IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT-III
IB – 280/ND/2023

Order under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s. HINDUSTAN COLAS PRIVATE LIMITED
Having Its Registered Office at:
B-601, 6th Floor, Marathon Futurex,
NM Joshi Marg, Lower Parel,
Mumbai-400013

..... Operational Creditor/Applicant

VERSUS

M/s. DSC ENGINEERING PRIVATE LIMITED
Having Its Registered Office at:
Room No 2, 3rd Floor,
South Extension, Part II,
South Delhi, New Delhi-110049

..... Corporate Debtor/Respondent

Order Pronounced On: 12.01.2024

CORAM:
SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)
SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES

For the Respondent: Mr. Deepak Khurana, Mr. Vineet Tayal, Ms. Nishtha Wadhwa, Mr. Meenal Garg, Advs.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This Application has been filed by M/s. Hindustan Colas Private Limited, the Operational Creditor/Applicant, before this Adjudicating Authority, under

Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), declaring moratorium and for appointment of Interim Resolution Professional ("IRP"), against M/s. DSC Engineering Private Limited, the Corporate Debtor/Respondent. The Corporate Debtor defaulted/failed to clear the outstanding amount of Rs. 1,41,89,027.61/-/- (Rupees One Crore Forty-One Lakh Eighty-Nine Thousand Twenty-Seven and Sixty-One Paisa Only).

2. Submissions of the Operational Creditor

i. M/s. Hindustan Colas Private Limited i.e. the Operational Creditor is a company incorporated on 17.07.1995 under the Companies Act, 1956 CIN: U23200MH1995PTC090671 having its registered office at HINCOL House B-601, 6th Floor, Marathon Futurex, NM Joshi Marg, Lower Parel, Mumbai-400013.

ii. The Operational Creditor is a Joint Venture Company of Hindustan Petroleum Corporation Limited (A Government of India Enterprise) with S.A. Colas, France and is engaged in the business of manufacturing and marketing all types of Bitumen Derivatives, namely Emulsions and Modified Bitumen.

iii. The Operational Creditor provided services to the Corporate Debtor in terms of a Work order dated 11.02.2022. The Operational Creditor had entered into three projects for Micro surfacing for the Corporate Debtor, the first being at Lucknow-Sitapur Expressway Project (Project I) through Work order dated 13.07.2020 and at Lucknow Sitapur (Project II) though Work Order No. 44 dated 22nd January 2021. The Operational Creditor thereafter submitted a quotation dated 11th February 2022 to the Corporate Debtor for "Microsurfacing on Raipur Anurang Project" (Project III).

iv. Pursuant to the quotation, the terms being acceptable to the Corporate Debtor, the Corporate Debtor issued a Work Order dated 26th February 2022 on the Operational Creditor for carrying out the work being "Type III Micro Surfacing application including layer of Scratch Coat wherever required".

v. The payment terms were mentioned in Clause 'B' of the Work Order which were as follows:

- **i.** An advance of Rs. 50,00,000/- (Rupees Fifty Lakhs Only) payable by the Corporate Debtor and to be adjusted in the final bill;
- **ii.** Thereafter, Operational Creditor to issue invoices after completion of an overlay area of 50,000 sq. mt. and the payment for the same would be disbursed within 10 days;
- **iii.** In case of any delay beyond the 15th day, interest at 15.4% p.a. would be leviable on the balance net payment dues;
- **iv.** Previous pending payment of Project II would be disbursed in 3 tranches; and
- **v.** Operational Creditor would submit a Retention Bank Guarantee of 5% after completion of the work which was to be valid up to 2 years after the completion of the work;

vi. The Corporate Debtor had transferred Rs. 49,00,000/- (Rupees Forty-Nine Lakhs only) on 15th March 2022. Thereafter, in accordance with the Work Order, the Operational Creditor commenced the work. The Operational Creditor raised its first Invoice on 31st March 2022.

vii. The Corporate Debtor through letter dated 13th April 2022 asked the Operational Creditor to revise the invoice due to the price escalation of Bitumen, leading to the price of the work undertaken being higher to be submitted to the Corporate Debtor through a separate statement. Thereafter, the Operational Creditor raised a revised invoice on 15th April 2022 of Rs.

78,64,102/- (Rupees Seventy-Eight Lakhs Sixty-Four Thousand One Hundred and Two Only).

viii. The Operational Creditor on account of the price escalation of Bitumen, raised the following debit notes:

i. Debit Note- HINCOL/DN/22-23/0001 dated 31/07/2022- Rs. 3,54,793/- (Excluding GST).

ii. Debit Note- HINCOL/DN/22-23/0002 dated 31/08/2022- Rs. 1,86,955/- (Excluding GST).

iii. Debit Note- HINCOL/DN/22-23/0003 dated 31/10/2022- Rs. 4,33,941/- (Excluding GST).

ix. The Corporate Debtor made part payment of only Rs. 34,30,000/- (Rupees Thirty-Four Lakhs Thirty Thousand Only) on 16th April 2022 against the First Invoice. After this the Operational Creditor continued the work and raised its invoices and debit note for increase in price of Bitumen separately.

x. The Operational Creditor raised its second invoice on 30th April 2022 of Rs. 84,68,429/- (Rupees Eighty-Four Lakhs Sixty-Eight Thousand Four Hundred and Twenty-Nine Only).

xi. The Operational Creditor, through emails dated 4th May 2022 and 9th May 2022 highlighted the fact to the Corporate Debtor that the part payment for the First Invoice was still outstanding and due and requested the payment be made. The emails also show that the Operational Creditor and the Corporate Debtor undertook an activity of joint Measurement. The quality of the work undertaken by the Operational Creditor had already been certified by the person deputed by the Corporate Debtor and there had been no whisper on the quality of work undertaken pursuant to this.

xii. The Corporate Debtor made two part payments: - one of Rs 42,37,661/- (Rupees Forty-Two Lakhs Thirty-Seven Thousand Six Hundred and One Only) on 09.05.2022 and second of Rs 83,18,545/- (Rupees Eighty-Three Lakhs Eighteen Thousand Five Hundred Forty-Five Only) on 18.05.2022.

xiii. Therefore, after certification of the work undertaken, the Operational Creditor raised third invoice of Rs 84,56,570/- (Rupees Eighty-Four Lakhs Fifty-Six Thousand Five Hundred Seventy Only) on 23.05.2022.

xiv. The Operational Creditor through email dated 26.05.2022, requested that the price per sq. mt. be revised as the scratch coating, which was earlier to be utilized "wherever required" was now required to be utilized on the entire area of the project, thus doubling the project cost. The Operational Creditor also highlighted that the surface of the road made the work difficult and time consuming. The Corporate Debtor, through email dated 27th May 2022, simply requested that this matter be escalated to the Chairman of the Corporate Debtor and the CEO of the Operational Creditor for a decision to be taken in this regard.

xv. The Operational Creditor thereafter through emails dated 31st May 2022, 01st June 2022 and 3rd June 2022 highlighted that their third Invoice is pending to be cleared and that the Fourth Invoice is soon to be raised.

xvi. The Operational Creditor through email dated 04th June 2022, raised certain points on which they required the consent of the Corporate Debtor as regards the work to be undertaken i.e., that work on the service road would not be possible during the monsoon which were impending. The Operational Creditor also highlighted that the due date for payment of the third invoice has elapsed.

xvii. The Corporate Debtor responded through email dated 05th June 2022 that the payment towards the third invoice would be made shortly and clarified

the points where the Operational Creditor had sought clarification. The Corporate Debtor here, raised the contention that the Operational Creditor had undertaken its work in bits and pieces due to which the Corporate Debtor found it difficult to undertake road marking and kerb painting, resulting in the delay in completion of the project despite being aware that the smoothness of the road made the work difficult and time consuming, as was highlighted to them through email dated 26th May 2022.

xviii. That after certification of the work undertaken, the Operational Creditor raised Fourth Invoice of Rs 79,64,234/- (Rupees Seventy-Nine Lakhs Sixty-Four Thousand Two Hundred Thirty-Four Only).

xix. In the meeting held on 28.07.2022 and 30.07.2022, the Operational Creditor and the Corporate Debtor agreed to pause the work till 15th September 2022 as the Corporate Debtor did not have the funds and also in view of the monsoon which would make the work extremely difficult. The Corporate Debtor made a part payment of Rs 19,60,000/- (Rupees Nineteen Lakhs Sixty Thousand Only) on 01.08.2022. After certification of the work undertaken the Operational Creditor raised fifth and the last Invoice of Rs. 35,03,549/- (Rupees Thirty-Five Lakhs Three Thousand Five Hundred Forty-Nine Only) on 16.08.2022.

xx. On 26.08.2022 a meeting was held between the Corporate Debtor and the Operational Creditor where the Corporate Debtor assured that they will clear the balance outstanding payment. Part payment of Rs 9,80,000/- (Rupees Nine Lakhs Eighty Thousand Only) was made by the Corporate Debtor.

xxi. The Corporate Debtor through email dated 1st September 2022 suddenly disputed the invoices of the Operational Creditor and for the first time raised an issue of quality of work undertaken.

xxii. The Operational Creditor sent emails dated 03.10.2022 and 04.10.2022 stating that the engineer visited the premises of the Corporate Debtor but he was not provided with the list of issues. The Operational Creditor also proposed joint inspection but the Corporate Debtor did not respond to it.

xxiii. The Operational Creditor raised invoices on the Corporate Debtor for aforesaid sales/ services from time to time. The debt fell due as agreed in terms of invoice which was raised by the Operational Creditor.

xxiv. The Operational Creditor sent a Demand Notice dated 09.12.2022 in terms of Section 8 of the Insolvency and Bankruptcy Code, 2016 demanding payment of unpaid debts. The Corporate Debtor sent reply to the Demand Notice on 22.12.2022.

3. <u>Submissions of the Corporate Debtor</u>

i. M/s. Dsc Engineering Private Limited i.e. the Corporate Debtor is a company incorporated on 13.09.2011 under the Companies Act, 1956 CIN: U45207DL2011PTC225011 having its registered office at Room No.2, 3rd Floor, E-9, South Extension, Part-II, South Delhi, New Delhi-110049.

ii. The Corporate Debtor took services from the Operational Creditor for Micro surfacing of Expressway projects through different work orders.

iii. There is pre-existing disputes between the parties. The Corporate Debtor had disputed the invoices of the Operational Creditor and also raised the issue about the poor quality of work. The Corporate Debtor vide email dated 05.06.2022 informed the Operational Creditor that the payment towards third Invoice will be made shortly and clarified the points where the Operational Creditor had sought clarification. The Corporate Debtor here, for the first time, raised the contention that the Operational Creditor had undertaken its work in bits and pieces which the Corporate Debtor found it difficult to undertake road

marking and kerb painting which, according to the Corporate Debtor resulted in the delay in completion of the Project.

iv. The first invoice was raised by the Operational Creditor on 30.03.2022. However, there were defects in the Works of the Operational Creditor that were discussed and notified to it even prior to raising of such invoice in the meeting held on 25.03.2022. The details of such specific defects were re-notified to the Operational Creditor by the Corporate Debtor vide its letter dated 13.04.2022. Relevant extract of the letter dated 13.04.2022 is reproduced hereunder: -

> *"We are also worried about the quality of Micro surfacing which is not meeting stipulated quality parameters. Please refer to our discussions on March 25, 2022, when discussions took place concerning the following defect in the Micro surfacing work under the Contract No. DEPL/WO/2022/951 dated 26-02-2022 (Quality Assurance).*
>
> *1. Flushing and bleeding in many places.*
>
> *2. The thickness of micro-surfacing is not constant, less than the prescribed value in many places. 3. Drag marks appear on the surface.*
>
> *4. Variation in surface texture.*
>
> *5. The longitudinal and transverse joint are not true to their shape and there was a ripple along with outer road edge.*
>
> *6. Couple of patches of uncovered area."*

v. The Operational Creditor also persisted with its delays in the execution of the works, inter alia, due to inadequate deployment of resources on the Project stretch. The quality of work was poor on account of deficiency in the equipment deployed by the Operational Creditor. These issues were again highlighted by the Corporate Debtor vide its letter dated 04.05.2022 and a request was made to the Operational Creditor to rectify the defects at the earliest.

vi. As per Point No. 5 under Clause E of the Work Order 'Time cycle of completion of the work should not exceed 90 days, unless unforeseen circumstances arise in line with the termination clause.' However, admittedly by 04.05.2022, the

Operational Creditor had only completed micro surfacing of about 1.28 Lac square meters and approximately 2.20 Lac square meters (total 3.50 lacs) from the scope of work was yet to be taken up. In other words, after elapse of 67 days from the date of issuance of Work Order (i.e. more than 74% of the time period had elapsed), the Operational Creditor had at best, executed only 36% of the works. Even qua the said executed works, there were various defects and deficiencies that were duly notified by the Corporate Debtor.

vii. The defects were also notified to the Operational Creditor by the Corporate Debtor vide its email dated 05.06.2022, wherein the Corporate Debtor pointed out that the work is getting delayed due to the defective work.

viii. Thereafter, a meeting was held on 06.07.2022 between the Parties wherein the poor quality of works executed by the Operational Creditor were discussed and Operational Creditor assured that corrective steps would be taken at the earliest but nothing was done.

ix. The Corporate Debtor vide its letter dated 01.09.2022 again highlighted the poor quality and defective work done by the Corporate Debtor and disputed the alleged invoices, and pointed out that no action was taken by the Operational Creditor for rectification of the said defects.

x. The Operational Creditor, despite being requested by the Corporate Debtor continuously, did not take any action for rectification of works, and as such was not entitled to any alleged payments. Operational Creditor has itself pleaded that no payments were made to it after 16.08.2022, the same being last payment received by the Operational Creditor. Furthermore, by this time i.e. 01.09.2022, the 90 days' period stipulated under the Work Order to complete the works had already expired long time back (on 17.05.2022) and the Operational Creditor admittedly had not completed the work in terms of the Work Order.

xi. The Corporate Debtor once again vide its letter dated 21.09.2022 highlighted the defective quality of work provided by the Operational Creditor. There were defects due to unclean rubber and proper gradation was not done prior to initiating the layer on the surface. This in-turn led to Bleeding of the surface due to increase in quantity of emulsion. It was further mentioned that to lack of adequate thickness of the Micro Surfacing layer was due to of inexperience paver operator and site manager. Drag marks, have occurred on the Raipur Aurang project road surface, due to micro-surfacing paver's movement in a careless and casual manner and at a no uniform speed thereby witnessing an unprofessional way of laying micro-surfacing. All these reasons clearly showed that Corporate Debtor had highlighted the defective work carried out by the Operational Creditor.

xii. Vide e-mail dated 04.10.2022, the Operational Creditor admitted that there were defects in the micro surfacing work done by it by stating that "The micro surfacing layer is intact & now matching with the BC overlay." A meeting held between the parties on 06.10.2022, wherein, it was agreed that an independent agency by the name of ANULAB be appointed for carrying out the inspection of the Works.

xiii. Furthermore, the aforementioned issues of delay and poor quality of Works executed by the Operational Creditor were also discussed inter se between the Parties during a meeting held on 06.07.2022. During the said meeting, representatives of the Operational Creditor had also assured that corrective steps would be taken at the earliest. But no steps were taken by the Operational Creditor.

xiv. The Corporate Debtor vide its letter dated 01.09.2022 requested the Operational Creditor to carry out the rectification works and also pointed out the poor quality of works being executed by the Operational Creditor.

xv. The Operational Creditor had deployed one of its officers for joint inspection to be conducted between 02.09.2022 to 09.09.2022. In consonance with the same, the Corporate Debtor had also deployed its officials for a joint visit. However, the Operational Creditor's officials were not interested in conducting a joint visit which was conveyed to the Operational Creditor by the Corporate Debtor vide its letter dated 22.09.2022. Moreover, the Corporate Debtor vide its letter dated 27.09.2022 had also requested the Operational Creditor to cure the defects and undertake the repair work as per its obligations under the Contract. To resolve the said issue, the Corporate Debtor suggested ANULAB as an "independent agency" for carrying out the inspection of the Works. However, the Operational Creditor denied the same on the frivolous ground that the expenses of the same would be borne by the Corporate Debtor. This is evident from the emails dated 11.10.2022 and 10.10.2022 exchanged between the Operational Creditor and the Corporate Debtor.

xvi. That due to the inaction of the Operational Creditor and continued breaches & defaults, the Corporate Debtor was constrained to invoke the Bank Guarantee of the Operational Creditor qua the LSEL Expressway. The Operational Creditor has concealed its letter dated 13.10.2022 before this Hon'ble Tribunal wherein the Operational Creditor itself had admitted that disputes have arisen between the Parties qua LSEL Expressway and had invoked arbitration. Hence, by its own conduct, there are pre-existing disputes between the Parties.

4. Analysis and Findings

i. We have heard the Ld. Counsel appearing for both parties and also perused the records.

ii. The main defence of the Corporate Debtor is based on the existence of a prior dispute before the issuance of the Section-8 demand notice dated 09.12.2022 related to the poor services and defective work. The services provided by the

Operational Creditor to the Corporate Debtor wasn't satisfactory. Their argument is based on the following letters dated 13.04.2022 and 04.05.2022 which are extracted below:

Letter dated 13.04.2022

"We are also worried about the quality of Micro surfacing which is not meeting stipulated quality parameters. Please refer to our discussions on March 25, 2022, when discussions took place concerning the following defect in the Micro surfacing work under the Contract No. DEPL/WO/2022/951 dated 26-02-2022 (Quality Assurance).

1. Flushing and bleeding in many places.

2. The thickness of micro-surfacing is not constant, less than the prescribed value in many places. 3. Drag marks appear on the surface.

4. Variation in surface texture.

5. The longitudinal and transverse joint are not true to their shape and there was a ripple along with outer road edge.

6. Couple of patches of uncovered area."

Letter dated 04.05.2022

" 4. Till date, you have laid micro-surfacing layer of 1.28 Lac square meters and aprox 2.20 Lac square meters is still balance to be taken up as per the Work Order. Rectification of micro-surfacing defective layer needs to be completed as well at the earliest. Area of Service Road and Main Carriageway from Mandir Hasaud to (ex) Rasni toll plaza (Ch 258+400 to Ch 242+650) are available for laying of Micro-surfacing layer. Your contention of idling of your machinery & workforce is hence not true.

iii. We find that Corporate Debtor has raised pre-existing dispute vide email dated 05.06.2022 which is extracted below:

"4. Please note you have carried out micro-surfacing in bits and pieces at many locations, which does not allow us to do road marking and kerb painting works, resulting in delay of the project. Service Road, km 266000 to 280000, you randomly made Micro Surfacing, which needs to take remedial measures at your end."

iv. We find that the Corporate Debtor vide its letter dated 01.09.2022 requested the Operational Creditor to carry out the rectification works and also pointed out the poor quality of works being executed by the Operational Creditor. Relevant extract of the letter dated 01.09.2022 are provided below:

"a. Flushing and bleeding can be seen at many places.

b. Thickness of the Micro Surfacing is not constant, less than the prescribed value at many locations along the road surface.

c. Drag marks have appeared on the surface.

d. Variation in surface texture which indicates that mix utilized for laying was not proper. e. The longitudinal and transverse joints are not true to their shape: there are ripples along the outer road edge."

v. It is to be noted that the Corporate Debtor once again vide its letter dated 21.09.2022 highlighted the poor quality and defective work issue as follows: -

"Now regarding quality observations, site has been inspected meticulously by our project head and his following observations are as under:

a. To ensure a course surface, proper gradation should have been done properly prior to initiating the laying on the surface. Incorrect gradation wherein higher proportion of dust/ fine aggregate was the core reason for smoothness in the surface. Furthermore, in efforts to correct this, repairs were carried out during execution of micro surfacing. This in-turn led to Bleeding of the surface due increase in quantity of emulsion.

b. *Lack of adequate thickness of the Micro Surfacing layer is a result of inexperience paver operator and site manager. It is important to ensure that the paver rubber responsible for giving thickness and finish to the layer are properly cleaned every time before laying is done. In case the rubber is unclean, it will lead to material being stuck in the spreader box due to which the paver will not be able to give the required thickness.*

c. *Drag marks, 'which have occurred on the Raipur Aurang project road surface, are due to micro-surfacing paver's movement in a careless and casual manner and at a no uniform speed thereby witnessing an unprofessional way of laying micro-surfacing. These drag marks, which are visible even today, do not get eliminated even with the passage of time and therefore it requires to be attended.*

d. *In sections, where there is a variation in the appearance of the surface texture, it cannot be a result of double layer of Micro Surfacing as upper/ final layer should always be uniform. While taking up a second layer, it is highly important to suitably adjust the quantity of emulsion along with other paver settings to avoid issues such as surface bleeding due excess emulsion, bad surface texture due to material not' being evenly distributed in the spreader box and lack of adequate thickness due to unclean rubber amongst others.*

e. *The said ripples are still visible and haven't disappeared and therefore need to be rectified."*

With respect to rectification of road surface, kindly refer to our various letters dated 04.05.2022 & 01.09.2022 submitted to you in this regard. Till date no action has been taken from your end."

vi. It is well settled that if the Corporate Debtor raises a plausible contention about a pre-existing dispute, which is not just a moonshine or feeble legal argument, it would suffice for the Adjudicating Authority to reject the application filed under Section-9 of the Code.

vii. In the facts and circumstances of the instant case, we are of the view that the Corporate Debtor has been able to raise a plausible contention regarding the pre-existence of "dispute" between the parties.

5. Order

In view of the above facts and circumstances and the foregoing discussion, we are satisfied that the present petition fails to fulfil the criteria laid down under Section 9 of the Code. It is accordingly, hereby ordered as follows: -

i. The Application bearing **IB-280/ND/2023** filed by the Operational Creditor under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Corporate Debtor is hereby **dismissed.**

ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

No order as to costs.

Sd/-	**Sd/-**
(ATUL CHATURVEDI)	**(BACHU VENKAT BALARAM DAS)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**