

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI.RAJEEV BHARDWAJ- HON'BLE MEMBER (J)

CORAM: SHRI.SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 19.12.2023 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/130/2021
NAME OF THE COMPANY	Prasad & Company (Projects Works) Pvt Ltd
NAME OF THE PETITIONER(S)	Masprocon
NAME OF THE RESPONDENT(S)	Prasad & Company (Projects Works) Pvt Ltd
UNDER SECTION	9 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this Petition is dismissed with costs.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – II

CP(IB) No.130/09/HDB/2021
U/s. 9 of IB Code, 2016

Between:

M/s. Masprocon,
O/o. # 16-2-754/A/17,
Plot No.17, APAU Colony,
Gaddiannaram,
Hyderabad – 500 060.

...the Petitioner/
Operational Creditor

Vs

M/s. Prasad & Company (Project Works) Pvt Ltd,
O/o. #6-3-871/3, Snehalatha,
Green Land Road, Begumpet,
Hyderabad – 500 016.

...the Respondent/
Corporate Debtor

Date of Order:19.12.2023

CORAM:

Hon'ble Sri Rajeev Bhardwaj, Member (Judicial)

Hon'ble Sri Sanjay Puri, Member (Technical)

Counsels present:

For the Applicant : Mr. K. Ravichandra Mohan, Advocate

For the Respondent : Mr. Alluri Krishnam Raju, Advocate

Heard on : 06.12.2023

Per : Sanjay Puri

ORDER

1. This Application is filed by M/s. Masprocon, (**the Petitioner**) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against M/s. Prasad & Company (Project Works) Private Limited (**the**

Respondent), for the alleged default in discharging the debt that is due to the Petitioner.

The facts of the case as per the Applicant:

2. The Applicant performed engineering services encompassing design and the preparation of drawings for civil works to the Respondent in accordance with the Work Order No. P&C/JAGDALPUR/5 dated 10.10.2011.¹ The initial amount agreed upon for the services was Rs.93,37,500/-. Subsequently, as the Respondent expanded the scope of work, the costs escalated to Rs. 2,94,41,268/-. The total Invoice value for the services amounted to Rs.3,87,78,768/-, out of which the Petitioner received Rs.1,01,65,957/-, inclusive of TDS. The current outstanding balance is Rs.2,86,12,811/-.
3. Furthermore, on August 12 2020, the Petitioner communicated to the Respondent, attaching an extra claim for design services related to the Project. The claim was necessitated by a significant increase in the size of buildings beyond the initially provided tender drawing size. The Respondent responded on September 11 2020, stating that efforts were being made to pursue the claims, and the matter was pending approval with their employer BHEL and the outcome would be communicated in due course.
4. It is emphasized that the Petitioner provided design engineering services as per the specifications and expansions outlined by the Respondent. The approval or disapproval of the works by the Respondent's principal is deemed irrelevant to the services allocated by the Respondent to the Petitioner. The Petitioner executed additional works as specified by the Respondent, and there is prima facie Agreement from the Respondent, explicitly stated in the email.

¹ Pg 27-30 of the Application

5. As of the date of Demand Notice, the Respondent is liable for an amount of Rs.2,86,12,811/-, excluding an interest component of Rs.1,53,38,034/-. The total outstanding sum, inclusive of interest amounts to Rs.4,39,50,845/-.
6. The Petitioner has persistently reminded the Respondent to settle the outstanding dues. However, the Respondent repeatedly deferred the payment. The Petitioner along with its key managerial personnel, issued a Demand Notice in Form 3 & Form 4 as per the Insolvency and Bankruptcy Code (IBC), 2016, on January 29, 2021.² The stated amount in the Demand Notice is Rs.4,26,30,594/-, inclusive of interest at 18% p.a. i.e. Rs.1,49,48,390/-. The claim has been adjusted to account for taxes, resulting in a total claim amount of Rs.4,39,50,845/-.
7. However, the Petitioner had not received the outstanding dues from the Respondent in response to the Notice issued under Section 8(1) through Form 3 of the Insolvency and Bankruptcy Code (IBC), 2016. Section 9(1) of the IBC, 2016 clearly stipulates that "*After the expiry of the period of 10 days from the date of delivery of notice or Invoice demanding payment under Section 8(1), if the operational creditor does not receive payment from the corporate debtor or notice of dispute under Section 8(2), the operational creditor may file an application before the Adjudicating Authority for initiating the Corporate Insolvency Resolution Process.*"
8. The Respondent, in failing to respond to the Demand Notice, took deliberate action by filing a civil case before Hon'ble IX Additional Senior Civil Judge, Ranga Reddy District, L.B. Nagar, under case number O.S. 181/2020 dated 5th February 2021.³ In this civil case, the Respondent falsely claimed an amount of Rs.33,81,700/- from

² Pg 15-25 of the Application

³ Pg 84 of the Application

the Petitioner without providing a proper reply to the earlier Demand Notice. Hence, this application.

The Counter

9. In response to the Application, the Respondent filed a Counter. The Respondent argued that the present Application is not maintainable due to a pre-existing dispute. It was asserted that the Respondent is not obligated to pay the claimed amount of Rs.4,39,50,845/-, inclusive of interest and the claim is time-barred. Well before the issuance of Demand Notice on 02.02.2021, the Respondent had initiated a civil suit before the Senior Civil Judge at Rangareddy District Courts, under OS No. 181/2021, filed on 29.01.2021⁴ for recovery of Rs.33,81,700/- along with interest pertaining to losses and additional payment received by the Petitioner.
10. It was asserted that, no amount is liable to be paid towards operational debt as claimed by the Petitioner, as no Invoice is raised on the Respondent. The Petitioner cannot claim any amount on a Proforma Invoice allegedly issued between January 2018 and December 2021. The Demand Notice/Invoice under Form-3 raised by the Petitioner is defective and cannot be relied upon, as it fails to meet the requirements under IBC, 2016. The Petitioner had failed to fulfill its obligations under two Work Orders issued on 10.10.2011 by the Respondent for an amount of Rs.63,37,500/- and Rs.30,00,000/- (Total : Rs. 93,37,500/-). The claimed debt in the present Application is asserted to be an afterthought to evade repayment obligations to the Respondent.
11. The Respondent asserted that, two Letter of Intents bearing No.77/11/6153/SMA and 77/11/6152/SMA both dated 28.09.2011 and two Work Orders bearing No. 88/11/0033/PS and 88/11/0032/PS both dated 14.10.2011 issued by BHEL in favor of

⁴ Pg 22-56 of the Counter

the Respondent for execution of the work amounting to Rs.263 Crores and Rs.170 Crores, respectively. The Petitioner had participated in pre-award meetings with BHEL and based on representations made by the Petitioner, the Respondent had awarded two Work Orders on 10.10.2011 for post-tendering engineering services for design and preparation of drawings for civil works/structural works at NMDC Steel Plant, Nagarnar, Chhattisgarh.

12. The agreed lumpsum price for the entire scope of work based on tender documents and assessments, is attempting to retroactively alter the agreed-upon terms of the contract. Despite participating in pre-award meetings and claiming vast engineering experience in designing and detailing civil and structural buildings, the Petitioner cannot now seek additional payment beyond the initially agreed terms and conditions in the work orders between the Respondent and the Petitioner.
13. It is emphasized that the Respondent has never agreed to entertain any extra claims for providing design services due to changes in building sizes. The Petitioner received all necessary information and data to carry out its scope of work, including obtaining approval from BHEL/MECON. The Petitioner was informed that there would be no revisiting of the agreed-upon terms and conditions of the contract.
14. The Respondent contends that it has made payments in excess of the agreed lumpsum compensation on various dates through bank transfers under the two Work Orders dated 10-10-2011. The Petitioner unilaterally initiated claims for extra amounts from the Respondent without any basis. Subsequently, the Petitioner issued a Legal Notice dated 19-11-2020, claiming Rs.2,76,82,804/- as a balance under the Work Order, asserting extra work executed due to the increase in building sizes.

15. The Respondent has consistently informed the Petitioner during visits to its office that no extra claims would be entertained. It has been communicated clearly that all agreed payments under both Work Orders were made, and part of the Petitioner's scope of work was left unfulfilled. The Respondent emphasizes that due to the Petitioner's non-performance under both Work Orders, it suffered consequences with its employer and led to termination, resulted in irreparable loss to the Respondent in terms of both money and reputation. During the execution of the Work Orders, the Petitioner failed to provide the agreed-upon drawings and specifications within the stipulated time frame and in the required number of sets as per the employer's satisfaction and approval needs. Consequently, the Respondent had to engage a third party to complete a portion of the work, resulted additional expenditure.
16. The Respondent, in various meetings with the Petitioner, explicitly brought to the attention about the additional costs incurred due to commissions and omissions on the part of the Petitioner. The Respondent also notified the Petitioner about the notices issued by its employer, attributing delays to the Petitioner's scope of work under the issued Work Orders.
17. It is emphasized that the Respondent explicitly communicated in 2013 that no extra claims related to the building sizes would be entertained or accepted. Despite this communication, the Petitioner, without raising any claim for extra work due to building size increases in its Invoices until the last Proforma Invoice dated 12.08.2018, continued to work on the existing Work Orders. The Respondent asserts that it is not responsible, accountable, or liable to pay the Petitioner in any manner beyond what is agreed upon in the Work Orders.

18. During meetings at the Respondent's office, the Petitioner was made aware of additional expenditures incurred due to non-performance, including payments made to third parties. These third-party payments include Rs.3,37,610/- to Mr. Sujith Sasmal for the preparation of fabrication drawings and Rs.4,20,780/- to M/s. Japan Metal Building Systems Pvt. Ltd. for the preparation of sheeting/roofing drawings for major buildings. These payments were made in various installments from March 2018 to January 2020 and from June 2017 to June 2019, respectively. These payments were made as part of the scope of work allotted to the Petitioner under the two Work Orders dated 10.10.2011. The Petitioner's shortcomings in execution contributed to the termination of the contract by the employer on 15.07.2019.
19. The Respondent asserts that a portion of its scope of work in the buildings package, specifically the RMHS building and CHP building, was deleted by the principal employer. Consequently, the Petitioner's scope of work under the mentioned Work Orders was also reduced, but the Petitioner continued to receive payments from the Respondent, including an amount of Rs.9,39,581/-, which was supposed to be received upon the successful execution and completion of the Petitioner's scope of work as defined in the terms of payment under Clause-6.0 of the Work Orders. The Respondent claims that the Petitioner is liable to repay the additional expenditure incurred by the Respondent and the amounts received in excess under ad-hoc payments without fulfilling its part of the scope of work under the work orders, until the termination of the contract with its employer BHEL on 15.07.2019.
20. The Respondent received a legal notice dated 19.11.2020 from the Petitioner, claiming a revised fee under the caption of an extra claim. The Respondent contends that the Petitioner's claim is not assessed, accepted, nor within the scope of the work orders. It is legally advised

that the claim is barred by limitation, untenable under the law, and made with the intention to gain illegally at the expense of the Respondent through vexatious and baseless claims. The Respondent responded to the legal notice on 24.12.2020, denying the claims and reserving its rights to institute appropriate proceedings for recovery of money and damages sustained due to the Petitioner's failure to fulfill its obligations under the two work orders. The Respondent has filed a suit for recovery for an amount of Rs.20,15,861/- as of 23.01.2021, which further amounts to Rs.33,81,700/- together with interest at the rate of 24% per annum from 23.01.2021. The Petitioner is deemed severally liable to pay this amount to the Respondent.

21. It is contended that a Proforma Invoice lacks the ability to create any liability as it serves as a preliminary bill generated before the completion of work. The Proforma Invoice, being not an official Invoice, cannot be used for accounting purposes, nor can it be considered a demand or request for payment. It does not establish any commitment binding the Respondent, especially regarding the claimed amount under the present application. Without an actual Invoice raised to date concerning the Petitioner's claim, the Proforma Invoice cannot be the basis for any existing liability by the Respondent.
22. The Respondent claims the existence of a pre-existing dispute, citing legal precedents (Mobilox Innovations Pvt. Ltd v. Kirusa Software Pvt Ltd and Allied Silica Ltd v. Tata Chemicals Ltd). It argues that the demand notice was delivered on 02.02.2021, and no part of the Petitioner's claim is adjudicated by a competent authority. Hence, the Petition needs to be dismissed.
23. **The Rejoinder:**
The Petitioner filed Rejoinder wherein reiterated the contents of the Application.

The Decision:

24. We have heard the submissions made by both the Learned Counsel and perused the record. In this case, the Respondent had issued two Work Orders, both dated 10.10.2011, to the Petitioner. These Work Orders pertained to Engineering Services for the Design and Preparation of Drawings. The precise services to be rendered were outlined in Annexure-1 of the respective Work Orders, and lump-sum

STATEMENT OF SERVICES RENDERED

BILL NO.	DATE	PAYABLE (Excl. Sax)	SERVICE TAX / GST	AMOUNT RECEIVED INCL. TDS
	09-Nov-11	9,33,750	96,176	9,33,750
1	08-Aug-12	10,02,800	1,23,946	5,00,000
2	06-Oct-12	9,20,150	1,13,731	6,00,000
3	14-Dec-12	9,57,800	1,18,384	-
4	17-Sep-13	15,22,000	1,88,119	6,83,333
5	20-Jun-14	19,22,243	2,69,114	9,00,000
6	11-Nov-14	22,64,242	3,16,994	43,72,220
7	15-Oct-16	6,43,797	93,351	-
8	06-Feb-17	10,96,922	1,64,538	10,84,061
9	30-Jan-18	6,03,336	1,08,600	10,92,593
10	12-Aug-20	2,53,18,775		
	TOTAL	3,71,85,814.50	15,92,953	1,01,65,957.00

TOTAL RECEIVABLE	3,87,78,768
LESS: RECEIVED INCL. TDS	1,01,65,957
TO BE RECEIVED	2,86,12,811

amounts of Rs 63,37,500 and Rs 30,00,000 were specified as compensation for these services. The Petitioner has claimed that the Respondent expanded the scope of work during execution, leading to an additional amount of Rs 2,86,12,811 becoming payable by the Respondent. This was in addition to the lump-sum amounts of Rs 93,37,500 agreed upon as per the Work Orders dated 10.10.2011. However, the said additional sum has not been paid by the Respondent. Additionally, the Petitioner is claiming an amount of Rs 1,49,48,390 as interest on the outstanding sum, taking his total claim against the Respondent to Rs 4,39,50,845.

25. In the statement of services rendered given in the application, the Petitioner has shown receipt of advance of Rs 9,33,750 on 09.11.2011. This was 10% of the contracted amount, paid as advance by the Respondent.
26. Next are the particulars of the bills raised from time to time from 08.08.2012 to 30.01.2018 and the amounts received against these bills. These bills are supported by detailed description of the work done by the Petitioner and itemized billing for the same, sometimes running into 6 pages⁵. There are payments received against each of these bills, totaling to Rs 92,32,207.
27. Finally, there is a bill of Rs 2,53,18,775 dated 12.08.2020. The breakdown of this bill is presented in the form of a 'Proforma Invoice' with a rather sketchy description of the work performed.

PROFORMA INVOICE

S.NO.	DESCRIPTION	AMOUNT
1	EXTRA CLAIM AMOUNT FOR STEEL STRUCTURES	30,29,355.00
2	EXTRA CLAIM AMOUNT FOR DESIGN OF RCC PORTION RELATED TO STEEL STRUCTURES	22,21,964.00
3	EXTRA CLAIM AMOUNT FOR CIVIL BUILDINGS	2,00,67,456.00
	TOTAL AMOUNT	2,53,18,775.00
	GST @ 18%	45,57,380.00
	TOTAL AMOUNT PAYABLE	2,98,76,155.00

(Rupees Two Crore Ninety Eight lakh Seventy Six thousand One hundred and Fifty Five Only)

NOTE: Calculation for the above are given in Annexure-1.

28. This Proforma Invoice was attached to an email of 12.08.2020, where the Petitioner had stated

⁵ Pages 71 to 77 of the Application

“PFA our extra claim for providing design services for the proposed project. The claim has been necessitated due to increase in size of buildings drastically beyond the tender drawing size which was provided to us for quotation. We request you to kindly pursue the matter and do needful at the earliest”

To which the Respondent had replied on 11.09.2020

“Our contract is on Lot basis for which you have also been engaged. It is to intimate you that (1) We are putting our best efforts in pursuing the claims due to increase of size of buildings. (2) Since the same is pending approval with our employer BHEL, the outcome of same would be informed to you in the due course of time. Kindly bear with us”

The above exchange has been cited to establish that the aforesaid outstanding amount was an admitted debt.

29. Due to the absence of a detailed description of the agreed-upon work between the parties, and what was actually executed and delivered, the situation remains inconclusive and is a mere exchange of emails without substantive evidence.
30. Moreover, this final bill amounting to Rs 2,53,18,775 not only lacks a detailed description of the work but was also raised more than 30 months in August 2020, after the preceding bill issued in January 2018. The significant time gap suggests an afterthought on the part of the Petitioner.
31. Our attention has also been drawn to a legal notice⁶ sent by the Petitioner to the Respondent on 19.11.2020, where the issues relating to outstanding payment of Rs 2,65,98,743 was raised. The Respondent responded to this notice on 24th December 2020, disputing the entire amount of Rs 2,65,98,743. Among other assertions, the Respondent contended that the Petitioner had not completed the work on time. The Respondent also clarified that it was

⁶ Page 81 of the Counter

incorrect to claim that the Petitioner was required to execute work significantly exceeding tender specifications. Further stating that the Respondent was not liable to pay anything beyond the contracted lump-sum amount.

32. We are not to go into the merits of the disputes. It is evident that a dispute existed between the parties as of 24th December 2020. The Petitioner subsequently issued a statutory Demand Notice under Section 8 of the Insolvency and Bankruptcy Code (IBC) to the Respondent on 29th January 2021, which was more than a month after the disputes regarding outstanding sums were raised by the Respondent. Given that disputes regarding the outstanding debt were already in existence before the issuance of the notice under section 8, the application would fail solely on this basis.
33. We also take note of the civil suit filed by the Respondent on 29th January 2021, which coincided with the day the Demand Notice under Section 8 was sent to the Respondent. While the Petitioner claims to have sent the Demand Notice via email⁷ at 4:45 pm on 29.01.2020, the Respondent initiated the civil suit against the Petitioner on the same date during the Court hours, as seen from the date stamp on the plaint⁸. According to the Petitioner, the Respondent actually filed the suit, after receiving the Demand Notice of 29th January on 2nd February, as a countermeasure on 5th February, but “tried to establish wrongly on 29th January 2021”.
34. During the hearing, the learned Counsel for the Petitioner strongly contended that the date-stamp of the Civil Court indicating the filing of the plaint by the Petitioner on 29th January 2021 was "managed" by the Respondent. However, the Counsel was unable to demonstrate how such manipulation could have been accomplished. Regardless, since the dispute over the outstanding amount existed before 29th

⁷ Page 10 of the Rejoinder

⁸ Page 22 to 56 of the Counter

January 2021, the matter of a plaint being filed by the Respondent disputing the contractual amounts payable/receivable has been rendered moot.

35. This is evidently a case where the provisions of the Insolvency and Bankruptcy Code (IBC) are being invoked as a means of recovering a disputed debt amount, betraying the primary objective of the IBC to facilitate the resolution of insolvency for corporate entities. Matters related to non-payment for services rendered are not within the purview of insolvency proceedings under the IBC. To recover any outstanding dues, the Petitioner could have opted for legal recourse through the appropriate Civil Court, which holds jurisdiction to adjudicate the validity of the outstanding dues.

As a result, the Petition is dismissed with costs.

Sd/-

(SANJAY PURI)
MEMBER (TECHNICAL)

Sd/-

(RAJEEV BHARDWAJ)
MEMBER (JUDICIAL)

VL