

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 933 of 2023

(Arising out of the Impugned Order dated 04.07.2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Jaipur Bench in Company Petition (IB) No. 14/9/JPR/2020]

IN THE MATTER OF:

**Mr. Ashok Singh
Erstwhile/Suspended Director of
M/s Macro Infra Contractors Pvt. Ltd.
S/o Sh. Babu Singh
R/o M-28, Income Tax Colony,
Durgapura, Tonk Road, Jaipur
Email ID: legal@fsrealty.co.in
Mobile No: 9057533581**

...Appellant

Versus

**1. Mr. Babu Lal Sharma
Reg. No: IBBI/IPA-001/IP-P01151/2018-
2019/11832,
AFA No. AA1/11832/02/1161123/104816
At: M/s B. Lal Sharma & Co.,
Chartered Accountants,
306, 3rd Floor, Durga Business Centre (DBC),
Near Pink City Petrol Pump, M.I. Road,
Jaipur, Rajasthan – 302039
Email ID: tejgati@yahoo.com**

...Respondent No.1

**2. M/s RG Colonizers Private Limited
CIN: U45201RJ1992PTC007109
Registered Address:
4, Tirupati Trade Centre,
Sansar Chand Road, Jaipur
Email ID: rgcpljaipur@gmail.com**

...Respondent No.2

Present:

For Appellant : Mr. Vivek Jain, Mr. Bhrigu Sharma and Mr. Rajat Jain, Advocates.

For Respondent : Mr. Priyesh Kasliwal, Mr. Bipin Garg and Ms. Sangita Mishra, Advocates

J U D G M E N T

(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

Brief facts:

The matter relates to an appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (“Code”) against the impugned order dated 04.07.2023 passed by the National Company Law Tribunal, Jaipur Bench in Company Petition (IB) No. 14/9/JPR/2020, in which Adjudicating Authority has allowed Section 9 proceedings against M/s Macro Infra Contractors Private Limited.

2. Heard Learned Counsel for both the parties and perused the record.

Case of the Appellant Mr Ashok Singh – Suspended Director of the CD

3. Appellant – Ashok Singh, is the Suspended Director of the Corporate Debtor namely, M/s Macro Infra Contractors Private Limited (Corporate Debtor- CD). The Corporate Debtor is primarily engaged in the business of the development of residential real estate in and around Jaipur, Rajasthan. On the petition of Respondent No.2 / M/s RG Colonizers /operational Creditor -OC, the Adjudicating Authority allowed Petition against the Corporate Debtor under Section 9 of the Code and it being represented through its Resolution Professional-RP, R1, herein. OC was given a project by the Corporate Debtor for construction of a complex, which was to be done within 15 months, the date of completion of the work was April, 2019. The Appellant claims that OC/R2 failed to carry out the said work within the stipulated time as per sub-contractor agreement, the payment was to be made to the OC/R2 on the basis of the actual measurement of work done, on

presenting the certificate of due amount issued by the Corporate Debtor to the OC/R2, after verification for the work. The Appellant claims that OC/R2 had to pay TDS, GST or other requisite taxes/fees/ charges in the concerned department in relation to the construction and not the Corporate Debtor. Further as per the sub-contractor agreement, the contractor(CD) is entitled to withhold any bills of the sub-contractor (OC), if in case, the construction is not completed within the time period.

4. Appellant had expressed dissatisfaction with the construction carried out by the OC/R2 and had communicated such concerns on multiple occasions. Respondent No.2 proceeded to construct the ground floor in accordance with its own preferences and subsequently abandoned the project, leaving it incomplete.

5. Despite the circumstances, the Appellant made a payment of Rs. 37,87,192/- to OC/R2. Additionally, the Appellant incurred expenses related to demolition of the aforementioned construction and levelling on the ground; consequently, the appellant suffered substantial financial losses, leading them to sell the land, on which the project was being constructed, to a third party.

6. As per sub-contractor agreement, a sum of Rs. 11,00,000/- including TDS as mobilisation advance was to be paid to the sub-contractor i.e. OC/R2 and that was paid on 22.01.2018. The Appellant claims to have made a cumulative payment of Rs. 37,87,192/- comprising of Rs. 11,00,000/-. This is also recorded in the First Information Report filed by the Appellant. It is further claimed that despite being duly informed, the OC/R2 has consistently

disregarded and failed to acknowledge the receipt of Rs. 37,87,192/-. Further, the Appellant claims that there existed a pre-existing dispute between the Appellant and OC/R2, as the latter had failed to adhere to the instructions and terms outlined in the sub-contractor agreement. The Appellant claims that the Adjudicating Authority allowed the CIRP under Section 9 application despite pre-existing dispute with respect to the outstanding amount and quality of work rendered by Operational Creditor.

7. The Appellant has relied upon the Hon'ble Supreme Court in ***Mobilox Innovation Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 SCC 353 at para 40*** which is as under:

“..

40. *It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or*

illusory, the adjudicating authority has to reject the application...”

8. The Appellant claims that there is a pre-existing dispute with respect to the existence of amount due and payable and the quality of work supply by the Operational Creditor to the Corporate Debtor. The Appellant has also given a notice in this regard on 24.10.2020 for invoking arbitration clause.

9. Appellant has also sought to rely upon this Tribunal’s judgment in ***Greymatter Entertainment Pvt. Ltd. through its Authorised representative Chandra Dev Bhagat Vs. Pro Spotify Pvt. Ltd. 2023 SCC OnLine NCLAT 82***, which is hereunder:

“.....It is observed from the afore noted Sections that neither Section 8 nor Section 9 of the Code indicate that in even Reply to Notice was not filed within 10 days, the ‘Corporate Debtor’ is precluded from raising the question of dispute or pleading that there or no amount ‘due and payable’, the ‘Corporate Debtor’ is not prevented from establishing by way of a Reply and relevant documents, any ‘pre-Existing Dispute or ‘Operational Debt’. We place reliance of the judgment of this Tribunal in ‘Brandy Realty Services Ltd. Vs. Sir John Bakeries India Pvt. Ltd.’”

10. Appellant further claims that the unpaid operational debt of Rs. 2,23,06,363/- is arbitrary. Further even the amount of Rs.1,33,93,132/- is also untenable and contrary to the facts on the record and thus, is baseless and arbitrary in nature. It is also further submitted that the interest rate of 18% was never agreed by the Corporate Debtor. The Appellant also claims that the payment was to be made as per Clause No.5 & 6 of the sub-contractor agreement which provided payments to be made on the basis of actual measurement of work done on presenting the certificate of due amount issued

by the Contractor to the sub-contractor after the verification of work but the Corporate Debtor sturdily pleads that the Operational Creditor abandoned the work incomplete and did not complete the same and hence is not entitled to the said amount.

11. Further Appellant had given a notice dated 24.01.2020 for invoking Arbitration clause as the work was incomplete and a dispute arose between the parties.

Case of the Operational Creditor– M/s RG Colonizers Private Limited

12. OC/R2 / M/s RG Colonizers Private Limited submits that the Respondent is a sub-contractor and the Operational Creditor, he had executed an agreement on 17.01.2018 for the construction of residential complex in Village Siroli, Tehsil-Sanganer, Jaipur (Rajasthan). The OC/R2 claims that there were no pre-existing disputes prevailing between the Appellant and the Respondent as no documentary evidence for the same has been produced by the Appellant. There is no iota of communication, ever made by the Appellant for any dispute to the Respondent. Further, Appellant had never replied to the demand notice dated 04.11.2019; in fact the Appellant had not the replied to the application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“IBC”).

13. OC/R2 relies upon this Tribunal’s judgment which in the matter of ***GupShup Technology India (P) Ltd. Vs. Interpid Online Retail (P) Ltd. decided on 25.07.2019***, reported in (2019) 110 taxman.com 221 in which it has been held that where corporate debtor failed to produce any letter or email to suggest that prior to issuance of demand notice, a dispute was raised about SMS services provided by operational creditor; it could be said that there was

no pre-existing dispute. Thus, in the present case no such documentary evidence is there which reflects the pre-existence of disputes.

14. OC/R2 relies on the judgment of Hon'ble Apex Court in the case of ***Innoventive Industries Ltd. Vs. ICICI Bank Ltd. (2017) 84 taxman.com 320/143 SCL 625*** in which it has been held:

“27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4)...”

15. OC/R2 further submits that since the application was filed on 03.01.2020, when the default amount as defined under Section 4 was Rs.1 lakh, the Code got triggered as the default amount was much more than Rs.1 lakh.

16. OC/R2 further submits that it has received only an advance of Rs. 11,00,000/- in the year 2018, as a mobilisation advance and thereafter, nothing has been paid for the construction work done by the Respondent. Further, for the construction work and as per the terms of the agreement, the amount is to be realised when the running bills are drawn by the Appellant but the appellant had failed to pay any amount even after work has been done

and also after the running bills have been signed and verified by the technical persons of the Corporate Debtor.

17. OC/R2 further submits that for the construction of work it took a heavy working capital loan in the hope that he will receive the payment from the Corporate Debtor on regular interval of time from the running bills. It submits that the work could not have been completed within 15 months as the appellant never released the payment on regular interval of time as stated in the conditions of the agreement. The project could not have completed from out-of-pocket expenses of the OC/R2 and also due to irregularity to issue drawings on the part of the Corporate Debtor. The Completion of project depends upon the realisation of money of the running bills but Corporate Debtor never paid attention to the same even though many emails and letters were sent to them. The Appellant has not paid single amount when the work started and also not even started the work with any other sub-contractor and sold the land as mentioned in the appeal.

18. The OC/R2 submits that there was no communication regarding disputes in the bills and in the invoices of the respondents.

19. OC/R2 further submits that the arbitration notice dated 24.01.2020 is purely afterthought, futile exercise and is issued after filing of the IBC Petition dated 03.01.2020 and after issuance of the demand notice dated 04.11.2019 just to safeguard from the IBC process.

20. OC/R2 submits that all the requisite conditions of no pre-existing dispute, acknowledgement of debt by appellant in the balance sheet, establishment of debt, occurrence of default has occurred and claim is within

limitation. Therefore, Section 9 proceedings are very much in place and the present appeal is required to be rejected.

Findings of the AA

21. The Adjudicating Authority in its order dated 04.07.2023 has concluded as follows:

“..

- i) *The registered office of the Corporate Debtor is situated in Jaipur, Rajasthan, therefore this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, the Applicant has alleged that the debt became due on 22.01.2018 and the Application has been filed before this Adjudicating Authority on 03.01.2020, hence the period of three years after the default occurred has not been exhausted at the time of filing of this Application. Therefore, the present Application has been filed within the prescribed period of limitation.*
- ii) *It is abundantly clear from the documents produced before us that the Respondent has defaulted in making full payments against the services rendered by the Operational Creditor.*
- iii) *The Operational Creditor has annexed invoices raised for the services rendered from Page No.16-87 of the Petition.*
- iv) *The Corporate Debtor ambiguously states in its Reply that the Operational Creditor failed to complete the work within stipulated timelines. However, neither any correspondence to the same has been annexed, nor there is any specific pleading which utters about the non-completion of the work...”*

22. It has formulated two issues and examined them as follows:

“...

- a) *The first issue for consideration is whether the Demand Notice in Form-3 dated 04.11.2019 was served upon the Respondent. The Demand notice was sent via a registered post on 05.11.2019 to the Respondent. The postal receipt is attached on Page No. 164-65 of the Petition.*

- b) *The next issue for consideration is whether the Respondent disputed the operational debt. The Respondent/Corporate Debtor has filed a Reply and argued that the work has not been completed by the Corporate Debtor within the stipulated timelines. However, they have not submitted any authentic communication to substantiate the same. Thus, as per the documents placed on record with the Adjudicating Authority, there is no dispute as to the outstanding liability of the Corporate Debtor towards the Operational Creditor...”*

23. Furthermore, AA has concluded that there is no merit in the argument for any plausible dispute in the present matter; and therefore, it has come to a conclusion:

“....

- a) *We have gone through the contents of the Applications filed in Form No.5 and found the same to be complete. As discussed above, there is a total unpaid operational debt (in default) of Rs.2,23,06,363/- (Rupees Two Crore Twenty-Lakh Six Thousand Three Hundred Sixty-Three Only). It is observed that the Operational Creditor has issued various invoices (Pages No. 16-87 of the petition) for services supplied to the Respondent Corporate Debtor. Applicant Operational Creditor has given Demand Notice in Form No.3 dated 04.11.2019, duly served on the Respondent Corporate Debtor. This Adjudicating Authority has held above the*

Operational Creditor correctly delivered the Demand Notice in Form No.3, and no pre-existing dispute is proved.

b) It has been shown that the Corporate Debtor has failed to make payment of the aforesaid amount due as mentioned in the statutory notice to date. It is also observed that the conditions under Section 9 of the IBC stand satisfied. Hence, this Adjudicating Authority is inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC....”

Findings and Conclusions

24. With respect to the existence of the Operational Debt, the matter has been examined in detail by the Adjudicating Authority and it has examined various invoices in para 4 of the Impugned Order and basis that Operational Debt of Rs.2,23,06,363/- has been arrived at as is reflected in the demand notice. The Appellant has not paid for these invoices and had not raised any issue with respect to these invoices when they were delivered to him in its defence.

25. The Appellant has raised the issue of the liability towards OC/R2 with respect to the amount of Rs.2,23,06,363/- and claims that Adjudicating Authority has not ascertained whether this claim amount is genuine or an arbitrary figure concocted with the intention to deceive the law and allowed the CIRP proceeding under Section 9 of the IBC. On the basis of record, it is apparent that apart from Rs. 11,00,000/- which was paid as mobilisation advance, no other payments have been made, even though running bills have been sent over a period of time. The threshold limit for initiation of the Section 9 proceedings was Rs. 1,00,000/- (One lakh) at that time and if we overlook the interest component from Rs.2,23,06,363/-, even than the payable

amount is much beyond Rs one lakh and this does not help the Appellant in anyway. His debt liability is established by AA also and we agree with that. As relied upon by the OC/R2 the conditions of debt as in ***Innoventive Industries Ltd. are satisfied*** and support the case of the OC /R2 and rather than Appellant.

26. The Appellant has also raised an issue that impugned order has been passed by not observing the due process on the grounds of rejection of CIRP. We have gone into the details of order and we find that there was no pre-existing dispute between the parties. This is clear from the sequence of events and facts starting with the fact that no dispute has been raised with respect to the running bill and no reply was issued to the demand notice of 4.11.2012 from the OC/R2. Later on, the Appellant invoked the arbitration clause on 24.01.2020, after the IBC proceedings which have been set into motion on 03.01.2020. It can be noted that the notice of dispute was sent by the Appellant to OC/R2 only on 24.01.2020 which appears to be an afterthought. And Appellant claims that even if there is absence of reply to Section 8 notice from the records available and pleadings, pre-existing dispute can still be established from the evidence available on record. In fact, most of the communications are from OC/R2 to the CD and later has not even been responding to most of the communications. Corporate Debtor has not replied to the demand notice sent by the Operational Creditor under Section 8 of the Code and there is no other record to show dispute except for an arbitration notice issued on 24.01.2020, which is not a pre-existing dispute. There appears to be nothing on record to prima-facie demonstrate that the respondent had raised the issue of dispute which could have prevented the

triggering of the CIRP. The pre-existing dispute appears to have made as a design to defeat the CIRP proceedings. Therefore, pre-existing dispute cannot be established and **Mobilox Innovations Private Limited (supra) will not support Appellant's case.**

27. Appellant has not been replying to all communications and very belatedly raised the issue that the work has not been done as per the sub-contractor agreement and the issue of 18% interest rate, which was never agreed between the parties, and therefore, an arbitrary percentage. It also raises an issue of a dispute as per notice of dispute dated 24.10.2020. There is no specific answer to the issue of the invoices and its non-payment.

28. It appears that invoices were raised by the Respondent No.2 and same were verified and confirmed by the technical person. Even though, the Appellant was to make payment of GST, to avoid any notices from the GST Department, Respondent No.2 paid the GST on the work, even though the due amount was to be paid by the Corporate Debtor. The Respondent No.2 had sent many emails to the Appellant, which were not responded to and even the salary dues for watchman which amounted to Rs.5,04,000/- were not paid.

29. **Greymatter Entertainment Pvt. Ltd.** which says that “even Reply to Notice was not filed within 10 days, the ‘Corporate Debtor’ is precluded from raising the question of dispute or pleading that there or no amount ‘due and payable’, the ‘Corporate Debtor’ is not prevented from establishing by way of a Reply and relevant documents, any ‘pre-Existing Dispute or ‘Operational Debt’...”. But in the aforementioned background even the **Greymatter**

Entertainment Pvt. Ltd. relied upon by the Appellant will not support his case as not only he didn't reply to the Demand Notice but all circumstantial evidence is against him and he is trying to come out with a defence as an afterthought after Section 9 proceeding have been initiated against him. Rather the judgements relied upon by the OC/R2 viz **GupShup Technology India (P) Ltd.** goes against the Appellant.

30. On the basis of the submissions and the documents, Adjudicating Authority has rightly concluded that there is a debt, which is more than Rs. 1,00,000/- and due and has not been paid and the Appellant had defaulted in making full payments against the services rendered by the Operational Creditor. Therefore, it has rightly proceeded for CIRP proceedings under Section 9 of the Code. We do not find any error in the order of the Adjudicating Authority. Appeal is therefore, dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

4th January, 2024

pks