mails dated 11.01.2019 and 14.01.2019.

E-mail dated 11.01.2019 is extracted below:

“Subject : RE: FWD: RE: Need Balance Confirmation Dated 27.12.2018
From : shekhar@atelier.co.in
Date : Fri, Jan 11, 2019 5:31 pm
To : “Sonnam”<crm3@modiithub.com>
CC : shyam@modiithub.com, accounts@modiithub.com,
pratap@atelier.co.in, prabh@atelier.co.in, reena@atelier.co.in,
lalit@atelier.co.in
Attach : Untitled
Image001.jpg

Dear Sonnam,

This is to inform that services have not been executed according to the invoice raised by you in financial year 2015-16. Kindly refund, if any advance. The bill number is mentioned below:

S. No.	DATE	BILL NO.
1.	31.10.2015	SI/NP/15-16/418
2.	31.10.2015	SI/NP/15-16/421
3.	18.11.2015	SI/NP/15-16/437
4.	25.11.2015	SI/NP/15-16/443
5.	31.12.2015	SI/NP/15-16/513
6.	31.12.2015	SI/NP/15-16/514”

E-mail dated 14.01.2019 is extracted below:

“From: shekhar@atelier.co.in [mailto:shekhar@atelier.co.in]
Sent: 14 January 2019 11:23
To: Sonnam
Cc: shyam@modiithub.com,accounts@modiithub.com,pratap@atelier.co.in,
prabh@atelier.co.in, reena@atelier.co.in, lalit@atelier.co.in ‘Anuj’
Subject : RE: FWD: RE: Need Balance Confirmation Dated 27.12.2018

Dear Sonnam,

Please provide with service/job completion report if you have any. You have not provided any service. The invoices were raised in advance and we had released Rs. 35 lakhs as 15% advance towards the desired works. Since you did not carry out any works therefore please return our amount and issue a credit note in effect to the same. We shall issue you a debit note for the same and close the subject matter.

Also an interest shall be levied at 24% towards retained by yourself without completing or providing of any service.”

- ix. It is a case of the Respondent/Corporate Debtor that no debt is payable by the Respondent/Corporate Debtor to the Operational Creditor/ Applicant and rather sum to the tune of Rs 36,98,203/- (Rupees Thirty Six Lakh Ninety Eight Thousand Two Hundred and Three Only) is liable to be recovered from the Operational Creditor/ Applicant.
- x. It is seen that the Corporate Debtor had sent emails which were prior to the date of the Demand Notice i.e., 17.09.2019 under Section 8 of the Code and this raises a plausible dispute. In view of the law settled in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353** 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.
- xi. Thus, the present application is legally untenable even after the argument of the Applicant is taken into consideration.
- xii. We do not find any cogent reason to entertain this application, which is liable to be dismissed on the grounds mentioned in the preceding paragraphs.
5. In view of the above facts and circumstances and the foregoing discussion, we are satisfied that the present petition fails to fulfil the criteria laid down under Section 9 of the Code. It is accordingly ordered as follows:
- i. The Application bearing **IB-243/ND/2022** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating

Authority Rules for initiating CIRP against the Respondent is **dismissed.**

- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

No order as to costs.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**