

SL. No.4

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

PHYSICAL HEARING

**CORAM: SHRI. RAJEEV BHARDWAJ – HON’BLE MEMBER (J)
CORAM: SHRI. SANJAY PURI - HON’BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 07.12.2023, At 10:30 AM**

| | |
|---|--|
| TRANSFER PETITION NO. | |
| COMPANY PETITION/APPLICATION NO. | Company Petition IB/180/2022 |
| NAME OF THE COMPANY | Telangana State Rajiv Swagruha Corporation Ltd |
| NAME OF THE PETITIONER(S) | K Lakshma Reddi |
| NAME OF THE RESPONDENT(S) | Telangana State Rajiv Swagruha Corporation Ltd |
| UNDER SECTION | 9 of IBC |

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this Petition is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – II**

CP No.180/9/HDB/2022

[Section 9 of the Insolvency and Bankruptcy Code, 2016]

In the matter of :

M/s.K.Lakshma Reddy,
Contractor,
H.No.3-10-212,
Reddy Colony,
Hanamkonda – 506 001.

....Operational Creditor/Petitioner

AND

M/s.Telangana State Rajiv Swagruha Corporation Limited,
7th Floor, West Wing, Gaganvihar,
M.J.Road, Nampally,
Opp: Gandhi Bhavan,
Hyderabad – 500 029
Telangana.

.....Corporate Debtor/Respondent

Counsel/Parties present:

For the Petitioner : Mr.S.V.Akarsh, Advocate

For the Respondent : Mr.Ganesh Pratapaneni, Advocate

Date of Order: 07.12.2023

Coram:

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)
Sri Sanjay Puri, Hon'ble Member (Technical)

Heard on : 09.11.2023

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. The application under Section 9 of the IBC has been filed by Mr.K.Lakshma Reddy, (hereinafter referred as operational creditor/applicant) for initiating Corporate Insolvency Resolution Process (CIRP) against M/s.Telangana State Rajiv Swagruha Corporation (hereinafter referred as corporate debtor/respondent).
2. The facts necessary to dispose of this application, as stated, are that:
 - 2.1 M/s.Andhra Pradesh Rajiv Swagruha Corporation Limited which is now M/s. Telangana State Rajiv Swagruha Corporation Limited had invited tenders for the construction of 57 Intrinsic (B-Type) Duplex Houses (in 200 square yards) (east facing – 27 Nos. & west facing – 30 Nos) including infrastructure facilities for “Akshaya” colony at Kundanpally (V), Ramagundam (M) in Karimnagar District under Rajiv Swagruha Scheme (Package II). The operational creditor, who is a contractor, also participated in the bidding process and being the highest bidder, the tender was awarded to him. Accordingly, both the parties entered into an agreement **Annexure A- page Nos.192**, dated **29.10.2009** (hereinafter referred as Original Agreement)
 - 2.2 In consequence of the contract, the operational creditor arranged the material etc. to complete the project within the time line, but the work could not be started as the forest department claimed ownership and possession of the land in question. Ultimately, the possession of the land was handed over to the operational creditor on 21.08.2009 vide **Annexure B – page No.193** and the joint inspection report is **Annexure C – page Nos.194-195, dated 29.07.2009**.
 - 2.3 For the construction work, the operation creditor had submitted the first bill in the month of December, 2011. Both the parties entered into supplementary agreement on 28.02.2011 **Annexure E – page Nos. 197-226, dated 28.02.2011** (hereinafter referred to as Agreement No.2) for the construction of Entrance Gateway to Akshaya gated community and the conditions of the original agreement were adopted verbatim.

- 2.4 Subsequently, another supplementary agreement **Annexure F – page Nos. 227-331, dated 05.03.2011** (hereinafter referred as Agreement No.3) was executed by both the parties, thereby the original construction of 57 Intrinsic (B-Type) Duplex Houses (in 200 sq yards) (east facing – 27 Nos. & west facing – 30 Nos) including infrastructure facilities for “Akshaya” colony at Kundanpally (V), Ramagundam (M) in Karimnagar District under Rajiv Swagruha Scheme (Package II) was revised to construction of 21 "intrinsic" (B-type) Duplex Houses (200 sq. yds. each) with reduced approx. value of work at INR 2,26,60,953/- and an additional work of construction of 42 "basic" Duplex Houses (150 sq. yds, each) and 21 "civic" independent houses (100 sq. yds. each) with approx. value of work at Rs.3,86,05,812/-, thereby revising the total approx. value of work to Rs.6,12,66,765/-.
- 2.5 After the agreement No.3, the operational creditor started the work and in the meanwhile raised another bill. The corporate debtor paid 1/3rd of the first bill that was raised on 20.03.2021. Due to the delay on the part of the corporate debtor in completing the project, the prices skyrocketed, but the standard schedule of rates (SSR) were not revised in accordance with GO Ms.No.35 dated 30.01.2009.
- 2.6 Due to the financial crunch, the corporate debtor wrote a letter to the erstwhile Government of Andhra Pradesh and consequently, some relaxations were granted to the corporate debtor and the loan of Rs.105 crores was sanctioned.
- 2.7 Another supplementary agreement **Annexure L – page Nos. 344—350, dated 13.12.2013** (hereinafter referred as Agreement No.4) was executed between the parties for the supply, erection, testing and commissioning and maintenance of transformers, HT & LT cables, panels etc., for external use of Akshaya Township at Ramagundam (V&M), Karimnagar District.
3. Meanwhile, State of Andhra Pradesh was bifurcated into Telangana State and Andhra Pradesh State. Thereafter, corporate debtor issued a letter in October, 2014 to Secretary to Government, Telangana State Housing Department, Hyderabad seeking issuance of suitable orders, duly empowering the Corporation to implement GO Ms.No,35 dated 30.01.2009.

4. When nothing had happened, the operational creditor submitted a representation dated 02.12.2014 to the Chief Minister stating all the facts. As a result, the bill of corporate debtor was directed to be examined for due payment.
- 4.1 As things stood thus, another supplementary agreement **Annexure O- Page Nos. 361-373 dated 20.06.2015** (hereinafter referred as Agreement No.5) was executed between the parties by duly adopting the terms and conditions of the original agreement dated 29.10.2009.
- 4.2 In view of supplementary agreements executed by the parties incorporating the terms and conditions of the original agreement, it is claimed that time lines were also accordingly extended for the completion of the works and submission of the bills. Bills were kept pending even after completion of work by operational creditor in the month of September, 2015. The final bill was submitted by the corporate debtor in the month of July, 2017.
- 4.3 Despite several reminders to the corporate debtor for the clearance of the bills, the payment was not made by the corporate debtor. Being aggrieved, the corporate debtor issued a demand notice **Annexure P' dated 02.02.2022** and reply of the same is **Annexure R dated 08.03.2022**.
- 4.4 Cause of action is stated to have arisen on the dates when the original agreement and supplementary agreements were executed, further on the 56th day from the submission of final bills in July, 2017 and finally when the demand notice was issued on 02.02.2022.
- 4.5 Consequently, the corporate debtor is liable to pay an amount of Rs.1,56,43,692.41 towards principal amount and Rs.1,87,22,430.89 towards interest.
5. The respondent by filing reply has contested and contended the averments of the applicant by submitting that the entire payment has already been made and in fact a sum of Rs,2,43,800/- has been paid in excess, which is liable to be adjusted against the security deposit.

- 5.1 It is submitted that the said contracts in the nature of lumpsum contract, therefore the SSR are not applicable. The terms and conditions of the agreement are applicable to both the parties and the delay has also been caused because of operational creditor.
- 5.2 The corporate debtor has specifically referred to letters dated 26.10.2014, 02.12.2014, 19.01.2014 and 29.12.2016, wherein the operational creditor has made representation only to consider the request for further payments in the light of G.O. Ms.No.35 dated 30.01.2009.
- 5.3 The operational creditor has also not submitted the receipts despite receiving the entire amounts, but claiming further amount as payments were also made to the other contractors on the basis of G.O. Ms.No.35 dated 30.01.2009. It is submitted that this stand is not relevant in view of the agreement between the parties.
- 5.4 It is claimed that the operational creditor has been fully paid in view of Clause 46.1 of the agreement and he cannot claim any relief on the basis of G.O. Ms.No.35 dated 30.01.2009, which claim is also hopelessly time barred.
- 5.5 Even in the supplementary agreements, there is no clause for price escalation as per the G.O. Ms.No.35 dated 30.01.2009 except as per clause 46.1. Notwithstanding this, entire payment has already been made and therefore nothing is due from the corporate debtor.
- 5.6 It is alleged that the operational creditor has executed the work with defects which were yet to be removed.
- 5.7 Thus, it is submitted that the present application has moved only to circumvent the law. The claim made by the operational creditor is not a debt within Section 3(11) of the IBC. Mere claim to an uncrystallised sum does not amount to a debt. The last bill was submitted on 04.09.2014 and representation to consider further payments does not amount to crystallized debt and it will also not extend the limitation period.
6. We have heard both the counsels and have also gone through the entire records.

7. M/s.A.P.Rajiv Swagruha Corporation Ltd. which was changed to M/s.Telangana State Rajiv Swagruha Corporation Ltd. after bifurcation of the State of Andhra Pradesh, has entered into an agreement dated 29.10.2009 with Mr. K. Lakshma Reddy for the construction of 57 intrinsic (B-Type) Duplex Houses (in 200 sq. yds.) (East Facing – 27 Nos. & West Facing – 30 Nos.) including infrastructure facilities for “Akshaya” Colony at Kundanpally (V), Ramagundam (M) in Karimnagar District under Rajiv Swagruha Scheme (Package II). **Annexure-A at pg. nos. 20-192 of the application.**
8. After execution of the Original Agreement, both the parties entered into four more Supplementary Agreements, the terms and conditions of these agreements were the same as of the Original Agreement. The description of the agreements, date of execution and purpose of the agreements are given below:

| S.No. | Description | Annexure/ Pg. Nos. | Date of Execution of the Agreement | Purpose |
|-------|-------------------------|-----------------------|---|---|
| 1. | Original Agreement | A /20-192 | 29.10.2009 | Construction of Houses etc. |
| 2. | Supplementary Agreement | E/197-226 | 28.02.2011 | Supplemental to Original Agreement – Entrance Gateway |
| 3. | Supplementary Agreement | F/227-331 | 05.03.2011 | Entrustment of additional works i.e. Basic & Civic Houses |
| 4. | Supplementary Agreement | L/344-350 | 13.12.2013 | External Electrification |
| 5. | Supplementary Agreement | O/361-373 | 20.06.2015 | For the construction |

9. As the terms and conditions of the Original Agreement remain unaltered, therefore date of execution of Supplementary Agreement No.5 is relevant i.e. 20.06.2015. The work to be done under the four Supplementary Agreements were so intermixed and interconnected with the Original Agreement that different dates cannot be fixed for the execution of all the agreements.

10. As per clause 24.1 of the terms and conditions of the Original Agreement, the contract was to be completed within 18 months from the date of entering into the agreement. In view of date of execution of the Supplementary Agreement i.e. dated 20.06.2015, the entire project should have been completed by 19.12.2016. The payment of the work is covered in Clause 42 and Clause 42.4.4 stipulates that no claim shall be entertained if the same is not represented in writing to the EE/General Manager within 15 days of its occurrence.
11. Connected with the date of Supplementary Agreement, there is also question of limitation. The applicant claims that the final bill was submitted by him in the month of July, 2017, while the case of the respondent is that the bill was submitted by the applicant on 04.09.2014 and the payment was accordingly made. When the date of the execution of the last agreement executed between the parties is seen i.e., 20.06.2015, the project was to be completed within 18 months from the said date i.e. before 20.12.2016. Thereafter, the bill has to be submitted within 56 days. Accordingly, the last date for submission of the bills was 14.02.2017 making the claim of the respondent unreliable that final bill was submitted on 04.09.2014.
12. It is settled law that Article 137 is applicable for filing petition under Section 9 of the IBC. Hence, the applicant was required to approach this Authority within three years from 14.02.2020. In view of the Hon'ble Supreme Court Order in *Suo Motu Writ Petition (C) No.3/2020*, the period from 15.03.2020 till 28.02.2022 is to be excluded for determining the limitation. The demand notice was given on 02.02.2022 and the present petition was filed in May, 2022. Accordingly, the present petition is within the limitation period.
13. Against the aforesaid background, Learned Counsel for the applicant has contended that the respondent has not made the entire payment, especially escalation in the prices because of delay in the project. In this regard, he has relied upon G.O.Ms.No.35, Transport, Roads & Buildings (R.I) Department, dated 30.01.2009 which provides that increase in price is entitled for all the items. These guidelines were adopted vide **Annexure-I, dated 08.07.2013**

by the State of Andhra Pradesh. Therefore, it is vehemently argued that the applicant is entitled for the enhancement.

14. Per contra, Learned Counsel for the respondent has submitted that excess payment has been paid to the applicant. As such, provisions of the IBC have been misused to pressurize the respondent to meet the illegal demands, but this forum cannot be misused for the alleged recovery.
15. In order to succeed in application under Section 9, the applicant is required to prove the following essentials:
 1. Whether there is an Operational Debt existing Rs.1.00 crore?
 2. Whether the documentary evidence shows that the debt is due and payable and has not been paid?
 3. Whether there is a pre-existence dispute between the parties?
16. An application under Section 9 of the Code, requires a 'strict proof' of 'Debt and Default'. Before filing an application, the operational creditor is required to meet the requirements of Section 8, meaning that operational creditor must first send a notice to the corporate debtor calling him to pay the debt and when the default has occurred. After receiving the notice, the corporate debtor is to respond to this demand notice within 10 days, and apprise the operational debtor of (a) either the payment of the debt or (b) the existence of a dispute, if any, with regards to the debt. If, on the expiry of the 10 days, the operational creditor does not receive (a) the payment or (b) the notice of a dispute by the corporate debtor, the operational creditor may file an application.
17. The operational creditor can send the demand notice either in Form 3 or Form 4 under Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Rule 5 provides the manner in which the demand notice under Section 8(1) has to be delivered. It provides:

4. Demand notice by operational creditor -- (1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.-

(a) demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form

18. Thus, an operational creditor can send the demand notice through two methods: (i) a demand notice in Form 3; or (ii) a copy of an invoice attached with a notice in Form 4.

19. It is clear that the applicability of Form 3 or Form 4 depends on whether the invoices were generated during the course of transaction or not. In case the demand notice is sent in Form 3, then the submission of a copy of the invoice along with the application in Form 5 is not a mandatory requirement, provided the documents to prove the existence of operational debt and the amount in default is attached with the application. Here we rely upon the decision in *Neeraj Jain Director of M/s Flipkart India Private Limited versus Cloudwalker Streaming Technologies Pvt. Ltd. [2020] ibclaw.in 221 NCLAT*.

20. Form 3 requires the operational creditor to provide the following information in relation to the operational debt:

| PARTICULARS OF OPERATIONAL DEBT | | |
|---------------------------------|---|--|
| 1 | TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE | |
| 2 | AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM) | |
| 3. | PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR. | |

| | | |
|----|---|--|
| | ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRATION OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY) | |
| 4. | DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS | |
| 5. | RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY) | |
| 6. | PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH DEBT HAS BECOME DUE | |
| 7. | LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT. | |

21. The applicant has sent the notice in Form 3, but he has failed to submit any documents to prove in existence of the operational debt and the date of default. Against column No.2, he has not given the date of default. Similarly, no document has been attached against column No. 7 in support of the operational debt except representation made to the government. The representation did not mention the date of sending it or who was the addressee, which will not meet the requirements of law that the debt must be supported by documents. The applicant has filed only synopsis of the details of the transaction in separate annexure attached with the demand notice, but no document supporting the debt has been attached. *In Kodeboyina Srinivas Krishna versus PVM Innvensys Pvt. Ltd. (2020) ibclaw.in 92 NCLAT*, it was held that the Demand Notice in Form 3 requires the date of default to be explicitly mentioned in the notice so that on the basis of documents the debt amount and the date of default could be ascertained. Hence, we think that the applicant failed to prove that legal notice was given to the respondent.
22. Now it is to be seen whether the whether the applicant is an operational creditor. For this, we need to analyze the definitions of operational creditor, operational debt, debt and claim defined in the IBC

Section 5(20)

“operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Section 5(21)

"operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

Section 3 (11)

"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Section 3(6)

"claim" means--

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

23. For an amount to be classified as an operational debt under the IBC, it is required to be proved:

Firstly, the amount should fall within the definition of ‘claim’ as defined under section 3(6) of the IBC;

Secondly, such a claim should be within the confines of a ‘debt’ as defined under section 3(11);

Thirdly, such a debt should fall strictly within the scope of an ‘Operational Debt’ as defined under section 5(21) of the IBC.

24. In view of Section 5(21), we can say that there are three types of operational creditors, namely: -

(i) Those who supplied goods and/or rendering services to the ‘corporate debtor’;

(ii) Employees of the ‘corporate debtor’; and

(iii) Who has to pay dues arising under any law for the time being in force and payable under the existing law to the Central Government or State Government or local authority.

25 It is in the context of definition of operational debt, the status of the applicant is to be determined. The applicant was to construct the flats for the respondent, therefore, it is clear that at least he does not fall either under clause (ii) or (iii).

26. As such, the applicant has to prove that claim regarding the construction of flats would fall either under the term ‘goods’ or ‘services’. Goods are physical, tangible articles, while Services are nonphysical and intangible in nature and can also satisfy a need like goods. Examples of services are like banking, telecom, courier, hotel, airline, multiplex, train, doctors, lawyers, healthcare. Goods can be used, stored, evaluated, taken home, or consumed.

27. Word ‘goods’ has not been defined under the IBC. However, this term has been defined under the Sale of Goods Act, 1930 as below:

Section 2

“In this Act, unless there is anything repugnant in the subject or context:

(7) “goods” means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.”

28. Similarly, the term “services” used in the definition of 5(21) has not been defined under the IBC. Services are intangible and value-added activities. The expression “services” as per Black Law Dictionary is “the act of doing something useful for a person or company, usually for a fees”. Another meaning as per the Dictionary is, “an intangible commodity in the form of human effort, such as labour, skill or advises”. Likewise, meaning of “Service Charge” as per the Dictionary is a charge accessed for performing a service. Here we may also refer to the decision in ***Sanjaya Kumar Ruia versus Magna Opus Hospitality Pvt. Ltd. [2017] ibclaw.in 08 NCLT.***

29. We may also profitably refer the decisions of the Hon'ble Apex Court in *Pioneer Urban Land and Infrastructure Ltd. versus Union of India (2019) 8 SCC 416*, wherein the term 'operational creditor' has been explained in the context of goods or services. It was held:

42. It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code. It was vehemently argued by the learned Counsel on behalf of the Petitioners that if at all real estate developers were to be brought within the clutches of the Code, being like operational debtors, at best they could have been brought in under this rubric and not as financial debtors. Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money--the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees. In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains from the time value of money. The fact that the allottee makes such payments in

instalments which are co-terminus with phases of completion of the real estate project does not any the less make such payments as payments involving "exchange" i.e. advances paid only in order to obtain a flat/apartment. What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project. One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information provided by the real estate developer compulsorily under RERA. This information, like the information from information utilities under the Code, makes it easy for homebuyers/allottees to approach NCLT Under Section 7 of the Code to trigger the Code on the real estate developer's own information given on its webpage as to delay in construction, etc. It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real estate developers as financial debtors. This being the case, it is clear that there cannot be said to be any infraction of equal protection of the laws.

30. In another decision in *Swiss Ribbons (P) Ltd. v. Union of India (2019) 4 SCC 17*, the constitutionality of certain provisions of the IBC was challenged, with the focus being on the difference of rights provided to the financial and operational creditors, when the interpretation of goods and services also arose. The Hon'ble Supreme Court held:

50. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. Also, financial creditors have specified repayment schedules,

and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code.

75. Since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, already quoted above, makes this abundantly clear.

31. In view of the elucidation of the terms 'goods' and 'services', it is to be decided whether the applicant can be considered as operational creditor. The applicant has constructed flats for the corporate debtor and the dispute is

about payment of dues for constructing flats. However, on that basis, the applicant can't claim himself as operational creditor as dues to be paid does not relate to goods or services.

32. The applicant has not relied upon the bills which he raised for doing the work and similarly, the respondent has also not furnished the receipts showing the payment made to the applicant. Now it is to be determined whether the applicant is entitled for enhancement of rates as per G.O.Ms.No.35, Transport, Roads & Buildings (R.I) Department, dated 30.01.2009. The relevant portion of the G.O. is as follows:

“Government after careful examination of the matter hereby allow to adopt Price Adjustment for all other materials and labour charges in Building works subject to the following conditions:

- i. The Price adjustment for Steel & Cement shall continue in the manner as envisaged in the G.O. 6th read above along with pertinent amendments.*
- ii. For all other items including water supply, sanitary and electrical, labour charges and machinery charges price adjustment shall be effected in the ongoing works by adjusting the difference in estimate rates to that of prevailing SSR rates whenever there is a change in SSR.*
- iii. 1st – June of every year shall be the date effective for allowing the price adjustments in respect of all other materials including electrical, sanitary etc. machinery and labour charges, or the date of release of the revised SSR, whichever is later.*
- iv. Measurements and check-measurements shall be commensurate with the progress of work and shall form the basis for adoption of price adjustments.*
- v. Rate analysis for the purpose of price adjustments shall be prepared and approved by the competent authority deriving the rates from the originally estimated rates based on the current SSRs as per the applicability subject to the provisions of this order.*
- vi. Government shall meet the additional costs, if any, in the Indiramma housing schemes due to the applicability of the price adjustments.*
- vii. For Non-SSR items, where the price adjustment is applicable as per the provisions of this Order, usual procedures shall be followed to finalise such rates subject to the conditions stipulated in this order.*

viii. *Tender premium / discount on the works are operative on the original Estimated Contract Value (ECV) and on price adjusted contract values as per the applicability subject to the conditions stipulated in this order.*

ix. *Contract Agreements shall be amended with work-slip statements and supplemental agreements for the applicable quantities with the modified/adjusted prices for making payments to the agencies.*

33. Therefore, no enhancement has been given for steel and cement work. At the same time, it is required that progress of work etc. shall be basis for price adjustment which should have been approved by the competent authority. Thus, it is to be approved by the respondent that the bills have been raised on the basis of G.O.Ms.No.35 and the conditions of this letter have been fulfilled by the applicant. However, no such bill has been produced by the applicant to show that such demand was raised with the respondent. He has straight away filed tabulation sheet indicating the payment to be made on the basis of revised rate as per G.O.Ms.No.35, which calculation is also imaginary as no supporting document has been filed. The onus to prove that such type of work as given in the tabulation sheet at pg.387 to 421 was done by the applicant, but there is no such evidence. Hence, the loss to the applicant is not crystallized. This Authority exercising summary jurisdiction cannot determine the claim amount and initiate the corporate insolvency resolution process.

34. As a sequel to our findings as above, there is no merit in the present application. As a result, **CP No.180/9/HDB/2022** is dismissed.

SD/-

SANJAY PURI
MEMBER (TECHNICAL)

SD/-

RAJEEV BHARDWAJ
MEMBER (JUDICIAL)

Vinod