NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL
ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 16.08.2022 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
TCP(IB) No.93/9/AMR/2019		**9 of IBC**	**Wens Infra Projects Vs Navayuga Engineering Company Ltd**

Counsel for Petitioner(s):

Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Ries

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

TCP(IB) No.93/9/AMR/2019 is admitted, vide separate orders.

Sd/-
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI

TCP (IB) No.93/9/AMR/2019
IN
CP (IB) No.242/9/HDB/2019

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. NAVAYUGA ENGINEERING COMPANY LIMITED

BETWEEN:

Wens Infra Projects
(Earlier known as Tristar Wens JV)
Registered Office at 302, Gupta Tower,
Azadpur Commercial Complex, Azadpur,
Delhi- 110033
Represented by Mr.Rashmi Jain,
Authorised Representative

.... Operational Creditor/Petitioner

AND

Navayuga Engineering Company Limited
Registered Office at D.No.48-9-17, Dwarka Nagar,
Visakhapatnam, Andhra Pradesh – 530016

... Corporate Debtor/Respondent

Date of Orders pronounced on: 16.08.2022

***Coram*:**

Justice Telaprolu Rajani, Member Judicial.

Sd/-

Parties/Counsels present:

For the Operational Creditor : Mr.Mayur Mundra, Advocate
For the Corporate Debtor : Mr.Vimal Vasi Reddy, Advocate

ORDER

1. This Company Petition is filed by the Wens Infra Projects ("hereinafter referred to as Operational Creditor") seeking for initiation of Corporate Insolvency Resolution Process (CIRP) against M/s.Navayuga Engineering Company Limited ("hereinafter referred to as Corporate Debtor") for the reason that it failed to discharge the debt due to the Operational Creditor which is Rs.1,34,28,808/-.

2. The facts of the case as briefly are as follows:

   i). The National Highways Authority of India and the Corporate Debtor entered into agreement for Rehabilitation, Strengthening and Four Laning of Quazigund to Banihal Section of NH-1A in the State of Jammu and Kashmir.

   ii). The Corporate Debtor entered into a Sub-Contract Agreement dated 01.10.2014 with Wens Infra Projects (earlier known as Tristar Wens JV) for providing and fixing of Geo Membrane & Water Proofing Membrane in tube one in South Portal and

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North Portal for a quantity of 2,01,300 Sqmt. @ Rs.990/- which amounts to 19,92,87,000/-.

iii). According to the contract, the date of commencement of the work was 20.01.2015 and the stipulated date of completion was 25.10.2016. The Operational Creditor, from the commencement of work has raised 21 RA (Running Account) Bills out of which the total outstanding as per the ledger books of the Operational Creditor is Rs.75,10,800/-.

iv). The Operational Creditor raised an invoice for a gross amount of Rs.87,54,976/- whose payment has been made by the Corporate Debtor. Several such bills were raised which were paid by the Corporate Debtor.

v). The Corporate Debtor provided a work Completion Certificate dated 21.06.2017 in the former name of the Operational Creditor certifying the performance of the Operational Creditor as "satisfying".

vi). On 20.02.2019 the Operational Creditor sent an e-mail regarding the balance confirmation of the outstanding dues, in respect of RA Bills and security deposit of Rs.1,34,28,808/-. The Corporate Debtor replied to the said e-mail on 21.02.2019 and made confirmation of the outstanding dues over the trail mail.

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vii). Statutory demand notice under Section 8 of IBC was issued to the registered address of the Corporate Debtor. The Corporate Debtor, after receiving the demand notice on 04.03.2019, brought into picture on 08.03.2019 some leaking against the waterproofing done by the Operational Creditor in the month of December, 2015 and a new e-mail was sent by the Corporate Debtor stating the reduced amount of the outstanding claim, which is clearly an afterthought. Hence, this application seeking the above mentioned relief.

3. The Corporate Debtor filed counter, admitting that the Corporate Debtor and National Highways Authority of India entered into an agreement as stated by the Operational Creditor and also admitted that the Corporate Debtor entered into Sub-Contract Agreement with the Operational Creditor. But it is contended that a joint venture is an altogether separate legal entity created by virtue of the Partnership Deed dated 21.04.2014. The Corporate Debtor entered into a Sub-Contract Agreement with the said entity. The joint venture was dissolved by virtue of the Retirement Deeds dated 05.11.2014 and 15.01.2015. Tristar and Wens Industries are two separate entities and they individually were not parties to the said Sub-Contract Agreement and the alleged due amount arises from the said sub-contract agreement, to which Tristar and Wens Industries were individually not parties. The Corporate Debtor was

never informed about the dissolution of the JV and it has only recently come to the notice of the Corporate Debtor.

4. The Retirement Deed does not assign any particular rights to the Operational Creditor to pursue the claims of the JV. All the bills have been raised on Tristar Wens JV's name and the Corporate Debtor has only corresponded with the representatives of Tristar Wens JV and it has never come into contact with the representatives of the Operational Creditor. There is no privity of contract between the Operational Creditor and Corporate Debtor and hence, the question of "debt" and "default" does not arise.

5. The Operational Creditor has also not filed any documents to show that it has been authorized to make the claims on behalf of the Tristar Wens JV. The Operational Creditor was never in the picture. Tristar Wens JV replaced Tristar Global as a Sub-Contractor. Hence, the Petition is liable to be dismissed. It is further stated that the Tristar and the Operational Creditor are having their own disputes and the Corporate Debtor received an email dated 11.08.2016 from Tristar, requesting the Corporate Debtor to hold the payments until further notice and it was intimated to the Corporate Debtor to foreclose the work order and the Corporate Debtor had to enter into agreement with other sub-contractors to execute the balance works. The sub-contract agreement was rescinded on 10.11.2016. The completion certificate was issued

upon the request from Tristar Wens JV for their future works. On 06.03.2019, the Corporate Debtor noticed a lot of leakages in some blocks at North Portal and immediately informed to the Sub-Contractor to rectify the same. According to Clause 15 of the Sub-Contract Agreement which is as follows:

> *"Clause 15 of the Subcontract Agreement*:
>
> *Warranty: The works shall be fully warrantied for a period of 5 years after the completion and handing over of the complete scope of sub-contracted works of the project. The works shall be warranted for a further of three years but the materials required for the repairs and rectifications during this 3 years period shall be provided by NECL and all other services including the cost of labour, machinery, tools plants, fuel, etc., shall be borne by M/s.Tristar Wens JV.*
>
> *Clause 16.5 of Sub Contract Agreement:*
>
> *The Sub Contractor shall be liable to repair or replace any loss or damage occasioned to the sub contract works for which the sub-contractor is responsible forthwith, irrespective of whether or any insurance claim has to be made accepted or paid."*

By virtue of the above clauses the Sub-Contract is obliged to rectify the leakages spotted by the Corporate Debtor and no action has been taken so far.

Clause 17.6 of the Sub-Contract Agreement is also relied upon which is as follows:

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"Save as provided for in Clause 6.4, the contractor shall have the right to deduct from or set off against any money due to the Sub contractor under this sub contract (including retention money) any sum or sums which the contractor reasonably considers the sub-contractor is liable to pay the contractor in respect of any claim or counter claim against the sub-contractor arising out of any default, breach of non-performance of this sub contract or otherwise in connection with the sub contract in so far as any sum or sums to be set off fair and reasonable."

6. The Corporate Debtor raised a debit note, since, there is a default on part of the sub-contractor. The amount that is finally due to the Sub-Contractor has not yet been determined. The debit note amount has to be deducted from the amount due, if any, and payable to Tristar Wens JV. The said issues cannot be dealt with by this Tribunal since, it is within the domain of a Civil Court.

7. RA Bills are only an adhoc arrangement to ensure the smooth fund flow for the timely progress of the project and are always adjusted against the final bills and they cannot be made the sole basis to make a claim for payment. There is no admitted liability and serious disputes exist between the Tristar Wens JV and the Corporate Debtor with regard to the quantity and quality of work under the Sub-Contract Agreement, hence, the Petition is liable to be dismissed.

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8. The Operational Creditor filed rejoinder, denying the contents of the counter. Tristar Wens JV was formed, by virtue of the deed of partnership dated 21.04.2014 which had partners namely, Tristar Global Infrastructure Private Limited (herein referred to as "Tristar") and Wens Industries Limited (herein referred to as "Wens Industries") and the word "JV" was just added for the name sake and it had nothing to do with the nature or type of the partnership firm and the partnership deed does not mention about forming a joint venture. The Retirement Deed made on 05.11.2014 was withdrawn retrospectively w.e.f. 24.12.2014. Thereafter, a new Retirement Deed 15.01.2015 was executed to give effect to the retirement of one of the partners of Tristar Wens JV namely, "Tristar Global Infrastructure Private Limited". The said Retirement Deed was for retirement of one of the partners rather than for dissolution of the Partnership Firm and the same was informed to the Corporate Debtor vide email dated 27.09.2016. As per Clause 17.1 of the Deed of Partnership dated 21.04.2014 the retirement of any partner shall have no effect upon working and continuance of the partnership business. Clause 6 of the said Retirement Deed states that **the continuing partner hereby shall be at the liberty to continue the business in the name of either as a sole proprietorship (division of Wens Industries Limited) or in partnership with other**.

9. The continuing partner was Wens Industries Limited. After the retirement of the Tristar Global Infrastructures Private Limited from the Partnership Firm, Tristar Wens JV was operated and carried its business under the supervision of Wens Industries Limited. Wens Industries Limited was converted into Private Limited Company on 16.11.2015 and later, the name of Wens Industries Limited was changed to Wens Industries Private Limited. On 07.09.2016, a new Deed of Partnership was executed between Wens Industries Private Limited and Mr.Guninder Sing Datta. On 01.04.2018, a modified Deed of Partnership was executed wherein Wens Industries Private Limited retired and a new partner i.e., Wens Infra Projects Private Limited was admitted into the Partnership Firm. On 01.12.2018, another modified Deed of Partnership was executed for changing the existing name of the Partnership Firm from Tristar Wens JV to Wens Infra Projects. Hence, it is incorrect to state that the Operational Creditor was never in the picture. The Corporate Debtor was informed long time back regarding the retirement by way of an email dated 27.09.2016. With regard to the email dated 11.08.2016, it is stated that it was sent by one Sri Sameer Vasu Deva (Group Managing Director of Tristar Group) to the Corporate Debtor to hold the payment of Tristar Wens JV. After retirement of Tristar Global Infrastructure Private Limited from the partnership, no representative of Tristar Group had any say in functioning and business operations of Tristar Wens JV/Operational Creditor. With respect to recission of the

Sub-Contract Agreement by the Corporate Debtor on 10.11.2016, the Applicant has never received any kind of communication in that regard. The intimation with respect to the leakages was given by the Corporate Debtor only after the issuance of the demand notice, which is only an aftermath of the Corporate Debtor, as there was no information of any leakage throughout the previous year. It is well settled principle of law that existence of dispute must be pre-existing. The Corporate Debtor also issued a completion certificate mentioning that the quality of work is satisfactory. There was no intimation regarding the debit note.

10. Heard both the Counsel and perused the written submissions filed by either side. The important contention raised on behalf of the Corporate Debtor is that there is no privity of contract between the Operational Creditor M/s.Wens Infra Projects and the Corporate Debtor since, it is formed after the retirement of the partner from the earlier partnership i.e., Tristar Wens JV Partnership. There is no denial of the fact that Tristar Wens JV partnership was dissolved after the retirement of one of the partners and Wens Infra Projects came to be formed as a new partnership. The contention is that the Corporate Debtor was never informed about the said new partnership and there is no privity of contract between itself and Wens Infra Projects and hence, no claim can be laid by M/s.Wens Infra Projects with regard to the works done by the earlier partnership. But from the pleadings of the Corporate Debtor itself

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it can be understood that an email was sent from Tristar Managing Director asking the Corporate Debtor to stop payment to Tristar Wens JV. The said email is given by one Sameer Vasu Dev. From the said email it can be not only be understood that due to the disturbances in the partnership, the said notice had to be given, but also that there were dues from the corporate debtor to the earlier partnership firm. Whether the flaws in the partnership can disentitle the Operational Creditor which had admittedly rendered services to the Corporate Debtor from recovering the dues has to be looked into.

11. Section 3 Clause 11 defines debt as meaning a liability or obligation in respect of a claim which is due from any person and includes the financial debt and operational debt. Person, as defined under Section 3(23) includes an individual and a partnership, apart from others mentioned thereunder. The law that is well settled with regard to unregistered partnership firm is that even an unregistered partnership can file an application under the IBC. The objective of IBC is to maximize the value of assets of the Corporate Debtor which might be a corporate person, partnership firm or an individual, in a time bound manner. Section 6 of the Code provides for persons who may initiate the Corporate Insolvency Resolution Process under IBC. It states that on occurrence of default an application can be made to the NCLT under Section 7, 9 or 10 by the Financial Creditor, Operational Creditor or the Corporate

Debtor itself respectively. The question whether an unregistered firm can file an application under Section 9 came up for consideration in several cases. Section 69(2) of Indian Partnership Act, 1932 on which the Counsel for Corporate Debtor relies on, runs as follows:

> *"No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."'*

12. The NCLT, in the case of *M/s. Shree Dev Chemicals Corporation Vs. Gammon India Limited CP (IB) No.3637/MB.IV/2018,* affirmatively answered the above question and stated that the unregistered partnership firm will have a right to file an application under Section 9 of the Code and it was further stated that Section 69(2) of the Indian Partnership Act, 1932 applies only to suit and not to proceedings. Thus, the bar will not apply to the applications filed under IBC, as they are in the nature of proceedings and not suits.

13. In a case of *M/s.NN Enterprises Vs. Relcon Infra Projects Limited CP (IB) 3980/MB/C-IV/2018 the NCLT Bench Mumbai* considered this issue. The Corporate Debtor therein argued on two grounds firstly that since the term partnership firm under Section 3(23) of the code, which defines person, essentially includes registered partnership firm, thus, the application filed by the Operational

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Creditor under Section 9 cannot be accepted and secondly that the application by the unregistered partnership firm would be barred under Section 69(2) of the Indian Partnership Act, 1932. The Operational Creditor therein referred to a judgment of the Calcutta High Court in the case of *Shree Balaji Steels Vs. Gontermann-Peipers (India) Limited 1 (2002) SCC OnLine Cal 821*, wherein it was held that an application under Section 9 will not be called as a suit. The judgment of Supreme Court in *Gaurav Hargovindbhai Dave Vs Asset Reconstruction Company Civil Appeal No.4952 of 2019* was also relied upon by the NCLT, wherein it was held that an application under Section 7 of Code would fall within the domain of Article 137 of the Limitation Act 1963 rather than Article 62 by virtue of it being an application and not a suit. Similarly Supreme Court in *Sagar Sharma Vs. Phoenix Arc Private Limited in Civil Appeal No.7673 of 2019* held that the applications under IBC are petitions and not suits. Hence, the above judgments would suffice to answer the contentions raised by the Corporate Debtor that Section 69(2) of the Partnership Act does not come in the way of maintaining this application before IBC. However, the Partnership Deed in this case is not an unregistered Partnership Deed. But, what can be understood from the reasoning reflected in the above judgments is that the technicalities which apply to suits would not apply to proceedings and that the petitions under IBC are not suits but are proceedings. The contention is that there is no privity of contract. The dissolution of the partnership and the

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constitution of the partnership is an internal affair of the partners. The only test, to admit the application is to see whether the Corporate Debtor has utilized the services of the Operational Creditor and whether it has acknowledged the debt and whether it fell due in discharge of the said debt .The corporate debtor abided by the instructions to stop payment to the earlier partnership, which goes to show the due. Even after the formation of new partnership with Wens Infra Projects there is a correspondence between the Corporate Debtor and the new partnership. An email dated 21.02.2019 confirms Rs.1,34,28,808/- as the amount due. However, it is addressed to Tristar Wens JV. But on the same day a letter of confirmation was given to Wens Infra Projects, which would undoubtedly show that the Corporate Debtor continued to utilize the services of the newly constituted partnership under the name of Wens Infra Projects. Hence, there need not be any demur in concluding that the Corporate Debtor is liable for the payments which are due towards the services rendered by the Operational Creditor.

14. The contention that the services rendered by the Operational Creditor are defective and that they have raised a debit note does not stand to merit, in the light of two things. One being the issuance of the completion certificate dated 21.06.2017. The said certificate is to the effect that Tristar Wens JV has executed the works as per the details mentioned therein and the appreciation for their performance was placed on record. It is also mentioned that the

Sd/-

Corporate Debtor does not have any hesitation to recommend them for execution of similar type of works. In the light of such unambiguous and categorical certificate the contention raised that the certificate was issued upon request from Tristar Wens JV for their future works does not stand to merit. Secondly, the dispute raised with regard to the leakages in certain blocks cannot be considered as a pre-existing dispute since, the same is not raised till issuance of the demand notice. Any issue raised after the issuance of the demand notice cannot qualify for a pre-existing dispute. On a similar set of facts the NCLAT Delhi, in a case between Amit Wadhwani and M/s Global Advertisers in Company Appeal (AT) (Insolvency) 616/2021, observed that till issuance of completion certificate, no dispute was raised and rejected the plea of pre-existing dispute. The Corporate Debtor after receiving the demand notice did not issue any reply notice. The demand notice was issued on 04.03.2019 and it was received on 07.03.2019 only an email was sent, mentioning about the leakages and no reply notice otherwise was issued. Be that as it may, as already observed, there is a Completion Certificate issued in clear terms which disentitles the Corporate Debtor to raise a dispute later. The remedy for the Corporate Debtor lies elsewhere but not in seeking for dismissal of this Application. It appears that the CD only seeks to scuttle its liability by attempting to frustrate the petition by making bare denials devoid of any merit. Hence, in view of the above, the Company Petition Admitted.

ORDER

The Company Petition is admitted. The Corporate Insolvency Resolution Process of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence.

i. **Mr. SRINIVAS GUDLA RAO,** (Registration No. IBBI/IPA-001/IP-P-02093/2020-2021/13333), having office at 6-20-20/3, Flat No.201, Aqua Towers, East Point Colony, Back Gate Chaitanya College, Visakhapatnam, Andhra Pradesh - 530017; e-mail: **gudlasrinivasrao@gmail.com**; Mobile:**8885524036**, is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending against him as per the IBBI website.

ii. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.

iii. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.

iv. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under

section 19 of the Code for effectively discharging his functions under the Code.

v. The Registry shall communicate the order to the Operational Creditor and the Corporate Debtor forthwith.

vi. The Operational Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

Sd/-

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu