



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Petition No. (IB)-205(ND)/2023

IN THE MATTER OF:

**R.A.J. Krishna Construction
Company Private Limited**

Registered office at:
S-28, Greater Kailash – 2
New Delhi – 110048

**...Petitioner/
Operational Creditor**

VERSUS

Newera Solutions Private Limited

Registered office at:
149/5, G/F, Ring Road, Kilokri
New Delhi – 110014

**... Respondent/
Corporate Debtor**

Section: 9 of IBC, 2016

Order Delivered on: 26.10.2023

CORAM

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Gaurav Mitra with Adv. Harshit Khare, Adv.
Shaleen Srivastava, Adv. Angan Dewan, Adv.
Prafful Saini and Adv. Ishan Roy

For the Respondent : Adv. Amar Vivek, Adv. Abhinav Tyagi



ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

The Petitioner viz. R.A.J. Krishna Construction Company Private Limited (hereinafter referred to as “**Petitioner/Operational Creditor**”) having CIN U70102DL2009PTC190415 has preferred the captioned petition seeking initiation of CIRP qua the CD i.e., NewEra Solutions Private Limited (hereinafter referred to as “**Respondent/Corporate Debtor**”) having CIN U74899DL1998PTC094973. As has been brought out in the petition, the OC entered into contract dated 12.10.2018 with Home & Soul Infratech Private Limited (“**H&S**”) for carrying out civil and structure works for residential project at B-8, Jaypee Green Sports City, Greater Noida with a contract value aggregating to INR 11,94,56,470 (INR Eleven Crore Ninety-Four Lacs Fifty-Six Thousand Four Hundred and Seventy Only) exclusive of GST.

2. Subsequently, while the work in terms of the aforementioned order was in progress, an MoU dated 07.12.2020 was entered into between Newera Solutions Private Limited viz., the Corporate Debtor and the Operational Creditor, whereby the rights, title, obligations and interest of H&S under the work order dated 12.10.2018 were transferred to the Corporate Debtor. To give effect to the MoU, H&S and the OC also entered into an addendum bearing Number H&S/P3/18-19/14/002 dated 14.12.2020, whereby H&S also confirmed that the rights, title, obligations and interest of H&S under the work order dated 12.10.2018 stood transferred to the Corporate Debtor.



3. Resultantly, the OC started raising invoices/bills on CD, w.e.f. 03.02.2021. The CD also made intermittent payments to the OC qua the invoices. The total amount paid by CD to OC was INR 6,24,83,788 (Six Crores Twenty-Four Lacs Eighty Three Thousand Seven Hundred and Eighty Eight Only), towards works executed in relation to the project under the work order dated 12.10.2018, as amended from time to time.

4. The Corporate Debtor issued another work order No. NES/PG3PROJECT/20-21/001 to the OC for performing the electrical work for Residential Project at B-8, Jaypee Green Sports City, Greater Noida. The total performance cost/value of the contract was INR 46,06,371. On 01.10.2022 the Home & Soul Infratech Private Limited (“H&S”) issued a letter directing the OC to demobilize from the project site, following which the CD stopped releasing payments to the OC. Ergo, on 25.02.2023, a demand notice was issued by the OC under the provisions of IBC 2016 asking for payment of an amount of INR 2,96,97,994 (Two Crores Ninety Six Lacs Ninety Seven Thousand Nine Hundred and Ninety Four Only) from the Corporate Debtor. However, despite receiving the demand notice, the Corporate Debtor did neither replied the same nor made the requisite payment, within the stipulated statutory time limit of 10 days from the date of receipt of demand notice. Only on 17.03.2023, the counsel for the OC received a belated response to the demand notice dated 25.02.2023, through the counsel of the CD. The CD espoused in the reply dated 17.03.2023 that in the wake of arbitration notice dated 19.01.2023, there existed a dispute qua the



demanded amount, before the demand notice dated 25.02.2023 was given by the Applicant to the CD.

5. The conspectus of facts, as enumerated by the CD in its reply are that in terms of the Board resolution dated 15.03.2023, the OC had authorized Mr. Arvind Bahl to act on its behalf to take steps in terms of provisions of IBC 2016, thus the demand notice, under Section 8 of IBC, 2016 served upon CD by Mr. Shaleen Srivastava was without there being any authority in his favour and was invalid. The amount of default referred to in the application is disputed one, which is evident from the following facts:-

- (i) In the wake of arbitration notice dated 19.01.2023 and the reply thereto given by the petitioner on 10.02.2023, there existed a dispute qua the demanded amount.
- (ii) In reply to the demand notice dated 25.02.2023, the CD clearly mentioned that the 18th - 22nd running invoices, appended with the notice under Section 8 of the Code were not legally tenable, as the same are neither signed by the Applicant nor acknowledged by the Corporate Debtor.

6. It is also the case of the CD that if the amount payable in terms of the invoice numbers 18th to 22nd is reduced from the total ledger account, placed at page 161-163, it would be the OC, who would be liable to pay the Corporate Debtor, thus there is no question of there being any default on the part of the CD in repaying any debt to OC.



7. In the additional affidavit dated 05.08.2023, filed on behalf of the petitioner, it could be espoused that the RA bill Nos. 18 to 22 were not only sent to the CD, but were also duly acknowledged and acted upon by it and as could be seen from e-mail dated 14.07.2022 sent by CD to OC the RA bill No. 19 was processed by the CD to make ad-hoc payment. To buttress the plea regarding receipt of the aforementioned invoices by the CD, the Ld. Counsel for the OC relied upon the e-mails dated 12.05.2022, 21.06.2022, 14.07.2022, 06.08.2022, 11.10.2022, 10.11.2022, 18.11.2022, exchanged between the OC & CD. The copies of the e-mails are enclosed as Annexure AA-1 (Colly.) with the affidavit.

8. Referring to its bank account, the petitioner has pleaded that the CD made ad-hoc payment towards RA bill No. 18 in the month of May and June 2022. It has enclosed the copies of its statement of bank account for the months of June & July 2022 as Annexure AA-2 (Colly.) to the affidavit. The Applicant has also placed reliance upon the copies of Form-26 AS of the Operational Creditor for AY 2021-2022, 2022-2023 & 2023-2024 to emphasize that the invoices (ibid) were received by the CD and qua some of them, the CD had also made the payment.

9. We heard the counsels for the parties and perused the record. As far as the stand of the CD is concerned, the same is self-contradictory. When the CD has denied the veracity of the invoices 18th to 22nd, it has also relied upon the arbitration notice dated 19.01.2023, to allege pre-existing dispute. The arbitration notice dated 19.01.2023 does not talk about the genuineness of the invoices 18th to 22nd. The issues raised in the notice are pertaining to delay



in completion of work, the losses suffered by Home & Soul Infratech Private Limited on account of delay, improper maintenance of site causing threat to life and live, unsatisfactory work, raising frivolous claims (not the invoices being forced), creation of nuisance at the site and not allowing the newly engaged contractor to perform the work, not keeping the sufficient security at the site etc.

10. Undoubtedly, the arbitration notice is by H&S and not by the CD. Nevertheless, the notice of appointment of arbitrator and reference of dispute to arbitrator referred to the contract/work order dated 12.10.2018, which involved INR 11,94,56,470/-. In the petition filed by it, the OC has referred to the work order dated 12.10.2018 only. The subsequent work order issued by CD was only for the work of value of Rs.46,06,371/- only. Thus, the amount of default alleged by the OC viz., INR 2,96,97,994/- pertains to the work order dated 12.10.2018 only.

11. We find from MoU dated 07.12.2020 (Annexure-E colly.) entered between the CD, the OC was to raise running bills directly on CD qua the work required to be performed by it with reference to work order No. H&S/P3/18-19/14 dated 12th Oct 2018, only. Indubitably in terms of the arbitration notice dated 19.01.2023, the H&S has raised the dispute related to the quality of service in respect of the work for which the order dated 12.10.2018 was issued to CD.

12. As can be seen from Section 5 (6) (b) of the IBC 2016, the dispute includes a suit or arbitration proceedings relating to the quality of goods or



service. It does not provide that the same should be between the OC and the CD only. It is not the case of the OC that the amount of defaulted operational debt referred to by him pertain to any work other than the one involved in work order dated 12.10.2018 referred to in the arbitral notice dated 19.01.2023. We can also see from the Section 8 (2) of IBC 2016 that the dispute should exist before the receipt of notice or invoice in relation to such dispute. Even the said provision also does not talk of the dispute being raised by CD only. The construction of Section 8 (2) (a) of IBC 2016 can only be that the dispute needs to be qua the work/service/goods, with reference to which the demand is raised in terms of the provisions of Section 8 (1) of IBC or the invoices.

13. The petitioner itself has enclosed the arbitration notice dated 19.01.2023 as Annexure-I to the petition.

14. As can be seen from Section 21 of the Arbitration and Conciliation Act 1996, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for the dispute to be referred to arbitration is received. In the wake, the dispute qua the quality of service in question could arise on 19.01.2023. The demand notice being dated 25.02.2023, there was apparently a pre-existing dispute qua the quality of service rendered by the OC, for which the defaulted amount of debt was demanded. It may be so that the reply to the demand notice was given after expiry of ten days, but by now it is stair decisis that irrespective of the reply being given by the CD in terms of Section 8 (2) of IBC 2016, the Adjudicating Authority while considering an application filed under Section 9



of IBC 2016 for admission, need to see the material available on record to ascertain as to whether there was pre-existing dispute or not. In the present case it is not so that the CD did not give any reply to the demand notice. Indubitably, the OC had received the reply to demand notice on 17.03.2023.

15. In terms of the provisions of Section 9 (5) (d) of IBC 2016, the Adjudicating Authority should admit the application only if there is no record of dispute or no notice of dispute has been received by the OC. In the present case, apparently the arbitral proceedings commenced on 19.01.2023 i.e., prior to issuance of demand notice 25.02.2023, by the OC. The petitioner itself has enclosed the arbitration notice as Annexure-J to the petition.

16. In view of the aforementioned, **captioned petition is rejected**, being hit by Section 9 (5) (d) of IBC 2016. It is made clear that nothing observed hereinabove would have any bearing or ramification on the arbitration proceedings commenced vide notice dated 19.01.2023 (ibid). No cost.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)