



IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – III

C.P.(IB)-1033(MB)/C-III/2022

(Under Section 9 of the IBC, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Dezire Group,

Through Mr. Harmanjeet Singh Bedi, Partner

C-397, Gali No. 18, Old Mustafabad, Delhi-110094.

.....Operational Creditor/Applicant

Vs

M/s. Indamer Mjets Airport Service Private Limited

Flat #A401 Tower 1 Ashoka Garden, Sewree, Mumbai-400015.

.....Corporate Debtor/Respondent

Order Pronounced on: 20.11.2023

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG
HON'BLE MEMBER (J)**

Appearances:

For the Operational Creditor: Adv. Palash S. Singhai

For the Corporate Debtor : ABH Law LLP (Vakaltname)
(Did not mark his appearance)



ORDER

Per- Lakshmi Gurung, Member Judicial

1. The Present Application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (**“IBC”**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Dezure Group, Partnership concern (**“Operational Creditor”**) through its Partner, Mr. Harmanjeet Singh Bedi for initiating Insolvency Resolution Process (CIRP) against Indamer Mjets Airport Services Private Limited (**“Corporate Debtor”**) for default in repaying an amount of ₹1,57,19,612.98 as on 11.05.2022.

Relevant Brief Facts as mentioned in the Petition

2. The Corporate Debtor executed a construction contract dated 01.03.2021 with the Operational Creditor, pursuant to which the Operational Creditor started the work relating to extension of lounge near Terminal 3 Delhi International Airport. As per the contract the work was supposed to be completed within 3 months from the date of the contract. However, due to inordinate delay in releasing the payments by the Corporate Debtor qua the RA Bills raised by the Operational Creditor, the Corporate Debtor extended the time for completion of the work.
3. As per the construction contract between the Operational Creditor and the Corporate Debtor, it was agreed that Running Account Bills will be submitted fortnightly and the due payments will be released within 5 days of submission of Bill/Modified Bill. Accordingly, the Operational Creditor raised four (4) Running Account (**“RA”**) Bills for the work executed in terms of the construction contract. The details of the RA Bills raised by the Operational Creditor are mentioned below:



Sr. No.	Date	RA Bill No.	Amount (In Rs.) including GST
1.	14.04.2021	1	33,91,167.78/-
2.	11.08.2021	2	82,90,646.96/-
3.	26.10.2021	3	1,35,37,302.20/-
4.	18.01.2022	4	94,83,516.04/-
	Total		3,47,02,634.98/-

4. The Corporate Debtor had informed that the Operational Creditor shall carry out landside construction work however, later on the Corporate Debtor informed that Operational Creditor is required to carry out Airside construction work as well. Due to the sudden additional work the Operational Creditor had to carry out various additional task such as taking permission from the Airport Authorities for entry of labours and materials which takes substantial time. Due to such reason the Corporate Debtor extended time for completion of the work without any demur.
5. In addition to the RA Bills the Operational Creditor submitted its bill of Rs. 17,00,000/- towards the payment made to the vendors for glass and aluminium.
6. The Operational Creditor has further submitted that the Corporate Debtor without any just and cogent reasons vide its letter/email dated 21.03.2022 discontinued the contract and directed the Operational Creditor to submit its final Bill for verification.
7. The Operational Creditor submitted its final bill dated 11.04.2022 which has been duly verified by the Corporate Debtor, however, till date the Corporate Debtor has miserably failed to clear the outstanding payment of all its bills including the Final Bill within the time stipulated in the contract and on the expiry of the said time said bills became due and



payable. According to the Operational Creditor following additional bills are also due and payable:

Sr. No.	Date	RA Bill No.	Amount (in Rs.)
1.	Feb 2022	Glass and Aluminum	17,00,000/-
2.	11.04.2022	Final Bill	1,02,87,004/-
		Total	1,19,87,004/-

8. The payment made by the Corporate Debtor are mentioned hereinbelow:

Sr. No.	Date	Amount (in Rs.)
1.	01.04.2021	32,95,653/-
2.	16.04.2021	27,86,279/-
3.	16.04.2021	8,86,699/-
4.	09.07.2021	14,13,154/-
5.	18.08.2021	29,40,000/- (Transaction reversed)
6.	19.10.2021	20,00,000/-
7.	20.11.2021	81,28,241/-
8.	09.12.2021	19,60,000/-
9.	04.01.2022	19,60,000/-
10.	08.02.2022	29,40,000/-
11.	14.04.2022	56,00,000/-
	Total	3,09,70,026/-

9. It is the case of the Operational Creditor that the Corporate Debtor availed the services from the Operational Creditor for Rs.4,66,89,639/- but paid only Rs.3,09,70,026/-. Thus, Rs.1,57,19,612.98/- is still due and payable. The Operational creditor submits that the Final Bill was verified on 11.04.2022 and in terms of the contract the same was to be paid within 30 days. However, even after verification by the Corporate Debtor, the same is still partially due and payable. By not releasing the




entire payment qua all the aforementioned bills, the Corporate debtor has committed a default.

10. The Operational Creditor sent various emails and reminders dated 18.02.2022, 10.03.2022, 14.03.2022, 15.03.2022, 01.04.2022, 25.04.2022, 17.05.2022 and 31.05.2022 to the Corporate Debtor seeking release of payment, however, the Corporate Debtor miserably failed to adhere with the request of the Operational Creditor and failed to release the outstanding payment.
11. The Operational Creditor issued a demand notice dated 03.08.2022 under Section 8 of IBC. The said demand notice was served on the Corporate Debtor by email on 03.08.2022. However, the Corporate Debtor failed to adhere with the necessary instructions as stipulated under the demand notice. In such circumstances, the Operational Creditors have filed the present Petition under section 9 of the Code.
12. The Petitioner has relied on the Judgement of the Hon'ble NCLAT in ***Saurav Mukherjee vs. Oriental Bank of Commerce CA (AT) (I) No.940 of 2019*** dated 14.02.2020 to contend that upon verification of the final bill, the Corporate Debtor has issued an acknowledgement and the debt has become due and payable.

Reply by the Corporate Debtor:


13. In response to this, the Corporate Debtor has filed a detailed reply primarily raising the plea of **pre-existing dispute** between the parties prior to demand notice and that the Operational creditor has filed the Petition solely with an intent of 'Recovery' which is not the aim and intent of the Code. The Respondent has submitted as follows:

- 13.1 No amount is due and payable to the Operational creditor. The Operational Creditor has received undisputed amount due to it totalling to Rs. 3,09,70,026 and the balance amount claimed by the



Operational Creditor is disputed on account of delay, in completing the contract and the quality of the work.

- 13.2 The Corporate Debtor submitted that Clause 7 of the Construction Contract clearly stipulates that the Petitioner had agreed to complete all work thereunder within a period of 3 months from the date thereof i.e. on or before 01.06.2021. The Construction Contract also provides that once the period of 3 months lapsed, the Petitioner was liable to pay to the Respondent an amount of Rs. 25,000 per day for any delay.
- 13.3 Due the pandemic and its effects, taking a view of the matter, the Respondent agreed to extend the period for completion of work under the Construction Contract till 31.01.2022. The said timeline was also breached by the Petitioner as there is correspondence of February 2022 to show that the construction work was ongoing even after the lapse of the timeline of 31.01.2022.
- 13.4 The Respondent further pointed out quality issues in the work undertaken by the Petitioner by its email dated 09.01.2022.
- 13.5 The Respondent submits that the purported final bill submitted by the Operational Creditor is itself disputed (as per the Operational Creditor's own case). In respect of the purported final bill, it is submitted:
- a. The purported final bill raised by the Operational Creditor is Rs.81,76,767/- (Rupees Eighty-One Seventy-Six Thousand Seven Hundred and Sixty-Seven only). Whereas, the Operational Creditor has claimed in its Petition Rs. 1,57,19,612.98 as the purported debt to be recovered from the Respondent.

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- b. The Operational Creditor, has, on the final bill, himself written a note by hand expressing non-acceptance of the final bill by the Corporate Debtor.
 - c. The Operational Creditor has unilaterally added 10% on the material left on the Respondent's site. On this count as well, the purported final bill is disputed.
 - d. The Operational Creditor has relied upon a ledger to demonstrate the Purported Debt. However, the ledger is not signed or acknowledged by the Respondent. It is pertinent to note that the purported final amount as shown by the Operational Creditor in its ledger is different from the amount as purportedly claimed by the Operational Creditor in its final bill. Therefore, even from the ledger, the Operational Creditor cannot prove that the Purported Debt is due and payable by the Respondent. Thus, such disputes require further investigation and cannot be decided in summary proceedings under Section 9 of the Code.
 - e. It's the case of the Operational Creditor that there were no disputes raised by the Respondent after finalizing the bill dated April 11, 2022. However, in the Petition itself, the Operational Creditor has addressed an email dated April 25, 2022, wherein he acknowledges that the purported final bill "won't be approved". Therefore, there was no question and/or occasion for the Corporate Debtor to respond to these e-mails since the Operational Creditor was already conveyed that the said purported final bill "won't be approved".
 - f. Similarly, the Operational Creditor vide emails dated May 17, 2022 and May 31, 2022, once again admitted disputes with respect to the purported final bill by stating that "*barring a few discrepancies, which have to be sorted out.*"



- 13.6 Insofar as the contention of the Petitioner that the bills submitted by it was certified by the Respondent, the Respondent has submitted that the same was done by an errant and corrupt employee of the Respondent company. The said employee, Mr. Navin Kumar, was involved in several corrupt activities including accepting favours in return for certifying bills that were not due and payable. Immediately upon learning of the fact that the said bills were wrongly and fraudulently certified by the said employee, the Respondent has terminated his contract on the ground that he was indulging in activities against the interest of the Respondent including dealings with third party contractors and certifying bills fraudulently.
- 13.7 The Respondent submitted that the dispute between the parties relating to the quantum of amount due to the Operational creditor will have to be decided by way of arbitration as per clause 30 of the Construction Contract.
- 13.8 The Respondent further submitted that the Operational Creditor also relied upon a purported letter of appreciation issued by the Respondent to overcome the impediment of serious disputes raised by the Respondent against the sub-standard work delivered by the Operational Creditor to the Respondent. The Respondent submits that the said purported letter of appreciation is undated. Thus, when and who issued the said purported letter of appreciation is itself a questionable fact. Therefore, the Operational Creditor has tried all means to recover the Purported Debt from the Respondent. On this count, the Petition ought to be dismissed.
- 13.9 The Respondent has relied upon **S.S. Engineers Vs. Hindustan Petroleum Corporation Ltd. and Others** and **Jai Balaji Industries Vs. D. K. Mohanty and Rajratan Babulal Agarwal Vs. Solartex India Pvt. Ltd. & Ors.**



Observations and Findings:

14. Heard the Parties and perused the records.
15. The Operation creditor has relied on the judgment of **Saurav Mukherjee vs. Oriental Bank of Commerce CA (AT) (I) No.940 of 2019**. The facts of the judgement are distinguishable; the issue before Hon'ble NCLAT was relating to limitation which is not the issue in the present case and the said judgement is not applicable in the present case.
16. From the records of the present case, we note that the Operational Creditor has raised various RA bills on the Corporate Debtor. The last and final Bill was dated 11.04.2022 for Rs. 1,02,87,004/-. It is noted that as per Final Bill dated 11.04.2022, tendered amount mentioned is Rs. 3,34,40,144/-. This does not support the case of the Corporate Debtor that total tendered amount was of Rs.466,89,639/-. Therefore, we note the discrepancy in the tendered amount mentioned in the Final Bill and what has been claimed by the Operational Creditor in its petition.
17. We further note that after the receipt of final bill, the Corporate Debtor has made a payment of Rs. 56,00,000/- on 16.04.2022 and has disputed the balance amount as demonstrated in the emails referred below.
18. We further note that clause 7 of the Contract Agreement dated 01.03.2021 executed between the parties stipulates as follows:

*“7. The contractor hereby agrees to complete the work in all respects in three months from the date of award of work i.e. 01.03.2012 (**correct date is 01.03.2021**). It is an express stipulation that time is the essence of the Contract. It is also notified that contractors will be awarded an honorarium of Rs. 25,000/- per day for early completion of work before three months. It is also part of the contract that if the work gets delayed beyond three months, a penalty of Rs. 25,000/- per day will be recovered from the contractor. Accordingly, it envisaged that the*



contractor may submit his detailed construction schedule within 3 days of award of work.”

19. The Corporate Debtor in its reply has annexed emails dated 09.01.2022, 20.01.2022 and 01.02.2022, which have not been denied by the Operational Creditor.
20. According to the contract agreement, work was required to be completed within 3 months and time was the essence of the contract. For any delay a penalty of Rs. 25,000/- per day was to be recovered from the contractor (Operational Creditor). Though the time was extended to 31.01.2022 but the Corporate debtor was dissatisfied with the quality of the work as clearly borne out from the contents of the email dated 09.01.2022 reproduced below:

“During yesterday’s rain there is critical leakage of rain water in existing fbo-1, already shown to your team through video. Now, the thing is that why your team has not taken necessary action to avoide (sick) this type of issues after repeated requests & intimation. This shows the negligence at your end.”

21. There is another email dated 20.01.2022, written by Corporate Debtor to Operational Creditor, wherein the Corporate debtor has stated that *“The drawing/decisions are not being followed through on committed dates, which is delaying the work at FBO as well.”*
22. There is yet another email dated 01.02.2022 by the Corporate Debtor urging the Operational Creditor to most urgently complete the work in FBO & workshop.
23. The Corporate Debtor terminated the Construction Contract vide email dated 21.03.2022 and asked the Operational Creditor to raise the invoices for the work already done by it. The Operational creditor submitted its final bill dated 11.04.2022. Thereafter, the Corporate debtor released the payment of the Rs. 56,00,000/- on 14.04.2022.



24. The Operational creditor has annexed final bill dated 11.04.2022 for Rs. 81,76,767/- which is duly signed by Naveen Kumar employee of the Corporate Debtor. We observe that there are following two remarks mentioned by hand-

“NOT ACCEPTING LEAVING THE SECURITY AMOUNT AS CONTRACT TERMINATED BY YOUR END.

10% ADDED TO LEFT OVER MATERIAL AS WE DID NOT INVEST IN THE MATERIAL TO LEAVE THE WORK.”


These remarks also point to some dispute between the parties.

25. It is noticed that the Operational Creditor has addressed an email dated 25.04.2022 to the Corporate Debtor stating as follows:-

*“Attaching the Workshop Balance amount, which Naveen is saying **won’t be approved**. My Workshop contract was not for Airside, it was for landside. Also it was you who asked me to give up the workshop contract. I did not give it up, I kept trying to get all approvals, even when all the process was new to me. I submitted my bill Two months back with handing over all the Materials to Naveen, Now after two months I am being told **that these expenses will not be approved**, isn’t acceptable, these were expenses done by keeping everyone in the loop and had nothing to do with my contract. I hope we can sort this out and bring it to its logical conclusion. I have gone above and beyond my scope to try and manage everything.”*

26. The Operational Creditor vide emails dated 17.05.2022 and 31.05.2022, admitted the dispute regarding the verification of the bill. It mentioned that its bills have been verified and submitted, **barring a few discrepancies, which have to be sorted out**. The content of the mail dated 17.05.2022 are as follows:

*“My bills have been verified and submitted, **barring a few discrepancies, which have to be sorted out** and in the meantime my request is to clear my outstanding, so that i can clear my vendors, till the time i don’t clear my vendors, I won’t*



be able to move my containers as i don't want the vendors coming to my office. Me sitting at the site is only costing me money, I request you to please clear my dues as soon as possible. If there's a delay then I will be billing my extra expenditure to you. Looking forward to hearing from you with a favourable response. You have assured me that my payments would be done on time."

27. The content of the mail dated 31.05.2022 are as follows:

*"As per our conversation last time we met, you had promised to me that my payment will be released, but even after my bill submission there is no response, no one is responding to my calls. I have supported and done what was asked of me. No one is willing to **discuss the discrepancies in the billing or sort this out**. I had even written to release 50% of my payment so that I can sort out my vendors, but again no one is paying heed. Please advise and tell me what's to be done. Awaiting your response."*

28. From reading of the above exchange of emails between the parties and and documents on record, there appears to be dispute between the parties which existed as on 17.05.2022 and 31.05.2022 as admitted by the Operational Creditors in its emails also.

29. Here, we may refer to the definition of "dispute" as given under the Code:

"dispute includes a suit or arbitration proceedings relating to—


(a) the existence of the amount of debt;

*(b) **the quality of goods or service; or***

(c) the breach of a representation or warranty;

30. In the case of **Mobilox Innovations Private Limited vs. Kirusa software Private Limited (Civil Appeal No. 9405 of 2017)**, the Hon'ble Supreme court has held that-

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



(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute? If any one of the aforesaid conditions is lacking, the application would have to be rejected.

40.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.** It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. **The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.**”

(emphasis provided)

31. In the present case the Corporate Debtor has been able to show the existence of dispute relating to the delay in execution of the contract and the quality of the work done by the Operational Creditor. The demand notice was issued to the Corporate debtor on 02.08.2022, and the above exchange of emails between the parties predate the demand notice, clearly indicating the existence of a dispute about quantum of amount due to the Operational Creditor and the quality of the work done. Such dispute can only be decided through the process of arbitration in accordance with clause 30 of the Construction Contract. The Corporate Debtor has effectively demonstrated the existence of a pre-existing dispute between the parties.



32. Accordingly, the present Company Petition is ***dismissed as non-maintainable.***

Sd/-

**CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)**

Arpan, LRA

Sd/-

**LAKSHMI GURUNG
(MEMBER JUDICIAL)**