



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI PRASANTA KUMAR MOHANTY
HON'BLE TECHICAL MEMBER**

CP No. (IB) 91/9/JPR/2018

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicatory Authority) Rules, 2016)

IN THE MATTER OF:

R.K. & Associates

Through its Partner Mr. Rohit Garg
Office at: E-31, Green Park,
Main, New Delhi- 110016

...Applicant / Operational Creditor

VERSUS

Suwalka & Suwalka Properties & Builders Pvt. Ltd.

Registered Office: Blue Sky
Apartment 304-C 73, Sarojani
Marg, C-Scheme, Jaipur-
302001

Also at: 1st Floor, Above IDBI
Bank, 381-382, Rawabhata
Road, Shopping Centre, Kota,
Rajasthan- 324005.

...Respondent/Corporate Debtor

For the Applicant : Mr. Archit Bohra, Adv.

For the Respondent : Mr. Amol Vyas, Adv.

Order Pronounced on: 06.02.2023

**ORDER****Per: Shri Deep Chandra Joshi, Judicial Member**

1. The present Application has been filed by R. K. Associates ('Operational Creditor') through its partner Mr. Rohit Garg to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Suwalka and Suwalka Properties and Builders Pvt. Ltd. ('Corporate Debtor'/'Respondent') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC'/'Code') for the alleged default on the repayment of Operational Debt amounting to Rs. 41,82,375/- (Rupees Forty-One Lakhs Eighty-Two Thousand Three Hundred and Seventy-Five Only).
2. The Corporate Debtor namely M/s Suwalka and Suwalka Properties and Builders Pvt. Ltd. is a company incorporated under the provisions of the Companies Act, 1956 on 22.07.2002 holding CIN U45201RJ2002PTC017733. The authorised share capital of the Corporate Debtor is Rs. 1,00,00,000/- (Rupees One Crore) and the paid-up Share Capital is Rs. 99,60,000/- (Rupees Ninety-Nine Lakhs Sixty Thousand Only).
3. The details of the transactions leading to the filing of this application averred by the Applicant are as follows:
 - a. The Corporate Debtor had issued a Work Order bearing number 114 dated 06.07.2015 by way of which the Operational Creditor was appointed as architects for project being developed by the Corporate



Debtor namely Buena Vista at Rajiv Gandhi Nagar, Kota (later renamed as Riddhi Siddhi Residency). In terms of the said work order, the Operational Creditor rendered its professional services i.e. providing architectural and building drawings for the construction to be carried out in the said project.

- b. The payment for the services rendered was to be governed by clause E and F of the Work Order. As per the said Work Order, the payments were to be released by the Corporate Debtor to the Operational Creditor upon crossing of each milestone as stipulated in Clause F. The Milestone and Payment Schedule as mentioned in Clause F of the Work Order is being reiterated herein under:

<i>S.No.</i>	<i>Particulars</i>	<i>% of fee due</i>
1.	Advance on Appointment as Architect	5
2.	On Finalization of Layout/Sketch design of the units	10
3.	On preparation and submission of building plan to local authorities	10
4.	On preparation of Architectural Working Drawing and submission thereof after approval is obtained from local authorities	10
5.	On preparation and Finalisation of Structural Working Drawings	5
6.	On preparation and finalisation of PHE/electrical/services working drawings	5
7.	On preparation of BOQ, List of Materials required, Tender Documents for various activities, Project report including Basic Bar chart, Detailed calculations of FAR, List of Total Drawings Provided etc	5



8.	During construction period (monthly payment on basis of estimated 24 months construction period)	40
9.	On submission of all as Built Final Drawing for	5
10.	On final certification of the completion of construction activities	5
	Total	100

- c. The Operational Creditor has rendered services from Stage (1) to Stage (8) till date and as per the terms stipulated in the Work Order, the payment was to be released to the Operational Creditor on completion of each milestone. On account of the business relations, the Operational Creditor maintained a current account for the Corporate Debtor, which resulted in the Operational Creditor first raising the Statement of Due Account pursuant to which the Corporate Debtor made payments in an ad-hoc manner. Despite unequivocally accepting the services of the Operational Creditor, the Corporate Debtor was always negligent in making timely payments even though reminders were repeatedly sent. Copies of the reminders dated 02.05.2018 and 27.07.2018 have been annexed with the Application.
- d. The Operational Creditor has completed work to the tune of Rs. 1,34,61,958/- (Rupees One Crore Thirty-Four Lakhs Sixty-One Thousand Nine Hundred and Fifty-Eight Only). The Corporate Debtor has failed to make payment as per the Statement raised by the Operational Creditor dated 08.08.2018 having completed work upto



8th Mile Stone as per clause F of the Work Order. The total amount of the outstanding dues is Rs. 41,82,375/- (Rupees Forty-One Lakhs Eighty-Two Thousand Three Hundred and Seventy-Five Only) which pertains to services rendered from July, 2016 to August, 2018. The Corporate Debtor has failed to make payment of the outstanding debt despite the several emails and letter dated 17.08.2018 and 01.09.2018.

- e. The Operational Creditor issued Demand Notice under Section 8 of the Code dated 15.09.2018 calling upon the Corporate Debtor to clear the amount of default i.e. Rs. 41,82,375/- (Rupees Forty-One Lakhs Eighty-Two Thousand Three Hundred and Seventy-Five Only). The Corporate Debtor replied to the demand notice vide letter dated 29.09.2018 stating that there exists dispute between the parties.
- f. The Applicant submits that during the continuation of work, the Corporate Debtor raised certain queries which had been duly resolved and the Corporate Debtor kept on availing the services of the Operational Creditor. The Corporate Debtor has at no point of time denied availing of the services of the Operational Creditor and therefore, is duty bound to make payment to the Operational Creditor.
- g. The details as reflected in Part IV of the Application are as follows:



PART IV
PARTICULARS OF FINANCIAL 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	Total Amount of Operational Debt due is Rs. 41,82,375/- (Rupees Forty-One Lakhs Eighty-Two Thousand Three Hundred and Seventy-Five Only)
2.	Amount claimed to be in default and the date on which the default occurred	Total Amount of Operational Debt due is Rs. 41,82,375/- (Rupees Forty-One Lakhs Eighty-Two Thousand Three Hundred and Seventy-Five Only) as on 17.09.2018

4. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply vide Dairy No. 348/2019 dated 28.02.2019 stating as follows:
- a. The Corporate Debtor has submitted that there existed number of disputes regarding the quality of services provided/ not provided by the Applicant to the Corporate Debtor. In order to understand the disputes, the Corporate Debtor has laid down the mandates of the project i.e. the project named Riddhi Siddhi Residency consisted of 5 building towers of residential and commercial apartments. As per the Work Order dated 06.07.2015, the Operational Creditor was required to provide executable drawings such as Architectural; Civil/Structural; Internal/ External Electricals; etc.



- b. The Applicant has not rendered services as per the requirements stipulated in the Work Order dated 06.07.2015. The team of the Corporate Debtor raised serious disputes via number of correspondences and e-mails regarding the drawings provided by the Applicant. The project has also suffered certain permanent defects on account of faulty drawings against which the Applicant ought to held liable. It has been mentioned in the Work Order that the Operational Creditor would provide complete Bill of Quantities (BOQ), Tender Documents, Bar Chart and list of all drawings to the Corporate Debtor well before the commencement of construction as until and unless these are provided, the Company cannot engage the contractors/suppliers with respect to various activities of the project. However, the same was provided in parts commencing from November, 2015 and going on till March, 2017 with lots of corrections and modifications which led to delay in the project. The Corporate Debtor was compelled to start/commence the project based on preliminary guidelines provided by the Applicant.
- c. The Corporate Debtor had committed to its customers that the Residential Project would be completed by December, 2017 i.e. 24 months from the commencement date in November 2015. The scope of work and milestones in the Work Order dated 06.07.2015 were categorically designed keeping in mind the above timeline. But the



Corporate Debtor failed to provide all the drawings before November, 2015. Thereafter, the Operational Creditor agreed to provide all the drawings by 10.03.2016 which is visible from the trail on acknowledgement mail dated 07.05.2016. Further on account of continuous faulty drawings/ drawings not as per expectations/ requirements, the Company had to suggest revisions in such drawings causing unwarranted delay in project. The same was conveyed to the Applicants vide e-mail dated 13.06.2016. Later in a meeting between the Chief Managing Director of the Corporate Debtor and the Operational Creditor, it was agreed by the Operational Creditor that they will provide all the required drawings by 31.07.2016. Copy of the Minutes of the meeting dated 30.06.2016 have been attached with the reply.

- d. Even then the dispute remained unsolved and number of e-mails were exchanged in respect of faults/ incorrectness in drawings. Another meeting was held on 16.08.2017 wherein the Applicant agreed that all the problems/faults regarding the drawings will be resolved by the end of August, 2017. However, many of the problems continued in the drawings provided by the Operational Creditor. Reliance has been placed on the e-mails exchanged between the parties and special emphasis has been placed on e-mail dated 01.01.2018.



- e. The Corporate Debtor vide email dated 13.06.2016 informed the Applicant that on account of faulty drawings of MEP Services, the Corporate Debtor would terminate the contract to the extent of MEP services if the same was not provided within a week's time. Thereafter, the Applicant provided drawings but the same was not fit for execution. Hence, the Corporate Debtor engaged another professional namely M/s MEPTEK Consultants in the month of March, 2018 and May, 2018 for MEP drawings.
- f. The Corporate Debtor while relying on sub-clause 8 of Clause F of the Work Order dated 06.07.2015 has submitted that the Applicant was to supervise the project during the construction period and on the basis of the same, it was to be paid monthly charges. Further as per Clause D, the Applicant was required to ensure that actual work was being carried out as per the drawings; undertake periodical surprise visits and report compliance. However, the Applicant has not performed its services of supervision of execution work and failed to provide any evidence certifying the supervision/inspection of the site. Hence, the Corporate Debtor is not liable to make payment in respect of the said clause.
- g. The Corporate Debtor was to hand over the possession of flats and shops to the customers by the end of December, 2017 but since the drawings were not provided by the Applicants in due course of time,



the construction could not be completed resulting in losses to the Corporate Debtor. As the Corporate Debtor could not recover the consideration from the customers on account of the delay, the Company had to continue the borrowed funds, thereby incurring more interest cost. Over and above, the Corporate Debtor had to incur cost with regard to idle manpower, rental on machinery and tools for extended period of construction of building from December, 2017.

5. The Applicant has filed Additional Affidavit vide Diary No. 1859/2019 dated 11.09.2019 wherein it has been submitted that in order to have the best project in the region certain tweaks and corrections were done in the drawings which cannot be attributed to the delay in the project. As per the declaration made by the Corporate Debtor before Rajasthan Real Estate Regulatory Authority ('RERA'); the estimated time of completion of the project and offering possession in the Affidavit cum Declaration and Sample Agreement respectively is committed as 14.10.2019. It has also been submitted that the project was approved by the Urban Improvement Trust, Kota vide letter dated 15.10.2015 with all the designs being duly submitted to them. As per the Applicant, the delay is ascribed to the cash crunch which was being faced by the Corporate Debtor. Moreso, the Applicant is not concerned with the agreements which were entered between the Corporate Debtor and individuals for delivery of the project.



The Applicant has also submitted that as per the Work Order dated 06.07.2015, no time frame was mentioned but only milestones. Furthermore, all the defects have been set up by the Corporate Debtor only after receipt of Section 8 notice. The appointment of another MEP Services has been done after 24 months from the threatening email of termination dated 13.06.2016.

6. The Applicant has filed 2 sets of Written Submissions vide Diary No. 15/2021 dated 04.01.2021 and Diary No. 3180/2022 dated 28.10.2022 which are being summarised as follows:
 - a. The Applicant has relied on e-mail dated 29.05.2017 which was a reminder for payment of dues to the Corporate Debtor, in reply of which the Corporate Debtor has vide e-mail dated 29.05.2017 confirmed that the bills will be cleared in some time. Thereafter, the Applicant has submitted that the project was approved by the Urban Improvement Trust Kota vide letter dated 15.10.2015 with all the designs duly submitted and while the approval is granted, majority of the drawings are to be submitted as per local laws. Further, since this is a large-scale project certain tweaks and corrections are done as part of standard practice and the same cannot qualify as a pre-existing dispute. Also, it has been undertaken that the drawings of the Applicant have not caused any permanent defect in the building.



- b. In reply to the email of the Corporate Debtor dated 01.01.2018, the Applicant preferred a response on 04.01.2018 reiterating that the Corporate Debtor has till date not paid for the services availed. Moreso, it has been acknowledged by the Corporate Debtor in the meetings that since the project period was enhanced to 36 months the rest of the payment would be distributed accordingly. Also in the meeting held on 30.06.2016 it was observed that All consultants visited RSR and RSA site and showed satisfaction on work execution, progress and found work in parity to the suggested design and drawings.
- c. The Applicant provided services to the Corporate Debtor for a period of 2 years before MEP professionals were engaged in the month of March, 2018 and May, 2018. The components of MEP works is only 5% of the total contract value/ consultation fee as stipulated in clause F of the work order dated 06.07.2015. Moreover, the Operational Creditor had conducted site visits which were recorded in the minutes of the meeting dated 30.06.2016.
- d. The Applicant has relied certain judgments:
- i. *Alhuwalia Contracts (India) Limited Vs. Raheja Developers Limited. Company Appeal (AT) (Insolvency) No. 730/2018 decided on 23.07.2019 by Hon'ble NCLAT at paragraph 15-20*



ii. *Kanchan Ostwal Vs. MEC Shot Blasting. CP No. (IB)-93/9/JPR/2018 NCLT, Jaipur at paragraph 3, 13-14*

iii. *VK Global Vs. Smaat India Pvt. Ltd. CP (IB) No. 91/9/HDB/2018 NCLT, Hyderabad at paragraph 8, 10, 14, 18, 26-27.*

7. The Corporate Debtor has filed Written Submissions vide Diary No. 3162/2022 dated 28.10.2022 which is being summarised as follows:

- a. As per work contract dated 06.07.2015 the work included not only drawings for architectural, civil/ structural but also for internal and external electrical, roads, sanitary and plumbing, water supply, sewage, storm water drainage, rain water harvesting, drive ways, gas pipe line, lifts, HVAC, Water treatment plant, Sewage treatment plant and firefighting equipment. Further, it has been mentioned that the Applicant will provide complete BOQ, tender documents, bar chart and list of all drawings and unless the same has not provided the Corporate Debtor cannot engage the contractor/ supplier for the project. All of these above mentioned were provided in piecemeal commencing from December, 2015 till March, 2018 with lots of corrections and modifications which led to delay of the entire project.
- b. Some of the drawings which were most important for the construction of the buildings are so faulty that there are permanent defects being taken in the buildings. Even after two meetings between the representatives of the parties, the problem continued in



the drawings and thereafter the Corporate Debtor wrote an email dated 01.01.2018 pointing out that some of the critical issues had not been resolved by them since the last 7 to 8 months. The delay in delivery is directly proportionate to the delay in the project.

- c. The Corporate Debtor has relied certain judgments:
- i. *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.*
(Supreme Court order dated 21.09.2017)
 - ii. *Shrivarad Polyfab Vs. OLAM Agro India Pvt. Ltd.* (NCLAT order dated 01.02.2018)
 - iii. *M/s one Coat plaster Vs. M/s Ambience Private Limited* (NCLT order dated 01.03.2017)
 - iv. *R.K. & Associates Vs. Pranay Infra Build Private Limited*
(NCLT & NCLAT order)
8. We have heard the Ld. Counsels for the parties and perused the averments made in the application, reply, rejoinder, written submissions and the documents enclosed with the application.
9. This Adjudicating Authority having perused all the relevant papers and finding them in order notes that the Registered Office of the Respondent is situated in Jaipur, and therefore Adjudicating Authority has jurisdiction to entertain and try this Application. Further this matter is within the purview of Laws of Limitation, as the time period of default is in the year 2018 and the Application has been filed before this Adjudicating



Authority on 29.11.2018, hence the period of three years after the default occurred had not been exhausted at the time of filing of this Application. Therefore, the present Application has been filed within the prescribed period of limitation.

10. It has been established in law that for a Section 9 Application to be admitted (i) there has to be an operational debt; (ii) the debt has become due and payable; (iii) there is default in repayment of the said debt and (iv) there is no existence of dispute between the parties prior to issuance of the demand notice under Section 8 of the Code.
11. It is seen that both the parties to the case have admitted that a work order was issued on 06.07.2015 as per which the Applicants were appointed as Architects in the project of the Corporate Debtor named Buena Vista at Rajeev Gandhi Nagar, Kota. The payment was to be made as per the schedule mentioned in the work order which included milestones i.e. a certain percentage of the fees will be advanced on the completion of the said milestone. The Applicant has undertaken that work from stage 1 to 8 as mentioned in the work order has duly been completed and therefore the present application has been filed seeking due amount as per the Statement of Dues raised against the Corporate Debtor. Certain letters have also been raised by the Applicant which are briefly summarised as follows:



- a. Letter dated 02.05.2018 preferred by the Applicant requesting the Corporate Debtor to clear the balance payment of Rs. 27,80,401/- (Anx-B of the Application at Page. 29)
 - b. Letter dated 27.07.2018 preferred by the Applicant requesting the Corporate Debtor to clear the balance payment of Rs. 36,86,101.45/- (Anx-B of the Application at Page 30)
 - c. Letter dated 08.08.2018 presenting Statement of Due requesting payment of balance amount of Rs. 36,86,101.45/- (Anx-C of the Application at Page 32)
 - d. Letter dated 17.08.2018 requesting payment of Rs. 41,82,375.48/- (Anx-D of the Application at Page 34)
 - e. Letter dated 01.09.2018 requesting payment of Rs. 41,82,375.48/- (Anx-D of the Application at Page 36)
 - f. Demand Notice u/s 8 of the Code dated 15.09.2018 against payment of Rs. 41,82,375/-. (Anx.-E of the Application at Page 38)
12. In the present Application, the Applicant has claimed balance payment to the tune of Rs. 41,82,375/- (Rupees Forty-One Lakh Eighty-Two Thousand Three Hundred and Seventy-Five) from the Corporate Debtor and in the said letter itself, the Applicant has submitted that amount to the tune of Rs. 81,17,397/- (Rupees Eighty-One Lakh Seventeen Thousand Three Hundred and Ninety-Seven) has been received from the Corporate Debtor.



13. After the demand notice dated 15.09.2018 was preferred under Section 8 of the Code to the Corporate Debtor, the Corporate Debtor has vide reply dated 29.09.2018 submitted that there exists a pre-existing dispute between the parties to the case. Copies of e-mails have been annexed with the reply to the demand notice as well as in the reply.
14. The Corporate Debtor has relied on certain e-mails to determine that there was deficiency in the services provided by the Applicant. The Corporate Debtor has relied on the e-mail dated 07.05.2016 wherein the Applicant had undertaken to provide the necessary drawings for RSA by 07.05.2016. Thereafter, vide e-mail dated 13.06.2016, the Corporate Debtor conveyed that due to continuous corrections and revisions, the project is getting delayed time and again. Reliance has also been placed on the minutes of the meeting dated 30.06.2016 wherein the Corporate Debtor undertook that all drawings & details for project RSR & RSA related to (MEP) shall be provided at the earliest possible- latest by 31.07.2016 which were earlier agreed to be provided by 10.03.2016.
15. It is seen from the long trail of e-mails exchanged between the parties that Applicant had certain timelines set for delivery of drawings which were time and again breached. Plain reading of the e-mail dated 04.08.2016, 08.08.2016, 18.08.2017, 01.01.2018 shows that the Applicant has undertaken to deliver the drawings on various occasions but failed to abide by the same resulting in the alleged delay of the project.



16. The dispute between the parties to the case is also evident from the fact that to complete the project, the Corporate Debtor had to engage the services of one M/s MEPTEK Consultants vide Work Order dated 30.03.2018 and 05.05.2018. To engage the services of another entity so as to complete the work of the Applicant clearly amounts to dispute between the parties. The correspondence between the parties to the case clearly amounts to dissatisfaction on part of the Corporate Debtor in the services provided by the Applicant, thereby creating a dispute.
17. In Mobilox Innovations Private Limited Vs Kirusa Software Private Limited, para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9. Para 34 is as follows:-

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
- (iii) Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”



However, the defence has to be plausible and while not examining it on merits, it must not appear as a moonshine defence.

18. In the present matter at hand, there is a clear dispute amongst the parties to the dispute. The conditions laid down under Section 9 of the Code are not fulfilled in the present application. In light of the judgment of the Hon'ble Supreme Court in *M/s S. S. Engineers vs. Hindustan Petroleum Corporation Ltd. & Ors.*, this Adjudicating Authority is not inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC.
19. Accordingly, CP No. (IB) 91/9/JPR/2018 is dismissed as rejected. The Registry is directed to serve the copy of this Order to the parties.

DEEP
CHANDRA
JOSHI

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

PRASANTA
KUMAR
MOHANTY

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Date: 2023.02.06
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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**