



IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH-VI
RCP (IB) No.03/MB/2025

[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:

CAPACITE INFRAPROJECTS LIMITED

[CIN: L45400MH2012PLC234318

605-607, Shrikant Chambers

6th Floor, Phase- I, Adjacent to R.K. Studios

Sion-Trombay Road, Mumbai-400071

Maharashtra.

...Operational Creditor

Vs.

RADIUS SUMER DEVELOPERS PRIVATE LIMITED

[CIN: U45400MH2014PTC259274]

ONE BKC, A Wing 1401, Plot No. C-66

G Block, Bandra Kurla Complex, Bandra (East)

Mumbai-400051

Maharashtra.

...Corporate Debtor

Pronounced: 18.03.2025

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances : Hybrid

Operational Creditor : Adv. Pulkit Sharma, Adv. Siddha
Pamecha, Adv. Rukshin Guiara
i/b Mulla Associates..

Corporate Debtor : None Present.



ORDER***[PER: SANJIV DUTT, MEMBER (TECHNICAL)]*****1. BACKGROUND**

- 1.1 This is a Restored Application bearing R.C.P. (IB) No.03/MB/2025, filed on 21.01.2025, connected to C.P. (IB) No.1159/MB/2022 (Original Application). The Original Application was filed by Capacite Infraprojects Limited, the Operational Creditor, on 12.10.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”), read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as “the AAA Rules”) through its Legal Head and Authorised Representative, Mr. Vaibhav Kapoor for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Radius Sumer Developers Private Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is a focused EPC (Engineering, Procurement and Construction) company that provides end-to-end construction services for high-rise residential, commercial and institutional buildings. The Corporate Debtor is engaged in the business of development of real estate projects.
- 1.3 As per Part-IV of the Original Application, the Corporate Debtor was liable to pay the Operational Creditor a total outstanding debt of Rs.10,65,04,291/- (Ten Crore Sixty-Five Lakh Four Thousand Two Hundred Ninety-One Rupees). This amount included the principal sum of Rs.6,20,13,646/- (inclusive of GST), the cost of site establishment amounting to Rs.1,26,66,342/-, recoverable TDS of Rs.18,90,133/- and interest of Rs. 2,97,89,097/-, calculated at 15% per annum until 10.09.2022, with further interest @15% p.a accruing until full realisation. The claim pertains



to construction work carried out by the Operational Creditor at the project site of the Corporate Debtor during the period of September, 2018 to April, 2019.

1.4 Despite repeated acknowledgements of operational debt owed to the Operational Creditor and entering into Settlement Agreements dated 10.05.2019, 17.10.2023, 15.02.2024 and 11.11.2024 with the Operational Creditor, the Corporate Debtor has been violating the terms of successive settlement agreements and defaulting in its payment obligations as per agreed terms. Hence, the Operational Creditor has preferred the Restored Application seeking initiation of CIRP in respect of the Corporate Debtor.

2. AVERMENTS OF OPERATIONAL CREDITOR

2.1 In September 2018, the Corporate Debtor issued a Letter of Intent to the Operational Creditor for certain civil construction works to be executed for a residential project known as "Harbour Heights". Subsequently, on 20.10.2018, the parties entered into an Articles of Agreement (Work Order) to crystallise the contractual terms.

2.2 In furtherance of the Letter of Intent and the Articles of Agreement, the Operational Creditor mobilised its equipment, machinery and manpower at the "Harbour Heights" project site and commenced the construction work. Pursuant to the completion of work in milestones, the Operational Creditor raised Running Bills from time to time. While the Corporate Debtor certified several invoices, it failed to clear the dues owed to the Operational Creditor.

2.3 As on date of filing Original Application, 5 (five) Running Account Bills remained due and outstanding. Initially, the Corporate Debtor acknowledged the debt and issued several post-dated cheques (PDCs) to the Operational Creditor. However,



soon after issuing the cheques, the Corporate Debtor requested the Operational Creditor not to encash them.

- 2.4 The debt owed by the Corporate Debtor was admitted and acknowledged through a Settlement Agreement dated 10.05.2019, wherein the Corporate Debtor admitted that as on the said date, it owed a sum of Rs.7,70,13,647/- to the Operational Creditor and agreed to issue five (5) PDCs in this regard. As per the terms of the agreement, the said amount was to be paid by 10.07.2019.
- 2.5 On 06.06.2019, a payment of Rs. 1,50,00,000/- was released to the Operational Creditor. However, no further payments were made thereafter, resulting in the Corporate Debtor's default. When approached by the Operational Creditor, the Corporate Debtor, considering the longstanding business relationship, sought accommodation. On 21.06.2019, the Operational Creditor, through an email, requested resolution of the outstanding debt. On the same day, the Corporate Debtor responded by email, stating that *"I am hopeful to clear some dues shortly."*
- 2.6 As the default on the part of the Corporate Debtor persisted, a Supplemental Agreement dated 25.09.2019 was executed, wherein the Corporate Debtor once again admitted and acknowledged its liability. Under this agreement, the Corporate Debtor agreed to clear the outstanding dues through fresh cheques. However, while the cheques were issued, the Corporate Debtor once again requested the Operational Creditor to defer depositing the same. Therefore, the Operational Creditor was yet again left without the monies which were admittedly due and payable to it.
- 2.7 To rectify its breach and discharge its liability, the Corporate Debtor executed a Second Supplemental Agreement dated 24.01.2020 with the Operational



Creditor. The Corporate Debtor once again admitted that it owed monies to the Operational Creditor and acknowledged that the mere handover of cheques would not absolve its liability. However, this time, instead of issuing PDCs, the Corporate Debtor handed over undated cheques, issued with the intent to beguile and to somehow restrain the Operational Creditor from initiating legal proceedings against the Corporate Debtor.

2.8 A month later, a nationwide lockdown was imposed due to the outbreak of the COVID-19 pandemic, bringing all economic activities to a standstill. However, the Corporate Debtor's default continued. After the lockdown was eased, the Corporate Debtor issued two Allotment Letters dated 20.08.2020 to the Operational Creditor, offering to transfer two flats in the "Harbour Heights" Project in lieu of the outstanding dues. In light of this assurance, the Operational Creditor decided to wait for the actual transfer of the flats. However, as the Corporate Debtor failed to fulfill its commitment, the Operational Creditor was constrained to issue a First Demand Notice dated 10.11.2020 under Section 8(1) of the Code. Further, the Operational Creditor filed a Commercial Arbitration Petition (bearing No.513/2021) before the Hon'ble Bombay High Court, seeking attachment of the Corporate Debtor's assets.

2.9 However, due to the second wave of the COVID-19 pandemic, the normal functioning of the Hon'ble High Court was disrupted and a strict lockdown was imposed in the State of Maharashtra. Once the lockdown was gradually eased, a representative of the Corporate Debtor once again assured the Operational Creditor that the flats would be transferred in fulfillment of the promise made through the Allotment Letters dated 20.08.2020. Based on this assurance, the



Operational Creditor once again refrained from taking legal action. However, till date, no Agreement for Sale has been executed in favour of the Operational Creditor in respect of the flats mentioned in the Allotment Letters.

2.10 As a last-ditch attempt, the Operational Creditor issued a Letter dated 04.04.2022, calling upon the Corporate Debtor to execute the Agreement for Sale within seven (7) days. In response, the Corporate Debtor, *vide* Letter dated 26.04.2022, acknowledged the outstanding debt and assured that "*in case of failure to execute the Agreement for Sale, the outstanding amount shall be paid by 30.06.2022.*" In light of this assurance, the Operational Creditor withdrew Commercial Arbitration Proceedings with liberty to file afresh, as recorded in the Order dated 21.06.2022, passed by the Hon'ble Bombay High Court. However, the Corporate Debtor failed to execute and register the Agreement for Sale and also failed to discharge the operational debt by 30.06.2022.

2.11 In view of the aforementioned facts and several admissions of liability on part of the Corporate Debtor, the Operational Creditor issued a Demand Notice dated 05.08.2022 under Section 8(1) of the Code. Despite receipt of the notice, the Corporate Debtor failed and/or refused to reply or make the payment. This led to the filing of the Original Application on 12.10.2022.

2.12 The Original Application bearing C.P. (IB) No. 1159/MB/2022, was withdrawn on 25.10.2023 following a Settlement Agreement between the parties, with liberty to revive the Application in case of default in complying with any of the terms of the agreement. However, the Corporate Debtor subsequently defaulted on its repayment obligations as per the Settlement Agreement. As a result, the Operational Creditor filed Restoration Application No. 63/2024 on 26.06.2024.



2.13 During the pendency of the Restoration Application, 50% of the shareholders of the Corporate Debtor, initiated amicable settlement discussions on behalf of the Corporate Debtor. This was recorded in the Tribunal's order dated 09.10.2024, wherein it was stated that 50% Shareholder of the Corporate Debtor made an initial payment of Rs. 2.5 Crore to the Operational Creditor. Subsequently, on 14.11.2024, this Tribunal acknowledged the Settlement Agreement and disposed of the matter as settled. However, 50% Shareholder of the Corporate Debtor, willfully defaulted on their obligations to pay the remaining debt. Consequently, on 13.01.2025, the Operational Creditor mentioned the matter, seeking the listing of the Restoration Application. The Application was subsequently listed for hearing and was allowed by this Tribunal *vide* its Daily Order dated 16.01.2025. Accordingly, C.P. (IB)/1159/2022 was restored and renumbered as R.C.P. (IB) No. 03/2025.

3. **CONTENTIONS OF CORPORATE DEBTOR**

3.1 This Bench takes note of its Daily Order dated 14.11.2024, earlier in Restoration Application bearing RST.A/63(MB)2024 filed by the Operational Creditor seeking restoration and revival of the main Application bearing CP (IB) No.1159/MB/2022 which was earlier disposed of as withdrawn *vide* Daily Order dated 25.10.2023 with liberty to the Operational Creditor to revive the same in the event of failure of any of the Consent Terms on the ground of settlement. Pursuant to the said Restoration Application, this Bench, *vide* its Daily Order dated 16.01.2025, allowed the restoration of the Company Petition since the Corporate Debtor had violated the consent terms. The Corporate Debtor appeared on 16.01.2025 and sought time for filing reply/hearing.



3.2 However, when the matter was listed for final hearing on 22.01.2025, the Corporate Debtor neither appeared nor filed its reply, despite sufficient opportunity being granted. Consequently, this Bench on 22.01.2025, forfeited the right of the Corporate Debtor to file a reply and the matter was heard on merits based on the materials available on record.

4. **ANALYSIS AND FINDINGS**

4.1 Upon due consideration of the pleadings along with the materials available on record and hearing the Ld. Counsel for the Operational Creditor, our findings are as under:-

4.2 It is observed from the record that the Operational Creditor has claimed a total debt of Rs.10,65,04,291/- in Part-IV of the Application inclusive of site establishment expenses, recoverable TDS and interest at the rate of 15% per annum till 10.09.2022. It is an undisputed fact that the debt in question arises from the provision of construction services rendered by the Operational Creditor to the Corporate Debtor, which squarely falls within the definition of 'operational debt' under Section 5(21) of the Code.

4.3 The said services were provided during the period September, 2018 to April, 19 pursuant to the Articles of Agreement/Work Order dated 20.10.2018. The Operational Creditor has placed on record supporting documents, including the Letter of Intent dated 07.09.2018, Articles of Agreement dated 20.10.2018, unpaid invoices and certified running bills, along with Settlement/Supplemental Agreements, wherein the Corporate Debtor has acknowledged the Demand Notice dated 10.11.2020 and 05.08.2022 and admitted the debt and default.

4.4 It is further observed that the initial default occurred on 10.05.2019, considering the last certified bill dated 30.04.2019, as per Clause 7 (Commercial Terms and



Conditions) of the Work Order, which mandated payment within 10 days from the submission of the final bill. However, instead of discharging its payment obligations, the Corporate Debtor entered into a Settlement Agreement dated 10.05.2019 with the Operational Creditor.

4.5 Upon perusal of the Settlement Agreement dated 10.05.2019, it is evident that the Corporate Debtor acknowledged the debt of Rs.7,70,13,647/- owed to the Operational Creditor and issued six (6) PDCs towards settlement. However, it is noticed that out of the total admitted debt, only Rs. 1,50,00,000/- was paid to the Operational Creditor, as evident from the ICICI Bank statement of the Operational Creditor, with no further payments being made. Subsequently, a Supplemental Settlement Agreement dated 25.09.2019 was executed, wherein fresh cheques were issued by the Corporate Debtor. However, even after admitting the debt and default, the Corporate Debtor once again defaulted in making payment. In an attempt to rectify the breach, a Second Supplemental Settlement Agreement dated 24.01.2020 was executed, wherein undated cheques were issued by the Corporate Debtor. However, the Corporate Debtor again failed to clear the dues as per the said agreement. We find that the Original Application was filed on 19.10.2022, which is well within the limitation period, considering the Corporate Debtor's continuous acknowledgment of debt.

4.6 It is also noted from the record that the Operational Creditor issued Demand Notice under Section 8(1) of the Code to the Corporate Debtor on 05.08.2022 which was duly served on the Corporate Debtor on 08.08.2022. Not to speak of making payment of outstanding dues to the Operational Creditor, the Corporate Debtor did not even respond to the said Demand Notice.



- 4.7 It is also observed from the record that during the pendency of the Original Application, the Corporate Debtor made several attempts to settle the debt through various Settlement Agreements dated 17.10.2023; 16.02.2024 and 11.11.2024; all of which failed due to the Corporate Debtor's repeated breach of commitments. At this stage, we are primarily concerned with the Settlement Agreement dated 11.11.2024, wherein the Corporate Debtor admitted an outstanding debt of Rs.9,59,57,229/-, with payment agreed to be made in two tranches: the first tranche by 31.12.2024 and the second by 28.02.2025. However, the Corporate Debtor once again violated the terms of the Settlement Agreement. Accordingly, after adjusting Rs.2.5 Crore already paid on 18.10.2024, the remaining amount is still outstanding, as evidenced by the Settlement Agreement. Clause 'E' of the Settlement Agreement makes it clear that in the event the Corporate Debtor fails to perform its obligations under this Agreement, the Operational Creditor shall be at liberty to revive/restore the Original or Main Application bearing CP (IB) No.1159 of 2022 against the Corporate Debtor.
- 4.8 It is well settled that the mere fact of entering into settlement Agreement would neither wipe out the right of the Operational Creditor nor change the nature and character of the operational debt. A breach of the Consent Terms on the part of the Corporate Debtor would not extinguish the operational debt. The breach of terms of the agreement is such a case would amount to a default of the operational debt owed to the Operational Creditor. Any contrary interpretation would provide undue advantage to the Corporate Debtor and frustrate the objective of the Code.
- 4.9 From the above discussion, we find that in view of the express admission the Corporate Debtor is patently in default of and acknowledgement of liability in multiple



Settlement Agreements, operational debt exceeding One Crore Rupees due and payable to the Operational Creditor but which has not been paid till date. We also find that no pre-existing dispute has been brought out by the Corporate Debtor. The Operational Creditor has filed a general Affidavit dated 10.10.2022, affirming that no dispute was raised by the Corporate Debtor. In light of the aforesaid findings, we are satisfied that the requisite conditions under Section 9(5)(i) of the Code are met, and the Original or Main Application is fit for admission.

4.10 A perusal of Part-III of Form-5 reveals that while the Operational Creditor initially did not propose an Interim Resolution Professional (IRP), it subsequently proposed Mr. Bharat Ramakant Upadhyay as IRP and filed Form-2 dated 22.01.2025, wherein it is certified that no disciplinary proceedings are pending against him.

ORDER

In view of the aforesaid findings, this Application bearing R.C.P.(IB) No.03/MB/2025 connected to C.P.(IB) No. 1159/MB/2022 filed under Section 9 of the Code by Capacite Infraprojects Limited, the Operational Creditor, for initiating CIRP in respect of Radius Sumer Developers Private Limited., the Corporate Debtor is **admitted**.

We further declare moratorium under Section 14 of Code with consequential directions as follows:

I We prohibit-

- a) the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment,



- decree or order in any court of law, tribunal, arbitration panel or other authority;
- b) transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - c) any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act, 2002;
 - d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- II That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under sub-section (1) of section 31 of the Code or passes an order for the liquidation of the Corporate Debtor under section 33 of the Code, as the case may be.
- III Notwithstanding the above, during the period of moratorium: -
- (a) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
 - (b) That the provisions of sub-section (1) of section 14 of the Code shall not apply to
 - i. such transactions as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
 - ii. A surety in a contract of guarantee to a corporate debtor.



- IV That the public announcement of the CIRP shall be made in immediately as specified under Section 13 of the Code read with Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other Rules and Regulations made thereunder.
- V That this Bench hereby appoints **Mr. Bharat Ramakant Upadhyaya** registered Insolvency Professional having Registration Number **IBBI/IPA-002/IP-N00120/2017-2018/10289** and e-mail address **brupadhyay@hotmail.com** having valid Authorisation for Assignment up to 31.12.2025 as the IRP to carry out the functions under the Code.
- VI That the fee payable to IRP/RP shall be in accordance with such Regulations/Circulars/ Directions as may be issued by the IBBI.
- VII That during the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the case may be, of the Code. The officers and managers of the Corporate Debtor is directed to provide effective assistance to the IRP as and when he takes charge of the assets and management of the Corporate Debtor. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP within a period of one week from the date of receipt of this Order and shall not commit any offence punishable under Chapter VII of Part II of the Code. Coercive steps will follow against them under the provisions of the Code read with Rule 11 of the NCLT Rules for any violation of law.



- VIII That the IRP/IP shall submit to this Tribunal periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- IX In exercise of the powers under Rule 11 of the NCLT Rules, 2016, the Operational Creditor is directed to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost arising out of issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the Operational Creditor on priority upon the funds available with IRP/RP from the Committee of Creditors (CoC). The expenses incurred by IRP out of this fund are subject to approval by the CoC.
- X A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.
- XI The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the IRP including by way of email and WhatsApp.
- XII Besides, a copy of this order shall also be forwarded by the Registry of this Tribunal to the IBBI for their record.
- XIII **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

**SANJIV DUTT
MEMBER (TECHNICAL)**

//LRA-Deepa//

Sd/-

**K. R. SAJI KUMAR
MEMBER (JUDICIAL)**