



IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
COURT - IV

ITEM No.104
IB/379/ND/2020

IN THE MATTER OF:

Rambaran Singh Apex Pvt Ltd

...

Applicant

Versus

Harji Engineering Works Pvt Ltd

...

Respondent

Order under Section 9 of IBC, 2016.

Order pronounced on 20.10.2023

CORAM:

MR. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)

ORDER

Order pronounced in open Court vide separate sheets.

IB/379/ND/2020 stands dismissed.

Sd/-

DR. BINOD KUMAR SINHA
MEMBER (TECHNICAL)

Sd/-

MANNI SANKARIAH SHANMUGA SUNDARAM
MEMBER (JUDICIAL)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV**

Company Petition No.(IB)-379(ND)/2020

**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. Rambaran Singh Apex Private Limited

.... Applicant/ Operational Creditor

Vs.

M/s. Harji Engineering Works Private Limited

.... Corporate Debtor

CORAM:

SH. MANNI SANKARIAH SHANMUGA SUNDARAM, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

Order Delivered on: 20.10. 2023

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

The instant application is filed by M/s. Rambaran Singh Apex Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') 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 in respect of M/s. Harji Engineering Works Private Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor') for defaulting the payment of Rs.1,91,20,346/- (Rupees One Crore Ninety One Lacs Twenty Thousand Three Hundred Forty-Six Only).



2. The Respondent Company M/s. Harji Engineering Works Private Limited having CIN: U74899DL1982PTC014899 incorporated under the provisions of the Companies Act, 1956 is having its registered office situated at 7, Aravali Shopping and Office Complex, Alaknanda, New Delhi-110019. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having 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 sub-section (1) of Section 60 of the Code.

3. Succinctly stated facts of the present case as averred by the applicant are that the Corporate Debtor is engaged in the business of carrying construction works as main contractor through engaging sub-contractors. The Applicant had worked as an approved sub-contractor of the Corporate Debtor, for the works of the Indian Oil Corporation Limited in connection with the project 'Civil Works in Combined Balance Station Works including civil, Mechanical, Electrical, PCP, Telecom & Instrumentation Works under Paradip Raipur Ranchi Pipeline Project, Group-B Station Works at Sambalpur Pump Station, Odisha ('Project').

4. The Applicant submitted that in terms of the work order dated 04.05.2015 issued by the Corporate Debtor for the given project, the Applicant had successfully executed the works to the satisfaction of the Corporate Debtor and also to the satisfaction of M/s. Indian Oil Corporation Limited being the client/owner. The Applicant upon completion of work had raised R.A Bill from time to time and also Final Bill (numbered as R.A. Bill No.26) which were duly approved and paid for by the Corporate Debtor after making deduction @ 10% from each of the bill amounts in the form of the Security Deposit to be refunded after the defect liability period of one year.



5. The Applicant further submitted that the Corporate Debtor was obligated to refund the Security Deposit amount of Rs.1,91,20,346/-, so deducted after expiry of defect liability period of one year i.e., on 04.07.2019, but the Corporate Debtor had not refunded the amount, despite the fact that the client i.e., M/s. Indian Oil Corporation had refunded the Security Deposit to the Corporate Debtor. The Applicant adds that as per the terms and conditions of the work order, same provisions qua security deposit as between the Corporate Debtor and M/s. Indian Oil Corporation has been made applicable between the Corporate Debtor and the Applicant.
6. The Applicant submitted that between, 22.10.2019 to 13.12.2019, the Applicant had written three emails dated 22.10.2019, 13.11.2019 & 29.11.2019 and also wrote letter dated 22.10.2019, reminder letter dated 25.11.2019, reminder letter dated 04.12.2019 and reminder letter dated 13.12.2019 requesting the Corporate Debtor to make payment of retention money/security deposit, but, the Corporate Debtor did not bother to respond against any of such request emails and letters for release of retention amount much less raising of a valid dispute.
7. Further, the Applicant acting through counsel sent statutory demand notice dated 21.12.2019 under Section 8 of IBC to the Corporate Debtor, via email as well as by speed post. The Corporate Debtor received said demand notice via email on 21.12.2019 and admittedly on 23.12.2019 by post, hence reply to the demand notice was to be made latest by 02.01.2020, but the Corporate Debtor sent belated reply through email dated 03.01.2020, which was beyond statutory period of 10 days. In the said reply, the Corporate Debtor took defence of pre-existing dispute for the first time, which is nothing but a moonshine and sham defence. Accordingly, the Applicant prayed for initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor.



8. Per Contra in the reply filed by the Corporate Debtor, the Corporate Debtor submitted that the agreement between the applicant and the Corporate Debtor was based on 'back to back' clause and same provisions as applicable between Corporate Debtor and M/s. Indian Oil Corporation Limited were applicable to the Corporate Debtor and the Applicant.

9. The Corporate Debtor further submitted that since certain disputes had arisen between Corporate Debtor and IOCL, the Corporate Debtor, had vide letter dated 20.11.2019, had invoked the Arbitration Clause under the Agreement and duly submitted its claims for adjudication. The Corporate Debtor has raised disputes towards wrongful deduction of Works Contract Tax (WCT) of Rs.1,22,84,372/- from the RA Bills of Corporate Debtor. Besides, the Corporate Debtor had claimed certain amounts towards loss of profit, interest, BG renewal charges, damages, legal expenses etc. The Corporate Debtor submitted that because of illegal deductions made by IOCL and for recovering the other dues, the Corporate Debtor has already initiated arbitration proceedings under Section 11(6) of the Arbitration and Conciliation Act, 1996 against IOCL before the Hon'ble Delhi Court numbered as Arbitration Petition [Arb.P] No. 151 of 2020.

10. Furthermore, the Corporate Debtor submitted that as per the General Conditions of Contract (GCC) dated 16.03.2022 applicable between IOCL and Corporate Debtor and in turn between Corporate Debtor and the Applicant, the Clause 2.1.0 deals with the Security Deposit submitted under the contract and as to the manner the said Security Deposit could be adjusted towards any form of recovery. Clause 2.1.1.8 of the GCC provides that the Security Deposit shall be held for any amounts claimed by the Owner and the said right of recovery would be absolute and unconditional. Clause 2.1.1.11 provides that the security would be



refunded only after due settlement of accounts and discharge of all amounts due under the contract. Therefore, the Security Deposit of the Applicant is liable to be adjusted towards any dues/recoveries to be effected by the OWNER i.e., IOCL.

11. The Applicant in its written submission had rebutted the contentions of the Corporate Debtor and submitted that on a conjoint reading of the provisions of the MOU and Work Order as quoted above, there is nothing wherefrom it can be inferred that the Corporate Debtor has any right to deduct WCT from the retention amount at the stage of refund of retention amount.
12. We have heard the Ld. Counsels for the parties and perused the averments made in the application, reply and written submissions filed by the parties. The relevant documents annexed with the respective submissions have been perused.
13. Adverting to the facts of the present case, it is an admitted fact that the work was awarded to the Corporate Debtor by M/s. Indian Oil Corporation Limited ('IOCL') on back to back basis, wherein IOCL was the principal employer. The Corporate Debtor had in turn awarded the said work to the Applicant on the same terms and conditions as between the Corporate Debtor and IOCL. As such, the same provisions as applicable between the Corporate Debtor and Indian Oil Corporation Limited (IOCL) were applicable to the Corporate Debtor and the Applicant.
14. We have minutely perused the covenants of the Work Order dated 04.05.2015 bearing no. HEW/RBS/W0/2015/200, MOU dated 04.05.2015 and General Conditions of Contract (GCC). The relevant clauses are reproduced below: -



Memorandum of Understanding dated 04.05.2015

“8. HEWPL shall retain 10% and pass on the rest of the value of Civil Works to RBS. **In case of any deductions made by Employer from R.A. bills, corresponding deductions shall be made from the bills of RBS.**

9. The parties agree that the following Taxes/Tax deductions shall be applicable:

a) TDS on the Civil Works of the Project shall be deducted by HEWPL and TDS certificate will be issued by HEWPL to RBS.

b) The rates shall be inclusive of all taxes as per the terms of the Work Order except Service Tax.

c) In the event of the Labour Welfare cess being deducted at source by the Employer from the R.A. Bills of HEWPL, the same shall be deducted by HEWPL from RBS for latter's respective area of work.

d) RBS shall provide copies of their Service Tax Registration Certificate, VAT Registration Certificate, PAN and PF Registration Certificate immediately on acceptance of HEWPL Work Order.”

Work Order dated 04.05.2015

3.3 In the event of the Labour Welfare cess being deducted at source by IOCL from the R.A. Bills of HEWPL, the same shall be deducted by HEWPL from corresponding bills of RBS.

6. BILLING AND PAYMENT

6.1 RBS shall get its work measured and certified by IOCL and submit all relevant documents along with the bills to HEWPL. Based on this, HEWPL shall raise R.A. Bills for payment by IOCL.

6.2. HEWPL shall make payment to RBS against latter's bills through postdated cheques values based on certified quantities **after retaining its portion and affecting deductions as specified in IOCL Work Order.**

6.3. HEWPL shall retain 10% and pass on the rest of the value of Civil Works to RBS. **In case of any deductions made by the Employer from RA Bills, corresponding deductions shall be made from the bills of RBS.**

General Conditions of Contract (GCC)

2.1.0.0 SECURITY DEPOSIT

2.1.1.0 **The contractor shall furnish Security Deposit in the amount equivalent to 10% (ten percent) of the total contract value.** Such security deposit is to be held by the OWNER as security for due performance of the Contractors obligations under the contract and/or



the **due payment of any amounts claimed by the OWNER from the Contractor.**

2.1.1.1 The Security Deposit shall be made up of the initial security deposit and the retention monies, of a sum equivalent to 10% (ten percent) of the total (gross) values of each bill up to and until the recovery of full security deposit to the extent specified in Clause 2.1.1.0 hereof is achieved. The deductions for the retention money will be stopped after the Security Deposit limit of 10% (ten percent) of the total contract value is reached, unless otherwise required in terms of Clause 2.1.1.6 hereof.

2.1.1.8 The Security Deposit shall be held by the OWNER as security for due performance of the Contractors obligations under the contract and for for the due payment of any amounts claimed by the OWNER from the Contractor, provided that nothing herein stated shall make it incumbent upon the OWNER to utilize the security deposit in preference to any other remedy which the OWNER may have, nor shall be construed as confining the claims of the OWNER against the Contractor to the quantum of .the Security Deposit

2.1.1.11 The security would be refunded only after due settlement of accounts and discharge of all amounts due under the contract.

[Emphasis Supplied]

15.The ground taken by the Corporate Debtor in its defence is that the employer/IOCL had deducted WCT unauthorizedly and other illegal deductions without any such provision from the bills of the Corporate Debtor and accordingly the Corporate Debtor had invoked arbitration proceedings and recovery proceedings against IOCL in the very year 2017, for the resolution of dispute between the Parties.

16.From the perusal of the facts and documents on record, specifically the Clause 8 of the MoU which clearly provides that, “in case of deduction made by the Employer from RA Bills, corresponding Deductions shall be made from the bills of RBS”, it is admitted position that all the deductions



made/claimed by IOCL from the Corporate Debtor had to be deducted/claimed by the Corporate Debtor from the Applicant.

17. It is admitted by both sides that the refund of retention money/security deposit @10% of contract value was to be made only after due settlement of accounts and discharge of all amounts under the contract as per GCC Clause 2.1.1.11 as extracted above. It is also admitted position by both sides that the contract between the Applicant and the Corporate Debtor is an exact replica of the Agreement between the Corporate Debtor and the IOCL, including the clause relating to refund of Security deposit/retained money. Therefore, the refund of Security Deposit/Retention money by the Corporate Debtor to the Applicant would follow refund of Security Deposit/Retention money by the IOCL to the Corporate Debtor. It is established through documents that there has been a dispute pending between the IOCL and the Corporate Debtor qua refund of the Security Deposit/Retention money due to alleged unauthorised deduction of WCT by IOCL since, 2017 as reflected in the e-mails and the Arbitration proceedings were invoked on 20.11.2019, that is, before the issue of Statutory Demand Notice under Section 8(1) of the Code, 2016 by the Applicant. The above facts do establish that the issue of refund of Security Deposit/Retention Money between IOCL and the Corporate Debtor has still not been resolved. Therefore, the Applicant cannot claim that the refund of Security Deposit/Retention Money has become due and payable.

18. Thus, in view of the on-going dispute between the Corporate Debtor and the IOCL, regarding the alleged illegal deductions by the IOCL, we are of the view that there is no crystallization of the Security Deposit/Retention amount, which is claimed to be in default by the applicant, and accordingly, the operational debt claimed to be due and in default in Part-IV of the present application cannot be considered to have fallen in



default, which is the sine qua non for admission of an application filed under Section 9 of the Code. In our view, the essential requirement, i.e., existence of 'default', for admission of an application under Section 9 of the Code, 2016, has not been met in the present case.

19. Accordingly, in view of the aforesaid discussion, the present Company Petition i.e., **C.P.(IB)/379/2020 stands dismissed**. No orders as to cost.

Sd/-

**(DR.BINOD KUMAR SINHA)
MEMBER (T)**

Sd/-

**(MANNI SANKARIAHSHANMUGA SUNDARAM)
MEMBER (J)**