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**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH – I, CHENNAI**

CP(IB)/140(CHE)/2021

*(filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 read with Rule 6
of the Insolvency & Bankruptcy (Application to Adjudicating Authority Rules),
2016)*

In the matter of M/s. Ozone Projects Private Limited

M/S. KUNNEL ENGINEERS AND CONTRACTORS PRIVATE LIMITED
Represented by Chairman and Managing Director M.V. Antony
3rd Floor, Puthuran Plaza,
K P C C Junction
MG Road, Ernakulam – 682 011

... Operational Creditor

-Versus-

M/S. OZONE PROJECTS PRIVATE LIMITED
New No.63, G.N. Chetty Road,
T. Nagar, Chennai – 600 017

... Corporate Debtor

Along with

IA/735/CHE/2022 IN CP(IB)/140(CHE)/2021

*(filed under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 and Rule 11
of NCLT Rules, 2016)*

M/S. OZONE PROJECTS PRIVATE LIMITED
New No.63, G.N. Chetty Road,
T. Nagar, Chennai – 600 017

... Applicant/ Corporate Debtor

-Versus-

M/S. KUNNEL ENGINEERS AND CONTRACTORS PRIVATE LIMITED
Represented by Chairman and Managing Director M.V. Antony
3rd Floor, Puthuran Plaza,
K P C C Junction
MG Road, Ernakulam – 682 011

... Respondent/Operational Creditor

Present:

For Operational Creditor : *P.H. Arvindh Pandian, Senior Advocate*
Jose Jacob, Advocate
Jerin Asher Sojan, Advocate

For Corporate Debtor : *P.S. Raman, Senior Advocate*
For Tatva Legal, Chennai

CORAM:

Justice RAMALINGAM SUDHAKAR, PRESIDENT
SAMEER KAKAR, MEMBER (TECHNICAL)

Order Pronounced on 1st May 2023

ORDER

This is a Company Petition filed by the Operational Creditor viz. **KUNNEL ENGINEERS AND CONTRACTORS PRIVATE LIMITED** under Section 9 of the Insolvency and Bankruptcy Code, 2016 (herein after referred to as 'IBC, 2016') seeking initiation of Corporate Insolvency Resolution Process as against the Corporate Debtor viz. **OZONE PROJECTS PRIVATE LIMITED**.

2. BRIEF FACTS OF THE CASE

2.1. The Corporate Debtor had undertaken a project under the name and style "The Metrozone" in Chennai, Tamil Nadu. The Phase 1 and Phase 2 of the project was constructed by the



Corporate Debtor. For Phase 2 and 3 of the project which consist of 13 towers, the Operational Creditor herein was appointed as the contractor for certain specified civil and allied works.

2.2 On 29.06.2016, the Corporate Debtor and the Operational Creditor signed a Letter of Intent (LoI) for taking up the works relating to 13 Residential Towers and Infrastructure for a total contract sum of Rs.224,25,00,000/- (*Rupees Two Hundred and Twenty-Four Crore and Twenty-Five Lakh Only*). Eventhough the towers were designed for different number of floors, built up area, stage of completion, it was uniformly agreed between parties that a sum of Rs.17,25,00,000/- will be paid for execution of a tower. The LoI clearly stated that the execution of any balance structural work or repairs or modifications thereof shall be the responsibility of the Corporate Debtor.

2.3. Subsequently, the Corporate Debtor issued the Work Order to the Operational Creditor for the works assigned, which was accepted by the Operational Creditor on 08.09.2017 and put to execution.



2.4. As per the payment terms in Clause 2.1 and Clause 2.2 of the Work Order, the Operational Creditor was eligible to submit one (1) Running Account Bill ("RAB") every month for the completed part of the works in the Project. However, in the event the value of work done reaches five percent (5%), then the Operational Creditor may raise an RAB irrespective of whether the thirty (30) day period has been completed or not.

2.5. Though the Work Order stipulated the above manner for raising of RABs, owing to the good relationship between the Corporate Debtor and Operational Creditor, the practice followed was slightly different. The Operational Creditor upon completion of certain value of work, informally intimates the Corporate Debtor of the value of work completed. Subsequently, the Corporate Debtor after analyzing the available cash flow, informs the Operational Creditor of the same, corresponding to which an RAB would be raised by the Operational Creditor. Further, Clause 2.2.3 of Work Order stipulates that payment against an RAB should be released within twenty-one (21) days of submission of the RAB.



The Operational Creditor pleads that out of good faith it raised RABs only to the extent which was capable of being paid by the Corporate Debtor.

2.6. Despite the above arrangement in raising RABS, the Operational Creditor was not receiving timely inflow of funds from the Corporate Debtor. As of October 2017, the Operational Creditor was due approximately Rs. 16,55,00,000/- as recorded in email dated 22 November 2017, on account of works executed in line with the Work Order, but not billed as per the understanding with the Corporate debtor, due to their cash flow problems. The same was conveyed by the Operational Creditor on multiple occasions during the meetings with the top management personnel of the Corporate Debtor who gave various assurances regarding payment most of which were not fulfilled. However, ignoring the outstanding dues and the difficulties faced by the Operational Creditor, the Corporate Debtor put forward numerous additional work requirements to Operational Creditor and also set out



unrealistic timelines for completion of Phase 3 towers of the Project by the Operational Creditor.

2.7. In response, the Operational Creditor expressed that these demands for additional works were unreasonable owing to the delay in cash flows and pending dues by the Corporate Debtor and conveyed that the work can be completed only subject to release of funds in line with the verbal commitments made by the Corporate Debtor. Various meetings and discussions were held on this account and emails were exchanged between the Corporate Debtor and Operational Creditor.

2.8. The Operational Creditor continued to face delays in payment on the part of the Corporate Debtor. This in turn caused delay in payment by the Operational Creditor to its suppliers and sub- contractors and it further affected all credit lines which were available to the Operational Creditor until then. All of this severely affected the progress of the Project. However, the Operational Creditor relying on the verbal assurances given by the top echelons of the management of the Corporate Debtor made every attempt to

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keep the work in progress and made purchases of all materials required for completion of both Phase 3 and Phase 4 works of the project.

2.9. Starting from February 2018, the Operational Creditor based on the priorities indicated by the Corporate Debtor started handing over the flats in Towers A, B, C and D of Phase 3 of the Project. By December 2018, the Operational Creditor handed over to the Corporate Debtor 218 out of 259 flats in towers A, B, C and D of Phase 3 of the Project. The exact dates of handing over of all flats in towers A, B, C and D of Phase 3 of the Project along with sample key handing over forms executed jointly by the Corporate Debtor and Operational Creditor are available as Annexure-8.

2.10. The taking over of the towers of the Corporate Debtor happened progressively at the convenience of the Corporate Debtor and though majority of the works were completed early as indicated above, due to the liquidity issues faced by the Corporate Debtor and upon request by the Corporate Debtor, RABs for the work undertaken thus far were not raised by the Operational

Creditor considering the substantial GST implications which would become imminent on raising RABs.

2.11. After March 2019, the Operational Creditor raised RABs in consultation with the Corporate Debtor, cumulative net receivable amount for Rs. 90,37,55,100/- towards the works of towers A, B, C, D, E, F and partial works undertaken with respect to Phase 4 of the Project. The net receivable amounts reflecting in the RABs were arrived at after adjusting the entire mobilization advance, material advance, retention amount, amount due to the Operational Creditor for the additional works and variations executed, cost of material handed over, etc. The details of the RABS raised are as follows:

- (i) Annexure-10 RAB No. 24 dated 27.03.2019 for a cumulative net receivable value of Rs.64,05,00,484/-;
- (ii) Annexure – 11 RAB No. 25 dated 31.03.2019 for net receivable value of Rs.4,10,47,438/-;
- (iii) Annexure – 12 RAB No. 26 dated 05.10.2019 for net receivable value of Rs.8,77,37,179/-;
- (iv) Annexure – 13 RAB No.27 dated 11.03.2020 for a net receivable value of Rs.13,44,70,000/-;

2.12. In the interim, most of the senior personnel of the Corporate Debtor involved in the Project resigned from their respective offices and the Corporate Debtor appointed a new team of top management, none of whom had a clear picture of the events that had transpired between the Corporate Debtor and the Operational Creditor as regards the Project.

2.13. As a result of this change in management, the Operational Creditor faced immense difficulty in getting the RABs raised certified and settled by the Corporate Debtor. The last RAB that was certified by the Corporate Debtor was RAB No. 24. The subsequent RAB No. 25 to RAB No. 27 remains uncertified by the Corporate Debtor till date.

2.14. Out of the total amount of Rs.90,37,55,100/- (Rupees Ninety Crores Thirty Seven Lakhs Fifty Five Thousand and One Hundred Only) raised up to RAB No. 27, only an amount totaling to Rs. 66,03,85,692/- (Rupees Sixty Six Crores Three Lakhs Eighty Five Thousand Six Hundred and Ninety Two Only) was paid by the Corporate Debtor. Thereby, a gross amount of Rs. 24,33,69,408/-

Rupees Twenty Four Crores Thirty Three Lakhs Sixty Nine Thousand Four Hundred and Eight Only) is due before adjustment of TDS, Works Contract Tax ("WCT") and retention amount deducted by the Corporate Debtor.

2.15. After deduction of TDS and WCT and addition of retention amount deducted by the Corporate Debtor to the gross amount due of Rs.24,33,69,408/-(Rupees Twenty Four Crores Thirty Three Lakhs Sixty Nine Thousand Four Hundred and Eight Only), an amount of Rs.29,12,17,245/-(Rupees Twenty Nine Crores Twelve Lakh Seventeen Thousand Two Hundred and Forty Five Only) is in default and payable by the Corporate Debtor against the RABs raised as on date. The breakup of the total due of Rs.29,12,17,245/- (Rupees Twenty Nine Crores Twelve Lakhs Seventeen Thousand Two Hundred and Forty Five Only) is as follows;

- (i) Cumulative amount of Rs.20,15,504/- (Rupees Twenty Lakhs Fifteen Thousand Five Hundred and Four Only) due against RAB No.24 dated 27.03.2019. This cumulative amount is arrived at considering all the receivables due from RAB 01 upto RAB 24;



- (ii) Amount of Rs.83,71,950/-(Rupees Eighty Three Lakhs Seventy One Thousand Nine Hundred and Fifty Only) due against RAB No.25 dated 31.03.2019;
- (iii) Amount of Rs.8,77,37,178/- (Rupees Eight Crores Seventy Seven Lakhs Thirty Seven Thousand One Hundred and Seventy Eight Only) due against RAB No.26 dated 05.10.2019;
- (iv) Amount of Rs.13,44,70,000/- (Rupees Thirteen Crores Forty Four Lakhs Seventy Thousand Only) due against RAB No.27 dated 11.03.2020;
- (v) Retention Amount Rs.5,86,22,613/- (Rupees Five Crores Eighty Six Lakhs Twenty Two Thousand Six Hundred and Thirteen Only) to be repaid on completion of DLP of 12 months.

2.16. Due to the staggered and untimely payments by the Corporate Debtor compounded by the liquidity crisis and the resultant inability to pay dues by the Corporate Debtor, the Operational Creditor was facing difficulties to complete works with respect to towers E and F in Phase 3 of the Project. At this point in time, the Corporate Debtor unilaterally took over the balance works for Phase 3 and terminated the entire works for Phase 4 of the Project without any notice or communication to the Operational



Creditor except for demanding that the Operational Creditor vacate the Project site peacefully.

2.17. By the end of May 2019, with just two months left of the time frame for completion of Phase 3 of the Project, the Operational Creditor was constrained to stop all works and hand over its workers, sub-contractors and balance materials to the Corporate Debtor as decided and directed by the Corporate Debtor. The Corporate Debtor took over the works optimistically. However, the Project remains incomplete even as on date.

2.18. Subsequently, the Corporate Debtor and the Operational Creditor engaged in various discussions to arrive at the final settlement of claims made by the Operational Creditor towards the works undertaken. Through back-and-forth discussions, the amount underwent changes multiple time.

2.19. The Corporate Debtor has also issued 4 cheques bearing Nos. 699880, 699881, 699882 and 699883 of Rs.25,00,000/- (Rupees Twenty Five Lakhs Only) each to the Operational Creditor



as an interim payment of Rs.1,00,00,000/- (Rupees One Crore Only) towards pending dues, until a definite settlement amount is arrived at and mutually agreed upon.

2.20. The Operational Creditor made attempts to get the payments due released by the Corporate Debtor, in vain. All of the sudden, the Corporate Debtor began to claim that the Operational Creditor was overpaid for the works executed on the project and denied having to pay any dues to the Operational Creditor. The Corporate Debtor also went to the extent of denying payment of dues that were admitted by them.

2.21. Simultaneously while denying the amount due, the Corporate Debtor vide its letter dated 24.06.2020 made an offer for settlement to the Operational Creditor for an amount of Rs.8.35 (Rupees Eight Crore and Thirty Five Lakhs Only). In the said letter, the Corporate Debtor contended that there is no amount due and payable by the Corporate Debtor to the Operational Creditor on account of the works executed in the project and offers the said settlement amount as a goodwill gesture on the part of the



Corporate Debtor considering the long standing relationship between the Corporate Debtor and the Operational Creditor. The letter dated 24.06.2020 was further substantiated and confirmed by the Corporate Debtor by forwarding a detailed statement vide email dated 27.06.2020 capturing the computation of the settlement amount of Rs.8.35 Crore arrived. This settlement letter issued by the Corporate Debtor to the Operational Creditor indisputably evidences and reconfirms the existence of a liability on the part of the Corporate Debtor to the Operational Creditor. Hence, the debt due is confirmed and non- payment thereof confirms default.

2.22. On realizing that all amicable attempts to recover the pending dues from the Operational Creditor was futile, the Operational Creditor served on the Corporate Debtor a Demand Notice dated 20.02.2021 in Form 3 under the provisions of IBC, 2016. In response to the same, the Legal Advisors of the Corporate Debtor vide reply letter dated 05.03.2021 communicated that the Corporate Debtor denies all claims made by the Operational



Creditor and contended that the Corporate Debtor has no dues payable to the Operational Creditor. Hence the present Petition.

3. REPLY FILED BY THE RESPONDENT

3.1. The Learned Counsel for the Corporate Debtor filed a counter and raised the following preliminary objections in para 5 of the Counter:

- a) Complaint under CPC camouflaged as a Petition under IBC
- b) Variation in pleadings and documents
- c) existence of dispute admitted by Operational Creditor
- d) Misplaced reliance on a letter of Corporate Debtor
- e) Unresolved issues under representations/ Variations
- f) Claims made based on Uncertified Running Account Bills (RABs)
- g) Value of Uncertified RAB 24 is below threshold limit
- h) Act of Fraud
- i) Release of Retention money only after defect liability Period (DLP)
- j) Disputes under IBC established by the Documents of Operational Creditor itself

3.2. It is stated in para 5 (f) of the counter that the Operational Creditor in their application admits that RAB 25, RAB 26 as well as RAB 27 remains Uncertified. Certification of RABs is an essential pre-requisite for raising demand for payment against the same. It is not even the case of the Operational Creditor that it had made any efforts to have the said RABS certified by this Corporate Debtor. Despite being



invited for a reconciliation meeting, the Operational Creditor has been avoiding the same, till date. In the above circumstances, the demand of the Operational Creditor against Uncertified RAB 25, RAB 26 and RAB 27 deserves to fail.

3.3. Further it is stated in para 5 (g) of the counter that the only RAB that was certified by this Corporate Debtor is RAB 24, the value of which is only Rs.6,36,440/- and even assuming that the said value is payable, such value falls below the minimum threshold limit fixed by the IBC.

3.4. On 17.06.2019, Disputes arose between Corporate Debtor and Operational Creditor regarding non-submission of supporting documents for Running Account Bill No.25 and for erroneous billing, which was recorded through e-mail.

3.5. On 19.01.2020, Reconciliation of Accounts were made between parties and the Corporate Debtor raises several issues pertaining to non-submission of documents, variation in claims and mismatch in Accounts maintained by Operational Creditor from that of Corporate Debtor's.

3.6. Again on 28.02.2020, Reconciliation of Accounts between parties wherein the Corporate Debtor had highlighted several pending disputes such as variation in Claims, difference between Invoice Value of each RAB and the Certified Value of each RAB up to RAB. No.24, mobilization advance of Rs.16.19 Crores pending with the Operational Creditor, cost of Pending work after the exit of the Operational Creditor from the Project etc.

3.7. Further, on 05.05.2020, Reconciliation of Accounts between parties wherein the Corporate Debtor had provided explanations for the difference in Claims made by the Operational Creditor and from that of the records maintained by the Corporate Debtor. The Operational Creditor has made several fictional claims and the difference in values is over Rs. 6 Crores.

3.8. The Corporate Debtor through e-mail dated 27.05.2020 requests the Operational Creditor to nominate and depute its representatives and technical members in Corporate Debtor's

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Office for reconciliation of Accounts and to conduct verification at Site. It is further highlighted that several requests have been made previously in this regard but there has been no support provided by the Operational Creditor.

3.9. In response to the above e-mail dated 27.05.2020 the Operational Creditor vide e-mail dated 29.05.2020 wherein they refused to depute any person at the Corporate Debtor's Site for reconciliation.

3.10. The Chairman and Managing Director of the Corporate Debtor addressed a letter to the Operational Creditor on 24.06.2020 stating that the CD has suffered huge Financial Loss with a loss of Reputation due to slow progress of work of the Operational Creditor and withdrawal of manpower from the worksite without completion of the balance works.

3.11. Further it is stated that on 11.02.2022, the Corporate Debtor replied to Demand Notice dated 20.02.2021 through their Counsel highlighting the several pre-existing Disputes and the bogus claims of the Operational Creditor and seeking dismissal of the present application.



4. FINDINGS

4.1. We have considered the submissions made by the Learned Senior Counsel for both the parties. The construction and execution of the project name Metro Zone is situated at No.44, Pilliar Koil Street, Anna Nagar. This project consists of four phases and the Operational Creditor was assigned the specific civil work in packages.

4.2. The civil work project covers about 13 towers. The work was executed beginning from June 2016 onwards. The letter of intent (Annexure-1) is dated 29.06.2016. The work order was issued on 08.09.2017 and the manner of payment was specified in clause 2.1 and 2.2 of Annexure-2 (work order) stating that the Operational Creditor is entitle to submit Running Account Bill (RAB) every month for completed works in the project. There are various conditions contained in the work order for execution and for payment based on timelines.

4.3. The project was going on and the Operational Creditor completed various works in terms of the work order and raised RA bill which was paid and settled by the Corporate



Debtor. The dispute arose between the parties on May 2019. The Operational Creditor who is executing the work and the Corporate Debtor fell out of good time and the project ran into rough weather as is evident from the record of the meeting between the Chairman of Respondent and CMD of the Operational Creditor which happened on 16.05.2019.

4.4. In the said meeting various issues were discussed and in order to resolve the issues, modalities were drawn as to how a parting should happened between the Operational Creditor and the Corporate Debtor on amicable terms. Annexure – 15 contains the details of the meeting on the resolution taken and for clarity and convenience, the same which is extracted hereunder;



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mailto:mailto:kunnel@kunnel.in

Subject: kuruvillapk

From: Kuruvilla P K <kuruvillapk@kunnel.in> on Fri, 17 May 2019 08:12:29

To: "Shekar B" <shekar@ozonegroup.com>

Cc: "Vasu" <vasu@ozonegroup.com>, "Sgopalan" <sgopalan@ozonegroup.com>, "christopher" <christopher@ozonegroup.com>, "Antony" <antony@kunnel.in>, "StGMcont Nair" <src@kunnel.in>

1 attachment(s) - MOM_190516.docx (26.81KB)

Dear Mr Shekar

First of all kindly accept our thanks for the hospitality extended to us during the meeting between the Chairman Ozone and CMD, Kunnel at HO, Ozone on 16 May 2019.

Placed below is the Recod of Discussions of the meeting.

Introduction

1. A meeting was conducted at the Ozone Head Office on 16.05.2019 at 1300 hrs. between the Chairman, Ozone Group and CMD Kunnel to lay down the modalities of closing the Kunnel Engineers & Contractors (KEC) activities at Metrozone site. Consequent to Ozone's decision to terminate the Contract, Kunnel was asked to hand over the remaining part of the works to Ozone Site Team.

Members present

2. (a) Ozone
- i) Dr. Vasudevan, Chairman, Ozone Group.
 - ii) Mr Srinigopalan, CEO, Ozone Group.
 - iii) Mr. B Shekar, CPDO, Metrozone.
 - iv) Mr. Christopher, VP, Metrozone'
 - v) Mr. Mohan, Metrozone.

- (b) Kunnel

mailto:mailto:kunnel@kunnel.in

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- i) Mr. M V Antony, CMD
 - ii) AVM. P K Kuruvilla VSM (Retd) CEO

Points Discussed

3. After exchanging the pleasantries, Chairman Ozone started the meeting by asking whether he should discuss the Ozone requirements first. He mentioned that since Ozone had taken a decision to part ways between Ozone and Kunnel, it would be better for both the parties to do so at the earliest in a cordial way. Mr Vasu then brought out the following points and after discussions and deliberations, the decisions as stated against each item were arrived at.

(a) Material Handing Over. Chairman Ozone stated that the material handing over should have been completed much earlier and wondered as to why there were delays on this issue. It was explained to him that Kunnel had deputed Wg Cdr Gopalakrishnan twice but the process could not be completed due to difference in the process. Chairman clarified the Ozone view and wanted to start the process by both the teams and complete the same by this week end.

Decision. Kunnel and Ozone would immediately form their respective teams to hand over/ take over complete store items of Kunnel's (purchased for the project irrespective of where it was stored) except those which were damaged or unserviceable. Kunnel would prepare the list of items to be handed over immediately.

(b) Taking over of the balance works from Kunnel. Chairman Ozone asked Kunnel should hand over the works immediately to Ozone.

Decision. Kunnel would stop executing all the works as of Sunday and hand over all the remaining works to Ozone starting from Monday (i.e. from 20 May 2019)

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(c) Sub/ Labour Contractors. Chairman, Ozone wanted the methodology of handing over the sub/labour contractors and their outstanding dues by Ozone. This point was discussed in depth and the following decisions were taken.

Decision. Kunnel would hand over the list of sub /labour contractors (herein after referred to as sub contractors) and their dues immediately to Ozone. The work orders also would be handed over to them. The work executed by the sub contractor would be agreed upon between Ozone, Kunnel and the sub contractor. There after the work orders would be assigned to Ozone. They would get the work done at the same rates as per the work order of Kunnel and would make the payments as well as the outstanding amount to the sub contractors. The same procedure would be applicable to the suppliers too. Kunnel would arrange a meeting of the sub contractors and the suppliers with Ozone and Kunnel team to sign off the work orders. Ozone would come out with a methodology to cover the Turn Over Loss of Kunnel latest by Monday (i.e. by 20 May 2019)

(d) Claims. Chairman Ozone wanted all the claims to be finalized and settled by next week end (i.e. by 25 May 2019).

Decision. Subject to the availability of Mr SRC Nayar, CEO and SRC Nayar would meet CPDO and team on Monday/ Tuesday for the for the finalization of the settlement at HO. Ozone by the due date.

(e) Closure Agreement. Chairman Ozone wanted the Closure Agreement to be signed by end of next week.

Decision. The process would start immediately so as to conclude the Closure Agreement by the end of next week (i.e. by 25 May 19)

4. The meeting came to end by about 1415 hrs.

Vice Marshal PK Kuruvilla VSM (Retd)

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4.5. The key issue in the decision taken on 16.05.2019 is that the Operational Creditor has to make all the claims to be finalized and settled by 25.05.2019.

4.6. In the present case we are not concerned with RA bill No. 24 dated 27.03.2019 which is a certified bill and also we are not concerned with RA bill No. 27 dated 11.03.2020, since the Operational Creditor themselves have stated that the same falls within the purview of 10A of IBC, 2016. However, we are concerned only with RA bill No. 25 and 26, wherein both are uncertified bill. The RA bill No. 25 which is an uncertified bill was submitted on 31.03.2019 for a sum of Rs.4,10,47,438/- and the RA bill No. 26 which is also an uncertified bill was submitted on 05.10.2019 for a sum of Rs. 8,77,37,179/-.

4.7. This fact is admitted by both the Counsels and hence in view of the above, the only issue that arises for consideration is whether the claim under RA Bill No. 25 and 26 can be justified and the amount that is specified is an acknowledged debt and default.

4.8. On 16.05.2019, the parties agreed to certain terms and it appears that the Chairman of the Corporate Debtor has sent a letter and also there were several e-mails correspondence between the parties. It is also the case of the Operational Creditor that on 24.06.2020, the CMD of Corporate Debtor Mr. Vasudevan sent a letter to the Operational Creditor giving him an offer for a sum of Rs.8.35 crores. This letter is reads as follows:



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Ozone Projects Private Limited

By Mail

24.06.2020

KUNNEL Engineers and Contractors Private Limited
3rd Floor, "PUTHURAN PLAZA"
K.P.C.C Junction
M.G.Road
Kochi - 6820 1 1

Kind Attn :- Mr.M.V.Antony, Chairman & Managing Director

Sub: Proposal to amicably resolve the existing disputes / issues

- Ref:
1. Our Letter of Intent dated 29.6.2016 for Metrozone phase III and IV, Jawaharlal Nehru Road, Anna Nagar, Chennai 40.
 2. Our Work Order dated 18.09.2016
 3. Your RA Bill No. 1 to 24 raised pursuant to the Work Order dated 18.9.2016
 4. Various payments made by our company against your RA Bills
 5. Balance Cost to Complete
 6. De-scoping / pre-closure of our Work Order based on MOM dated and our various email communications
 7. Negotiations between us on the above subject

Hope you, your family members, employees of KUNNEL and their families are safe.

At the outset, we would like to clarify that as per our records, we have made excess payment against the work done, and as such there is no outstanding payment to be made by the company considering the various scope of works executed by you. Per our records, you are liable to refund several crores of such excess payment for the various scope of works.

In fact, we have suffered huge financial losses coupled with loss of reputation because of your slow progress of works and abrupt removal of man power from our site. Upon your request and during our joint meeting we agreed for your total withdrawal of manpower and handover the site to us for completing the balance works at your risk and cost. Remobilization of contractor and work force took considerable time and caused unrest among our customers. Many of the sub-contractors appointed by you started exerting pressure on our company for payments, being the principal employer.



As against your RA Bills (1 to 24) with cumulative invoices of Rs.84,48,02,735/- we have paid Rs.104,59,78,506/- comprising of payments made to you, TDS, supply of materials which were under your scope of the contract, pending mobilization advance, pending material advance, mobilization advance for phase IV, outstanding payments made/to be made to your sub-contractors, etc.,.

We have carefully considered your counter claim of approximately Rs.20 crores over and above the said amount of Rs.104.59 crores paid. We do not find any merit in your claim; and it is neither based on our work order nor based on work completed at site. Such inflated claim is therefore denied.

We are offering this proposal only with an intention to explore the possibility of a settlement of this long pending dispute and outstanding issues around your claims on purported balance payment to be made, advance payments released by our company, assessment of cost to complete the work covered under our contract, balance dues payable to your sub- contractors, mode of dealing with retention money, de-scoping of our work order, etc. Without prejudice to any of our rights, our goal is to amicably resolve the dead-lock so that we are able to dedicate our time and energy towards serving our customers.

In view of the above, while no moneys are payable by the company, considering our long standing relationship and to acknowledge your services in the past, without prejudice to our rights we are willing to offer you a payment of Rs. 8.35 Crores (inclusive of applicable taxes subject to deduction of applicable TDS) towards full and final settlement of all your claims.

Should you concur for the above, please sign and return a copy of the letter by 30th June 2020 and we can draw up a mutually acceptable documentation and payment plan appropriately. However, if we do not receive your acceptance on or before 30th June 2020, this proposal shall stand withdrawn.

Thanking you,

Yours truly,

For Ozone Projects Private Limited

A handwritten signature in black ink, appearing to read 'S. Vasudevan', written over a horizontal line.

S Vasudevan

Chairman and Managing Director

The details of it is contained herein below

A small, handwritten mark in green ink, possibly a signature or initials, located below the text 'The details of it is contained herein below'.

No	Description	Amount in Crores (with VAT/ GST)	Remarks
A	Budget (KEC presentation 12 Mar 2020)	120.72	
B	variation claim as on 13 Mar 2020	4.09	Refer- Annexure-1
C	Material transferred by Kunnel for ph-4	2.04	Refer- Annexure-5
D	Total agreed amount for Kunnel (A+B+C)	126.85	
E	paid to Kunnel for RABs and advances	104.59	
F	work to be done by ozone (CTC working)	15.60	Refer- Annexure-3
F-1	Cost of works not executed by KEC, which are under scope of KEC	2.42	Refer- Annexure-4
G	Waiver to be recovered from KEC	1.39	Refer- Annexure-6
H	total amount to be deducted from Kunnel (E+F+G)	124.00	
J	Balance payable to KUNNEL as on 31 May 2020	2.85	
K	Additional payment cosndered by OZONE on Goodfaith		
1	Additional value for flooring Material to be taken over	0.47	Refer- Annexure-5
2	Discount for the balance screed work in basement	0.48	
3	ReImbursement of Payment made to KGD by KEC	0.413	
4	Additional Variation considered	4.13	Refer- Annexure-2
	Sum of total consideration as GOODFAITH	5.50	
L	Balance payable to KUNNEL as on 17 Jun 2020	8.35	

4.9. It is the case of the Corporate Debtor that this offer was made in good faith to restore the long pending dispute and a good will offer. The Operational Creditor however did not accept this offer and also did not respond to the same by their trailing mail, in and by which it is understood that the Operational Creditor did not accept this proposal. This is also evident from Annexure-26, which is a mail dated 27.06.2020. According to the Corporate Debtor the offer has not been accepted and is disputed by the Operational Creditor and

therefore it cannot be termed as admission of debt. The Operational Creditor did not give concurrence and the good will offer lapsed on and after 30.06.2020.

4.10. The Learned Senior Counsel for the Operational Creditor submitted that the running bill coupled with the letter of the CMD of the Corporate Debtor referred to above dated 24.06.2020 is a clear admission of debt. On the contrary the Learned Senior Counsel for the Corporate Debtor pleads that in view of the longstanding relationship and the extent of work taken up by the Operational Creditor, the substantial payment already made and in order to continue the project without further delay, as a goodwill gesture and to resolve all pending issues, a sum of Rs.8.35 crores was offered by the Corporate Debtor, which was not accepted by the Operational Creditor. Therefore in the absence of acceptance there is no liability admitted. The Operational Creditor cannot rely on this letter. The Operational Creditor has declined to take the offer and the issue stands closed.



4.11. On a conspectus of the transaction between the parties, it is clear that the civil contract which is executed based on a work order granted by the Corporate Debtor in favour of the Operational Creditor, is a running account for over a period of time. A sum of more than Rs.104 crores has been disbursed and paid to the Operational Creditor by the Corporate Debtor as stated above. It is the Operational Creditors claim that few RA bills remain unpaid while Corporate Debtor disputes it on the ground of uncertified bills and excess payment.

4.12. Dehors the larger claim between parties and other proceedings, the dispute presently is restricted to RA bill No. 25 and 26. The point that arises for consideration is whether the letter of the Chairman of the Corporate Debtor dated 24.06.2020 giving a good will offer would amount to admission of debt collated with other documents and e-mails.

4.13. On perusing the pleadings on the nature of transaction between the Operational Creditor and the Corporate Debtor, the letter of CMD, the e-mails that is exchanged between



the parties, we are able see that there has been a longstanding relationship between the Operational Creditor and the Corporate Debtor. In the execution of the project work has been executed and based on the work order, RA bills has been raised and money has been paid from time to time. Further reconciliation has also happened at particular stage and reduced to writing on modalities of transition and payments. When the relationship between the parties had become sour, it is seen that a joint meeting was conducted on 16.05.2019 in which it is recorded that certain terms were agreed by the parties and the work was shifted from Operational Creditor to the sub-contractor of the Operational Creditor for completion of the project. It is a comprehensive reconciliation of dispute and records the way forward.

4.14. There are agreed terms, procedure for reconciliation of the accounts and for the payments between the parties. While that had to happen, an offer is made by the CMD of the Respondent. It appears to be a goodwill gesture, to resolve all pending issues. It is however to be noted that the said offer was

not accepted by the Operational Creditor, to be more precise it was declined. Therefore, nothing turns on this letter dated 24.06.2020. Even otherwise the letter makes it clear that as against 24 RA bills with cumulated invoice amount of Rs.84.48 crores. The Corporate Debtor claims that they have paid Rs.104.59 crores approximately and the Operational Creditor was paid in excess. It is also stated that there exists a dispute on overpayment, besides other issues. An offer was made only to resolve the issue amicably and it is not an admission of debt. In any event the offer was declined.

4.15. In the case of an application filed under Section 9 of IBC, 2016, the debt should be clear and precise and should be unqualified. We find from the tone and tenor of the e-mails that has been transacted between the parties, the Operational Creditor and the Corporate Debtor are unable to reconcile the actual amount due and payable. The work was completed by the Corporate Debtor by engaging the sub-contractors of the Operational Creditor. Another issue is whether the completion of the towers was done in accordance with the work order. This

requires adjudication before a Competent forum based on evidence and not before this Tribunal in a summary proceedings.

4.16. At this juncture, we find it apt to refer to the Judgment of the Hon'ble NCLAT in the matter of **Anjani Gases Vs. B.P. Projects Pvt. Ltd. In Company Appeal (AT)(Insolvency) No. 661 of 2019** wherein it has been held that *"it is very clear that the IBC is a summary procedure fully time bound as specified in the Act. The Adjudicating Authority cannot go into the serious disputes which require adducing of evidence. From the facts and records, it is emphatically clear that there is serious dispute between the parties which are prior to issuance of Demand Notice. Neither the Adjudicating Authority nor this Appellate Tribunal sitting in a summary jurisdiction can go into those issues which otherwise required regular trial. Accordingly, there is pre-existing dispute between the parties which cannot be adjudicated in a summary proceeding as held by the Hon'ble Supreme Court in the matter of Mobilox"*



4.17. It is not in dispute that the present project is uncompleted and an ongoing project. Therefore we do not find reason to hold that there is a clear admission of debt. Further, it was also submitted that Arbitration proceedings is also pending. However that does not have any relevance for the present as the Arbitration proceedings was initiated after filing of the present petition. We find that both the Operational Creditor and the Corporate Debtor have been continuously discussing with each other on the quantum of amount paid, amount due, uncompleted work etc. They also discuss on completion of the project and payments to be made. In an ongoing project, the reconciliation of account is a primary issue and we find from the nature of statements made by the parties the reconciliation has not happened in the correct proportion. There is a serious dispute on the amount claimed by each party. There is no clear and precise statement of debt and default attributed to the Corporate Debtor.



4.18. Also it is apt to refer to the Judgment of the Hon'ble NCLAT in the matter of **Rohini Industrial Electricals Ltd. Vs. National Textiles Corporation Ltd. in Company Appeal (AT) (Insolvency) No. 420 of 2020** wherein it has been held that *"Adjudicating Authority is not in a position to determine the dispute on question of fact as to work completed or not completed or rectified or not. The question as to whether on rectification of the work, the Corporate Debtor accepted the liability and thereby there was no existence of dispute is a question of fact which can be determined only by Court of competent jurisdiction and not in an application under Section 9 of the Code. Once evidence are brought on record to show pre-existing dispute raised prior to issuance of demand notice under Section 8(1), the Adjudicating Authority cannot entertain the application under Section 9 of IBC, 2016."*

4.19. Further, the Hon'ble NCLAT in the matter of **Mr. Praveen Kumar Sharma Vs. Arcee Trading Corporation in Company Appeal (AT) (Insolvency) No. 213 of 2020** has held that *"when there were clear documents raising disputes, it was not appropriate for the Adjudicating Authority to enter into procedure in*

the nature of Trial of Civil Suit. It was a matter which would require adjudication before the appropriate Court. The Impugned Order itself shows that the Operational Creditor was aware regarding the dispute relating to subcontract and pleaded before the Adjudicating Authority that it was with good intention to get the work completed, that the Operational Creditor had subcontracted work. Whether or not Operational Creditor could sub-contract was issue for appropriate Court to decide. Nature of Proceedings under Section 9 of IBC are summary & disputed questions of facts already raised before Notice under Section 8 of IBC, cannot be investigated."

4.20. Further, the Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited; 2017 1 SCC Online SC 353** held that the 'existence of dispute' and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the Demand Notice or Invoice as the case may be and observed as follows;

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e. on non-payment of a debt, any part whereof has become due and



payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be [Section 8(1)]. Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute [Section 8(2)(a)]. What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be..”

At paragraph 51 it is held:

“51.Therefore, all that 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.”

5. In the present case the fall out of the Operational creditor from the execution and completion of the project pre exists. The terms of payment based on the certified RA Bills and uncertified RA Bills are disputed questions of fact. The letter of CMO is an offer not accepted rather declined. The amount offered was by way of goodwill. The



letter categorically denied any liability and claims excess payment.

Therefore dispute is clear, present and pre existing.

6. Thus, in this view of the same, we find that that there exists dispute and reconciliation process which did not materialize between the parties even before the issuance of the Demand Notice. The contentions raised by Corporate Debtor on debt and default requires further investigation. In the said above factual circumstances, the present Application fails to satisfy the conditions laid down under Section 9(5) of IBC, 2016.

7. Accordingly, **CP(IB)/140/2021** stands **dismissed**. Connected **IA(IBC)/735(CHE)/2022** also stands **closed**.



— Sd —

SAMEER KAKAR
MEMBER (TECHNICAL)



— Sd —

JUSTICE RAMALINGAM SUDHAKAR
PRESIDENT

Raymond