IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT NO. 5, MUMBAI BENCH

CP 4158 (IB)/MB/2018

Under Section 9 of the I&B Code, 2016

In the matter of

RS INFRA PROJECT

…Operational Creditor/ Applicant

v/s

SUPREME INFRASTRUCTURE INDIA LIMITED

...Corporate Debtor

Order Dated: 20.03.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Applicant: Ms. Punita Arora Adv.
Ms. Avadhi Jain Adv.
For the Respondent: Mr. Prateek Seksaria Adv.
Mr. Ashish Pyasi Adv.
Mr. Priyesh Mishra Adv.
Mr. Tushar Garodia Adv.

Per: Chandra Bhan Singh, Member (Technical)

ORDER

1. This is an Application being CP 4158/2018 filed by RS Infra projects, Operational Creditor or Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against Supreme Infrastructure India Limited Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).

2. This Application is filed through its proprietor Mr. Ram Babu Sharma of the RS Infra Projects duly authorized to file the present Application.

3. The Applicant has claimed an amount of ₹3,14,83,817/- from the Corporate Debtor. The Applicant is of the view that its claim is based upon an Agreement arrived at between them. A copy of the said Agreement dated 20.07.2015 is annexed to the Application.

4. A brief history of the transaction between the Applicant and the Corporate Debtor is as follows:

    a. The Petitioner enters into an agreement with the Corporate Debtor on 22.07.2015. As per the agreement, the Petitioner had provided the services i.e. filling with available earth including, watering, ramming, consolidating and dressing complete at KM Toll Road NH 8A in state of Gujarat and related transportation to the Corporate Debtor. RS Infra Project, in that sense, is the sub-contractor of the Corporate Debtor.

    b. The Petitioner claims that on demand and request of the Corporate Debtor the Petitioner from time to time supplied the goods and raised various invoices on the Corporate Debtor. The payment/part payment paid by the Corporate Debtor were from time to time duly debited and credited on regular basis on the running account maintained by the Petitioner.

5. The Petitioner sent the demand notice under Section 8 of the code on 10.09.2018 to the Corporate Debtor demanding payment of ₹3,14,83,817/-

6. The Corporate Debtor filed the reply of the demand notice and denied the liability and inter-alia among other things contended as below:

"That the documents attached with the said notice is just a letter of Intent as per the letter dated 20.07.2015 sent to you by us and is not an actual legal binding contract/ agreement. That making it evident to show that you have not performed any work and has miserably failed act in furtherance of compliance of your obligations and you are under strict proof of it.

Further, special attention may be drawn to clause 7 of the terms and conditions as mentioned the same is not complied by you and there is no certification and verification by us of the bills attached as the same were never sent to us earlier and is a creation of your mind to extort huge sum of money, as you have not done any work and accordingly you do not have any evidence supporting the execution of work.

Further, there is no certification of guarantee as no measurement sheets are attached.

Further, the bills and invoices raised does not bear 'site address' CIN number and 'Tax return' details as per the amendment of companies (Amendment) Act, 2015 making it evident that you have tampered and created bogus and fake bills to extort money from us for no work done and we therefore reserve our rights to take strict against you and file proceedings before any court of law not inclusive of criminal proceedings.

Further, the amount given to you was payment in advance and against no bills therefore the debt as sought to be alleged by you is not due and payable by us.

We, have incurred loss of getting the work getting completed from other contractor since you left the work un attended and accordingly a huge amount of financial loss is suffered by us and continue to suffer for which we reserve our right to claim as advised."

7. The relevant clauses of the LOI as provided in the Petition is reproduced below:

a. This LOI is being issued in duplicate. You are requested to please sign the duplicate copy as a token of your acceptance and return the same to us for our records. On your acceptance, a detailed agreement shall be entered onto for the above work.

b. **Procedure for billing of work in progress**

   Volumetric Measurements of filling of earth

   Payment for overburden removal by the Sub Contractor shall be made in the basis of the actual work executed.

   The actual work executed shall be calculated on the basis of volumetric Measurement.

c. The procedure for volumetric measurement shall be as below:

   All the works in progress will be jointly measured in situ by representative of the Engineer-in-charge and the Sub Contractor's agent progressively. Such measurements will be recorded by the engineer-in-charge or his authorized representative and signed in token of acceptance by the sub-contractor of its authorized representative.

d. The bills submitted by the Sub contractor shall be processed only after getting it verified for payment of wages and other claims or payment of whatsoever nature mandatory under various statutory provisions. The outstanding claims or dues shall be deducted from the bills before making the payment.

e. The Sub-Contractor shall furnish/engage all equipment, labour material, competent personnel infrastructure etc. to perform the scope of work specified also with fulfilling all obligations specified by the contractor. The sub contactor shall direct, supervise and control operations under the direction of engineer-in-charge nominated by contactor.

f. Interpretation of contract documents

Several documents forming the contract are to be taken as mutually explanatory. Should there be any discrepancy, inconsistency error or omission in the contract or any of them the matter, may be referred to engineer-in-charge who shall give him decision and issue to the Sub-Contractor instruction, direction in what manner the work is to be carried out. The decision of the engineer-in-charge shall be final and conclusive and the Sub Contractor shall carry out work in accordance with the decision.

g. In case of violation/non-fulfillment of contract conditions by either party, either of them will give three months prior notice to terminate this contract.

The Corporate Debtor has filed its Affidavit in Reply opposing admission of Application filed by the Applicant under section 9, and following are the contentions

8. The Corporate Debtor has filed its Affidavit in Reply opposing admission of Application filed by the Applicant under section 9, and following are the contentions:

a. That the Petitioner and Corporate Debtor exchanged the LOI not a concluded contract between the parties. The Corporate Debtor sent the LOI to the Petitioner after endorsing its signature and rubber stamp. As per the LOI it is decided between the parties that detailed agreement will be entered between the parties but the parties never entered into a contract and the Petitioner never shared the LOI with Corporate Debtor the Petitioner create false record at the time of initiating under Insolvency and Bankruptcy Code, 2016.

b. The alleged invoices submitted by the Petitioner was never served upon the Corporate Debtor and the invoices are also false and created document to extort money from the Corporate Debtor.

c. The National Highways Authority of India issued tender for construction of road KM toll road NH8 at state of Gujarat. The said work was allotted by said authority to one contractor M/s Crest Logistics and Engineers Private Limited the said contractor further allotted/assigned the said work to the Corporate Debtor. The Corporate Debtor was intended to assignee part of the said work to the Petitioner and accordingly said LOI was issued to Petitioner. The cost of the said work was approx. ₹4.78 Crores the work was required to be undertaken as per the terms and conditions and specifications of the contract executed with the authority with the said contractor.

d. That during the construction of the road or stretches of the road, regular inspections were undertaken by the said authority the payments were released to the said contract only after due certification and verification of the work done submitted by the contractor.
e. That the Petitioner has produced certain invoices which were never served upon the Corporate Debtor because the petitioner has not done any work under the said invoices.
f. The petitioner relying upon the alleged confirmation of accounts the Corporate Debtor submitted that the signature and the rubber stamp affixed in the said accounts are forged the corporate debtor never signed and stamped any confirmation of accounts.
g. The corporate Debtor has also filed criminal complaint with the Powai police station.

9. The petitioner through its rejoinder dated 06.06.2019 denied the contents of the reply filed by the Corporate Debtor that:
   a. It is submitted that the Petitioner raised the invoices only after the due completion of the work. The same is evident from the confirmation of accounts from 01.04.2015 to 31.03.2016 which is signed and stamped from the Corporate Debtor.
   b. It is submitted by the Petitioner that it denies that the rubber stamp and signature on the said confirmation of accounts are not made by the Corporate Debtor or any of its employees.

Findings:

10. This Bench, after going through the averments made in the petition and the arguments made during the hearing, observes the following:-

(i) The Petitioner mentions that the work has been carried out pursuant to an Agreement dated 20th July 2015. However, this is not an Agreement but a Letter of Intent (LoI). The forwarding letter in the LoI from Supreme Infrastructure India Limited (Corporate Debtor/ Respondent to the Operational Creditor/ Petitioner M/s. RS Infra Projects at Para 7 mentions as under:-

> *"This LOI is being issued in duplicate. You are requested to please sign the duplicate copy as a token of your acceptance and return the same to us for our records. On your acceptance, a detailed agreement shall be entered into for the above work."*

It is clear from the above that only after the acceptance of this LOI by the Petitioner, a detailed Agreement was to be drawn for the work in question. Since no acceptance was made by the Petitioner, no Agreement was signed between the parties. Therefore, the contention of the Petitioner that the work of filling up of earth was carried out as per an "Agreement" is not correct.

(ii) The 'LoI' mentions at Para 6 and 7 the procedure by which a Bill would be raised by the Petitioner on the Respondent. It says that it would be based on volumetric Measurement, Para 6.1. to 6.3 about the volumetric measurement as mentioned in the LoI is as under:-

> *"6.1. Payment for overburden removal by the Sub Contractor shall be made on the basis of actual work executed.*
>
> *6.2. The actual work executed shall be calculated on the basis of volumetric Measurement.*
>
> *6.3. The procedure for volumetric measurement shall be as below:-*
>
> *6.31. All the works in progress will be jointly measured in situ by representative of the Engineer-in-Charge and the Sub-Contractor's authorized agent progressively. Such measurements will be recorded by the Engineer-in-*

Charge or his authorized representative and signed in token of acceptance by the Sub Contractor or its authorized representative."

It is clear from the above that the Engineer-in-Charge of the Contractor (here, the Respondent) and the representative of the Sub Contractor (here, the Petitioner) were to jointly do the volumetric measurement and thereafter submit the Bill. No such joint measurement of work done has been submitted before the Bench. The Respondent mentions that since no work was done, therefore, there was no question of a joint measurement of work.

(iii) Para 7.1 of the 'LoI' deals with manner of payment and mentions the following:-

> "7.1. The bills submitted by the Sub Contractor shall be processed only *after getting it verified for payment of wages and other claims or payment of whatsoever nature mandatory under various statutory provisions. The outstanding claims or dues shall be deducted from the bills before making the payment."*

From Para 7.1 quoted above, it is clear that the Bills of the Sub Contractor (here, the Petitioner) will be processed after payment of wages to the workers made by the Sub Contractor is verified. The 'Invoices' which has been produced by the Petitioner by way of Bill etc. do not mention anything about payment of wages subsequent to its verification by the Respondent. The contention of the Respondent is that since "no work" has been done by the Petitioner for the Respondent, there is no such verified Bill for wage payment.

(iv) The Petitioner has submitted Invoices raised between 14.09.2015 to 16.03.2016 against the Respondent. There is no signature or receipt etc. of the Respondent side on the 'Invoices', therefore, it appears that these 'Invoices' were never served on the Respondent. The

Respondent also mentions that since no work was done, therefore, it is a bogus invoice which was never received by them.

Each of these Invoices have been raised over a period of time has the exactly same wording, i.e. "*Filling with available earth including, watering, ramming, consolidating and dressing complete at KM Toll "Road NH 8A in State of Gujrat and Transportation*." The Bench notes that there is no supporting document like the 'wages paid' as was necessary as per the LoI and also details like details of transportation made for bringing the 'earth' for filling up. Therefore, this Bench is of the view that the 'Invoices' are not proper invoices which can prove the point of view of the Petitioner. As per the LoI, which is basis on which work was to be carried out, monthly Bills were supposed to be raised after the end of the month, payable after verification, by 10th day of the next month. However, no such monthly Bill has been produced before this Bench.

(v) The Petitioner has produced a Statement regarding 'Confirmation of Accounts' for the year 2015-16, 2016-17 and 2017-18. The Respondent mentions that the signature on these statements has been forged and it does not belong to any employee of the Company. The Respondent mentions that they have filed a criminal complaint with the Police regarding these documents on 03.12.2018.

(vi) This Bench also took note of the fact that the last Invoice was raised on 16.03.2016 and as per Para 7.2 of the LoI payment was to be released within 10 days from the receipt of the Bills. However, before the issue of Demand Notice in Form-3 on 10.09.2018, there was no communication from the Petitioner to the Respondent for any payment. This Bench, therefore, finds merit in the contention of the 'Respondent' that no occasion ever arose of any payment as there was no work done by the Petitioner and therefore, no dispute was raised by the respondent before the issue of the Demand Notice.

(vii) The Corporate Debtor on Affidavit has mentioned that the work to be performed by the Petitioner related to "Filling with available earth including watering, ramming, consolidating and dressing complete at KM Toll Road NH-8A in the state of Gujarat and Transportation". The Corporate Debtor mentions that this work is at a site viz. Nh-8A in the State of Gujarat. As per the mandatory NHAI guidelines, earth works are to be carried out following certain procedure which is that after the work is awarded, the location wherein work is to be done is identified and informed to NHAI and a Request for Inspection (RFI) is raised by the contractor/ sub contractor at site. Thereafter the source of material i.e. area from where the soil is excavated and brought is identified and informed to NHAI. NHAI officials thereafter approve the specific area known as "Borrow Area" from where the material is brought onto the road site in order to fill the land with the approved material only. Once the RFI is approved and the material from the approved source is brought at the site wherein the work is being carried out at the site the work is certified by NHAI and a confirmation report is generated. If the work is approved and in case the work is of inferior quality a Non Confirmatory Report is generated. Thereafter measurements are recorded and bills thereafter are certified and approved for payment. Besides, for excavation and transportation of materials, as per the submission made by the Corporate Debtor, the following procedure is adopted:-

a. *The agency performing excavation applies to the local Sub Registrar of Collector office to present the formal application.*
b. *Thereafter the respective land revenue authority issues Royalty Challans which must be accompanied with each vehicle doing excavation work.*
c. *Payment of Royalty is mandatory and statutory in terms of the land laws and also a pre-requisite for working by NHAI.*

It is evident from the copies of invoices that there is no tax invoice paid by way of royalty to the land authorities by the Petitioner which points to the fact that no work was done by the Petitioner. There is nothing on record to show that there has been any compliance to NHAI procedures, royalty payment, approval of source of material in name of either of the parties. Therefore, this Bench has no hesitation in arriving at a conclusion, based on the facts submitted before it, that it is not a fit case of Operational Debt which can be considered u/s. 9 of the IBC.

11. In view of the above, the Bench finds there is no 'Debt due' and payable and therefore, dismisses the Petition filed by the Petitioner.

12. In the light of the above discussions, the petition no. CP 4158(IB)/MB/2018 is dismissed.

Sd/-
CHANDRA BHAN SINGH
Member (Technical)

Sd/-
SUCHITRA KANUPARTHI
Member (Judicial)

Date : 20.03.2020