IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

IB-610(ND)/2022

Order under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s. K. D. TECHNOLOGIES

Having its registered office at:

3879, 1st Floor, Shraddhanand Marg,

Delhi-110006.

Through its Proprietor

Shri Kuldeep Dhawan **...... Operational Creditor**

VERSUS

M/s. ODEON BUILDERS PRIVATE LIMITED

Having its registered office at:

M-116, 2nd Floor, Connaught Place,

New Delhi-110001.

CIN: U74899DL1991PTC043711 **...... Corporate Debtor**

Order Delivered On: 12.03.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Prakash Sinha, Mr. Rishabh Kumar, Mr. Rakesh Mishra, Advs.

For the Respondent : Mr. Karunesh Tandon, Mr. Rahul Chauhan, Advs.

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. This Application has been filed by M/s. K. D. Technologies, the Applicant/Operational Creditor on 17.08.2022 before this Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), against M/s. Odeon Builders Private Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding principal amount of Rs. 1,94,63,890/- (Rupees One Crore Ninety Four Lakh Sixty Three Thousand Eight Hundred and Ninety Only) plus Rs. 88,45,000/- (Rupees Eighty Eight Lakh Forty Five Thousand Only) as interest upto May 2022 totaling to Rs. 2,83,08,890/- (Rupees Two Crore Eighty Three Lakh Eight Thousand Eight Hundred and Ninety Only).

2. **<u>Submissions of the Applicant/Operational Creditor:</u>**

i. It is case of the Applicant/Operational Creditor that the Corporate Debtor applied for the e-tender dated 27/02/2012 from prequalified contractors for the purpose of setting up of "National Intelligence Academy-cum-Regional Training Centre" for Intelligence Bureau (IB) at Plot No. 9/1, Sector-9, Dwarka, New Delhi which was accepted by the National Buildings Corporation Constructions Limited (NBCC) for Rs. 65,29,42,556.60 vide letter dated 11/04/2012. The entire work was to be completed within 18 months.

ii. As per the agreement dated 20/04/2012 entered into between NBCC and the Corporate Debtor which defines the scope of work, conditions and covenants including the general conditions of the contract. Later, NBCC also issued the General Conditions of Contract (GCC) which was to be complied with by the Corporate Debtor.

iii. In terms of the GCC, the Corporate Debtor vide letter of intent dated 15/10/2012 offered the work of internal electrification of the above referred work of the NBCC to the Operational Creditor herein for an amount of Rs. 5,61,99,071/-. The letter of intent clearly indicates that the main agreement between the NBCC and Corporate Debtor is to be followed by the Operational Creditor herein. All work to be done by the Operational Creditor was to be certified by the NBCC. The letter of intent was issued in compliance of Clause 59 of the GCC. The Operational Creditor complied with the said directions and even NBCC approved the same in terms of clause 59 of the GCC and accordingly, the Corporate Debtor issued notice of award dated 30/10/2012.

iv. The entire work was completed in the month of March 2015. The building was handed over to the NBCC by the Corporate Debtor and the same was inaugurated by the Hon'ble Prime Minister of India on 24/03/2015. The Operational creditor respectfully reiterates that as the building was inaugurated on 24/03/2015, the defect liability period of the Operational Creditor was till 24/03/2016. The Corporate Debtor vide e-mail dated 15/05/2015 had forwarded its ledger account of the Operational Creditor and the due amount till 02/05/2015 was Rs. 67,77,451/-.

v. The Corporate Debtor paid a sum of Rs. 5,00,000/- to the Operational Creditor in the month of November 2015. In the meantime, the Operational Creditor had also sent a running bill (RA-19) for Rs. 80,27,327/- to the Corporate Debtor which it kept for verification on 06/06/2015. The Operational Creditor made a representation dated 19/12/2016 to both the NBCC and the Corporate Debtor highlighting the issues involved and a request was made to release the payment.

vi. As no action was taken by the NBCC, the Operational Creditor filed W. P. (C.) No. 2840/2017 before the Hon'ble Delhi High Court requesting for a direction amongst others to release the balance payment of the Operational Creditor. The Hon'ble Delhi High Court vide order dated 29/03/2017 directed the NBCC to inform the Operational Creditor as to whether it had cleared the bills of the Corporate Debtor or not. Liberty was granted to the Operational Creditor to take legal remedies as per the communication to be sent by the NBCC. The NBCC vide letter dated 25/04/2017 which enclosed e-mail dated 11/04/2017 informed the Operational Creditor that it has made all payments against running bills to the Corporate Debtor in respect of construction of the referred building.

vii. The Operational Creditor thereafter sent a demand notice under Section 8(1) of the IBC, 2016 to the Corporate Debtor along with all the communications and invoices at its registered office on 20/04/2018, but the demand notice was returned to the counsel for the Operational Creditor on 28/04/2018 with noting "office is closed for last three days and nobody is there to receive" and "left". As the demand notice dated 20/04/2018 could not be delivered, the Operational Creditor through its authorized signatory sent another demand notice in Form-4 dated 09/11/2020 to the Corporate Debtor at its registered office and further also sent the notice through e-mail. The tracking report shows that the "addressee left without instructions". However, the e-mail was received by the Corporate Debtor.

3. **<u>Submissions of the Respondent/Corporate Debtor:</u>**

i. The Corporate Debtor has filed a reply affidavit denying the allegations made by the Applicant and stated that the Application filed by the Operational Creditor is not maintainable and liable to be dismissed as the application preferred by the Operational Creditor is barred by the law of limitation provided for filing the application under Section 9 of Code. The work was completed on 24.11.2014 and the application has been preferred by the Operational Creditor in the year 2022 on the basis of the demand notice dated 09.11.2020.

ii. It is a settled proposition of law that the “right to sue accrues when a default occurs”. In the instant case the default not admitting at best occurred on 30.11.2015, therefore, as the default has occurred over three years prior to the date of filing of the application under IBC, the application would be barred under Article 137 of Limitation Act.

iii. It is submitted that the Operational Creditor in para 7 of the demand notice dated 19.12.2016 specifically stated that out of the total value of Rs. 5,61,99,071/-, the Corporate Debtor cleared an amount of Rs. 5,46,34,153/- till 02.05.2015 and thereafter on 30.11.2015 paid another payment of Rs. 5 Lakh. From the aforesaid assertion of the Corporate Debtor at best it can be construed, although not admitted, that an amount of Rs. 10,64,918/- (i.e., Rs. 5,61,99,071- 5,46,34,153 + 5,00,000 = 10,64,918/-) remained unpaid against the contractual value. This makes it clear that the left out amount is beyond the territorial jurisdiction of this Adjudicating Authority.

iv. The total principal debt against the Corporate Debtor is Rs. l,94,63,890/-, it is reiterated that no amount whatsoever is due and payable against the Corporate Debtor. It is further submitted that all the claims of the Operational Creditor are self-declaratory without having any evidence to substantiate the alleged wrong allegation.

v. As per the agreement dated 15.10.2012, the Corporate Debtor was obliged to make the payment of the measurement which has been certified by NBCC authorities and a representative of OBPL. The Corporate Debtor had released the entire payment of the measurement which was certified by NBCC Authorities and OBPL representative. Therefore, no amount whatsoever is due and payable by the Corporate Debtor and the claim of the Operational Creditor is false, frivolous and self-declaratory.

4. **Analysis and Findings:**

I. We have heard the Ld. Counsel appearing for both parties and also perused the records.

II. We find that the Operational Creditor issued multiple demand notices to the Corporate Debtor which is not acceptable. The IBC, 2016 is a procedural Code and the process stipulated therein needs to be followed in the letter and spirit. There is no such provision in the IBC, 2016 and in the Regulation made thereunder that allows the Operational Creditor to issue multiple demand notices to the Corporate Debtor. Hence, we are of the view that the multiple demand notices are beyond the ambit of the IBC, 2016.

III. We have to consider the following issues:

(a) Whether the present application is within the Limitation period to initiate the CIRP against the Corporate Debtor or not.

(b) Whether the present application is within the minimum default amount of Rs.1,00,00,000/- as provided under Section 4 of the Code or not.

IV. <u>Limitation Period:</u>

i. As per the law laid down by the Hon'ble Supreme Court in the case of **B.K. Educational Services Pvt. Ltd. versus Parag Gupta and Associates** in Civil Appeal No. 23988 of 2017, Law of Limitation i.e., Article 137 of the Limitation Act 1963 applies to Applications filed under Section 9 of the Code. Article 137 of the Limitation Act provides a 3 (Three) year Limitation Period from the date when the "Right to Apply" accrues. The "Right to Apply", accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act.

ii. In the present case, the Applicant has claimed to have raised the last unpaid running bill (RA-19) for Rs. 80,27,327/- to the Corporate Debtor which it kept for verification on 06/06/2015 and the defect liability period of the Operational Creditor was till 24/03/2016. Accordingly, the Limitation for filing the present Section 9 Application starts from the date of the last unpaid running bill (RA-19) i.e., 06/06/2015. The limitation period of 3 (Three) years, if calculated from 06/06/2015, shall expire on 05.06.2018. The limitation period of 3 (Three) years, if calculated from the defect liability period i.e., 24/03/2016, shall expire on 23.03.2019. However, it is the Applicant's case that the last payment was received from the Corporate Debtor on 30.11.2015, which has been corroborated by the Bank Statement annexed with the Application. As per Section 19 of the Limitation Act 1963, a fresh limitation period begins to run from the date of part payment towards an acknowledgment of liability. In view of the aforesaid provision, the limitation period of 3 (Three) years as calculated from the date of part payment i.e., 30.11.2015, shall expire on 29.11.2018. Whereas the present Application under Section 9 of the Code has been filed on 17.08.2022 which is beyond the period of limitation and hence, the Application filed under Section 9 of the Code is barred by the Law of Limitation. Further, it is noted that the Operational Creditor/ Applicant has failed to explain the delay.

iii. Hence, in view of the above, we are of the considered view that the present Application under Section 9 of the Code is barred by the limitation and is not maintainable.

V. <u>Threshold Limit:</u>

i. The Respondent has raised an Objection as to the maintainability of the present application filed under Section 9 of the Code on the ground that the amount claimed is below the threshold limit of Rs. 1,00,00,000/- as envisaged under Section 4 of the Code.

ii. The Applicant/Operational Creditor has claimed the principal amount to the tune of Rs. 1,94,63,890/-, however invoices brought on record do not confirm the same.

iii. Admittedly, as per para 7 of the notice dated 19.12.2016, a total value of Rs. 5,61,99,071/- is due towards the Corporate Debtor. Thereafter, the Corporate Debtor cleared an amount of Rs. 5,46,34,153/- till 02.05.2015 and thereafter on 30.11.2015 paid another payment of Rs. 5,00,000/-. From the perusal of the notice dated 19.12.2016 and after subtracting the payment, the amount comes to Rs. 10,64,918/- (i.e., Rs. 5,61,99,071- 5,46,34,153 + 5,00,000 = 10,64,918/-) which remained unpaid against the contractual value.

iv. After perusal of the agreement dated 20/04/2012, letter of intent dated 15/10/2012 and notice of award dated 30/10/2012, we do not find any clauses and provisions which indicate/provide that in the event of failure on the part of the Corporate Debtor to pay the invoiced amount, the Applicant was entitled to interest on the due amount. In the present case, the Applicant failed to provide any communications that show that interest will be charged in the case of delayed payment which has been agreed by the parties. Hence, we observe that the Interest cannot be clubbed together to reach the threshold limit of Rs. 1,00,00,000/-.

v. Hence, the Applicant/Operational Creditor has failed to justify the aforesaid claim and also failed to substantiate the submission by any documentary evidence.

VI. Thus, the present application is legally untenable even after the argument of the Applicant is taken into consideration. We do not find any cogent reason to entertain this application, which is liable to be dismissed on the grounds of limitation period and threshold limit (minimum default amount).

5. In view of the above analysis and findings, we are satisfied that the present Applicant fails to fulfill the criteria laid down under Section 9 of the Code. It is accordingly ordered as follows:

   i. The Application bearing **IB-610(ND)/2022** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is **dismissed.**

   ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

   No order as to costs.

Sd/-	Sd/-
(ATUL CHATURVEDI) **MEMBER (TECHNICAL)**	**(BACHU VENKAT BALARAM DAS)** **MEMBER (JUDICIAL)**