

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-IV

IB-608/(ND)/2021

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

RKSK Steel India Limited

...Operational Creditor/Applicant

Versus

Apace Builders and Contractors Pvt. Ltd.

...Corporate Debtor/Respondent

Order Delivered on: 15.09.2022

Coram:

SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: DR. BINOD KUMAR SINHA, MEMBER- TECHNICAL

This is an application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent company, claimed to be the corporate debtor.

2. The applicant is engaged in the business of manufacturing and supply of TMT bars, whereas the Corporate Debtor is a private limited company engaged in the business of real estate building and construction work.

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3. The details of transactions leading to the filing of this petition as averred by the petitioner are as follows:

- a. The Operational creditor has been in business relation with the Corporate Debtor for past many years for providing TMT bars for their business purposes.
- b. The Operational Creditor submitted that materials provided by them were of impeccable quality and the same used to be delivered to the Corporate Debtor within stipulated time frame along with the invoices which were also acknowledged by the Corporate Debtor.
- c. The Operational Creditor further stated that the Corporate Debtor never raised any objection regarding the quantity, quality of the material supplied to them.
- d. The Operational Creditor submits that they have maintained the running ledger account of all the transactions done with the Corporate Debtor and also entries have been made in the invoices. The Payments received partly from the Corporate Debtor were also adjusted in the transaction done between the parties.
- e. The Operational Creditor submits that during the financial year 2016-2019 various goods were supplied. And during the financial year 2017-2020, part payments have been made by the Corporate Debtor.
- f. The Operational Creditor states that the Corporate Debtor had issued 3 cheques dated 07.11.2019 for Rs. 1,00,00,000/-, Rs.

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1,00,00,000/- and Rs. 31,51,500/- in favour of them but the cheques got dishonoured for 'Payment stopped by drawer'.

- g. The Operational Creditor further submits that the last payment was received from the Corporate Debtor on 23.10.2020 and the total amount due is Rs. 1,59,91,031/- without interest.
- h. The Operational Creditor also stated that several reminders were made to the Corporate Debtor with respect to the outstanding dues towards them but they delayed the payment on one pretext to another.
- i. The Operational Creditor sent a Demand Notice dated 16.04.2021 but the service of the same was not effective, hence the demand notice dated 11.08.2021 was sent on to the registered address of the Corporate Debtor. The service of the same was also not effective. Hence, the said demand notice was sent via email to the registered e-mail address of the Corporate Debtor demanding payment of an unpaid operational debt of Rs. 1,59,91,031/- as per provisions under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
4. The Corporate Debtor has filed its reply against the said Application. The main objections raised by the corporate debtor are as follows:
- a) The Corporate Debtor stated that the Operational Creditor has not come before this Tribunal with clean hands and in this regard, they have relied on the observations made by the Hon'ble Supreme Court in the matters of **S.P. Chengalvaraya Naidu v. Jagannath**

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1994 AIR 853, 1994 SCC (1) 1 and Kishore Samrite v. State of U.P. Criminal Appeal NO.1406 OF 2012

- b) The Corporate Debtor further stated that the Operational Creditor has failed to disclose the true and complete facts. As the matter was amicably resolved between the Operational Creditor and the Corporate Debtor in 2020 wherein, the Operational Creditor agreed to take over 3 flats amounting Rs. 1,59,66,198/- in the group housing project without payment of any consideration which is being developed by M/s Rudra Buildwell Projects Pvt. Ltd. and in the said project they i.e. the Corporate Debtor were acting as a sub-contractor.
- c) The Corporate Debtor further stated that with regards to the amicable settlement 3 credit notes were issued in favour of M/s Rudra Buildwell Projects Pvt. Ltd. who in turn sold 3 flats via duly executed builder buyer agreements to the Operational Creditor in their group housing project 'Palace Heights' and also debit notes were issued against the Operational Creditor for sum of Rs. 1,59,66,198/-.
- d) The Corporate debtor further submits in his reply that the Operational Creditor had issued a legal notice dated 18.11.2019 under Section 138 of the Negotiable Instrument, Act, 1881 with regards to the dishonouring of the cheques to which they replied vide letter dated 03.12.2019, stating therein that the 3 cheques were handed over to the Operational Creditor at the starting of the business in year 2015 as security and not on 07.11.2019. As, the

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payments were made timely, the Operational Creditor was asked to return the cheques in year 2017 to which the Operational Creditor contended that they have misplaced the cheques. Hence, the Corporate Debtor wrote a letter dated 27.12.2017 to its bank requesting the payment against the said 3 cheques to be stopped as the same had been misplaced by the Operational Creditor.

e) The Corporate Debtor states that with respect to the dishonouring of 3 cheques the Operational Creditor never instituted any legal proceedings before the competent Authority under Section 138 of the Negotiable Instrument Act, 1881 nor refuted any of the facts stated in the reply dated 03.12.2019 by the Corporate Debtor.

f) The Corporate Debtor has relied on the documents listed below to prove their averments: -

- Copy of credit notes dated 01.11.2020 issued by the Corporate Debtor in favour of M/s Rudra Buildwell Projects Pvt. Ltd.
- Copy of debit notes dated 01.11.2020 issued by M/s Rudra Buildwell Projects Pvt. Ltd. against the Operational Creditor.
- Copy of builder buyer agreement dated 12.11.2020 executed between M/s Rudra Buildwell Projects Pvt. Ltd. And the Operational Creditor.
- Copy of Legal Notice dated 18.11.2019 issued by the Operational Creditor to the Corporate Debtor under Section 138 of the Negotiable Instrument Act, 1881.
- Copy of the reply dated 03.12.2019 on behalf of the Corporate Debtor to the legal notice dated 18.11.2019.

5. The Applicant has filed the rejoinder and stated as follows: -

a. The Operational Creditor submits that they have never entered into any agreement for the settlement with the Corporate Debtor.

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- b. The Operational Creditor further states that the documents and agreements to sell placed on record by the Corporate Debtor are forged and fabricated as the same were never executed by them.
- c. The Operational Creditor states in neither their rejoinder that the agreement to sell placed on record by the Corporate Debtor is forged and fabricated as the name of the allottee /authorized representative is not mentioned therein nor the name of the witnesses.
- d. The Operational Creditor states that they have filed a complaint under Section 138 of the Negotiable Instrument Act, 1881 for the dishonoured cheques in question before the Judicial Magistrate, Satna and the same is pending for adjudication.
6. We have heard Ld. Counsel for both the parties and perused the averments made in the application, reply and rejoinder filed by the parties. The relevant documents annexed with the respective submissions have been examined.
7. With regard to the contention of the respondent corporate debtor of setting off the operational debt due by allotting the flats to the operational creditor, we find that in order to substantiate the plea of setting off the operational debt between the parties, the respondent corporate debtor has stated contentions in its reply along with relevant documents including builder buyer agreement, credit and debit notes issued between the parties. We further observe that all the above referred documents relied upon by the respondent corporate debtor are issued much prior to the issuance of the demand notice dated 11.08.2021 by the applicant.

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8. The Hon'ble Supreme Court in catena of Judgements has laid down the principle that 'pre-existing dispute' which may be ground to thwart an application under Section 9 has to be a real dispute, a conflict or controversy. A conflict of claims or rights should be apparent from the reply as contemplated by Section 8(2). The Corporate Debtor is not to raise bogie of disputes, but there has to be real substantial dispute. The existence of dispute when the Demand Notice was issued is mandatory condition for exercising jurisdiction to reject the Application by the Adjudicating Authority as is referred to in sub-section (5) of Section 9. The statute uses the expression 'existence of a dispute'. The word 'dispute' has been defined in Black's Law Dictionary as in the following manner:-

"Dispute.

A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a relation to which jurors are called and witnesses examined. See Cause of action; Controversy; Justiciable controversy; Labour dispute."

9. In the instant matter the preliminary contention made by the Corporate Debtor in their reply is that they have adjusted the amount due i.e. Rs. 1,59,66,198/- towards the Operational Creditor via allotting 3 flats in a group housing project 'Palace Heights' developed by M/s Rudra Buildwell Projects Pvt. Ltd., wherein the Corporate Debtor is a sub-contractor and the said allotment is done without payment of any consideration by the Operational Creditor. On a perusal of the builder buyer agreement, credits and debit notes issued between the parties, the Operational Creditor had disputed the authenticity of the Builder-Buyer-Agreement denying the

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execution of the said Agreement. Consequently, the alleged transaction off setting of the operational dues between the parties is squarely covered under 'pre-existing dispute'.

10. At this juncture, we will have to examine as to whether the claim of the respondent Corporate Debtor with regard to the "setting off the operational debt" can be considered to be a real 'pre-existing dispute' or it is one which is spurious, illusory or not supported by any evidence. We find it relevant to refer to the builder buyer agreement with regard to allotment of 3 flats to the operational creditor, issue of debit and credit notes between the parties. On perusal of the documents referred, it is clearly evident that there is a dispute between the parties with regard to the validity of the builder buyer agreement and issue of the relevant debit and credit notes which undoubtedly proves that there is a pre-existing dispute as to the existence of the amount of debt between the parties.
11. The corporate debtor had disputed the alleged amount of debt of Rs. 1,59,66,198/- on the ground that both the parties had amicably settled the debt due pursuant to which the corporate debtor had issued 3 (Three) Credit Notes in favour of M/s Rudra Buildwell Projects Pvt Ltd who in turn sold 3 (Three) Flats to the Operational Creditor in its group housing project 'Palace Heights' through duly executed Builder Buyer Agreements (BA) and instead of taking consideration from the Operational Creditor, M/s Rudra Buildwell Projects Pvt. Ltd sent (Three) Debit Notes against the operational creditor.
12. In the case of "**Mobilox Innovative Private Limited vs. Kirusa Software Private Limited**" in civil appeal number 9405 of 2017 ([2017] ibclaw.in 01 SC) the Hon'ble Supreme Court vide order dated 21.09.2017 has held that:



“Therefore, all 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. In the present case the respondent has raised dispute with sufficient particulars. Besides the case records reveal that there was existence of dispute much prior to the issuance of notice under section 8 of the code. The claims of the dispute suggest the need of elaborate investigation. The moment there is existence of such a pre-existence dispute, the corporate debtor gets out of the clutches of the code.”

13. Furthermore, no such condition is prescribed in the purchase orders issued by the Corporate Debtor and the tax invoices issued by the Operational Creditor that in case the Corporate Debtor makes any default in clearing the dues against the Operational Creditor would be able to adjust the remaining dues via allotment of flat(s) in any project. It is noted that the Operational Creditor in its pleadings have challenged and disputed the genuineness of the builder buyer agreement dated 12.11.2020 executed between the M/s Rudra Buildwell Projects Pvt. Ltd. and Operational Creditor. However, the question of the genuineness of the said document can only be adjudicated upon in an evidentiary proceeding and not by a summary proceeding under the Code. As held by the Hon’ble Supreme Court in the **case of Radha Exports (India) (P)Ltd. V. K.P. Jayaram [(2020) 10 SCC 538]**, it was held that **“Disputes as to whether the signatures of the Respondents are forged or whether records have been fabricated can be**



adjudicated upon evidence including forensic evidence in a regular suit and not in proceedings under Section 7 of the IBC.”

14. In the light of the above said facts and after giving careful consideration to the entire matter, hearing the arguments of the Ld. Counsels for the Operational Creditor and the Corporate Debtor and upon appreciation of the documents placed on record and keeping in mind the provisions of law laid down in the Code and the Judgments cited supra, it is amply clear that there exists a pre-existing dispute with respect to the ‘builder-buyer-agreements’ between the parties which definitely creates a bar as far as initiation of proceedings by Operational Creditor against the Corporate Debtor is concerned.

15. Accordingly, the instant petition **stands dismissed** with no order to costs.

Let copy of the order be served to the parties.

Consign the file to the record room.

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(DR. BINOD KUMAR SINHA)

MEMBER (T)

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(DHARMINDER SINGH)

MEMBER (J)