

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III
C.P. (IB) – 367(ND)/2018**

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. ENERGY EFFICIENCY SERVICES LIMITED

Having Its Registered Office at:

4th Floor, Sewa Bhawan,

R.K. Puram, New Delhi-110066

Through Its Authorized Representative

Mr. Prakash Jha

..... Operational Creditor

VERSUS

M/s. A-ONE REALTORS LIMITED

Having Its Registered Office at:

227-228, Amba Tower, Plot No.2, Community Centre,

D.C. Chowk, Setor-09, Rohini

Delhi-110085

..... Corporate Debtor

Order Pronounced On: 22.03.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Pawan Sharma, Advocate

For the Respondent : Mr. Prakhar Mithal, Advocate.

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Date of Order: 22.03.2024

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. This Application has been filed by M/s. Energy Efficiency Services Limited, through its Authorized Representative Mr. Prakash Jha, the Applicant/Operational Creditor 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. A-One Realtors Private Limited, the Respondent/Corporate Debtor, on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding amount of Rs. 6,77,69,978/- (Rupees Six Crore Seventy Seven Lakh Sixty Nine Thousand Nine Hundred and Seventy Eight Only) exclusive of the outstanding penal interest @18% p.a. on this amount which stands as Rs. 1,85,42,325/- (Rupees One Crore Eighty Five Lakh Forty Two Thousand and Three Hundred Twenty Five Only). As on the date of Demand Notice, i.e., 05.01.2018, the Total Outstanding Amount was Rs. 8,63,12,303/- (Rupees Eight Crore Sixty Three Lakh Twelve Thousand Three Hundred and Three Only).
2. **Brief Background of the Case:**
 - i. The Operational Creditor is a body corporate set up under the Ministry of Power to facilitate implementation of Energy Efficiency Projects and one of its lead project being UJALA which is a program for "Urmat Jyoti by Affordable LED's for All" and the sole objective is to reduce the consumption of power using energy efficient means. The Operational Creditor has been set up with the objective to lead the market related action of the Nation Mission of Enhanced Energy Efficiency (NMEEE), one of the 8 National Missions under Prime Minister's National Action Plan on Climate Change. This project of the Government of India is solely being taken up and implemented through Operational Creditor.

- ii. The Corporate Debtor participated in the tender process of Operational Creditor and after price matching with L1 bidder, three letters of Awards for different States were issued for carrying out large scale distribution, storage and inventory management of LED bulbs and Data Base preparation, etc. as per scope of work for DELP (Domestic Efficient Lighting Program) work.
- iii. The Corporate Debtor gets the supply of these LED Bulbs directly into their respective godowns from the Manufacturing Company, however, the invoices are raised by the manufacturer in the name of Operational Creditor. The Corporate Debtor has to deposit the monies collected through distribution of LED bulbs and 5 Star Fans into the Bank Account of EESL. As per the terms of the agreement/LOA the deposit has to be done every alternate day and the actual deposit slips should be submitted to Operational Creditor mandatorily. Whereas the total amount deposited pursuant to the aforementioned LOA are detailed hereunder:

S.No.	States	Total Amount Deposited with EESL	Amount Accounted Upto	Due Date
1	Uttar Pradesh	6,77,23,964	01.10.2016	01.01.2017
2	Madhya Pradesh	6,76,32,925	08.03.2017	02.08.2017

- iv. The debt becomes due and payable on 01.01.2017 and 02.08.2017 for the states of Uttar Pradesh and Madhya Pradesh respectively being the closure date of respective Letter of Awards.
- v. Various review meetings were held from time to time with the representative of Corporate Debtor as well as several written requests and reminders were also sent for making the payment of the amount collected from distribution to the Operational Creditor or to return the unsold LED Bulbs, if any retained by the Corporate Debtor. Despite all efforts, the Corporate Debtor have miserably failed, avoided and neglected the payment of outstanding amount. Hence, the present application.

3. **Submissions of the Applicant/Operational Creditor:**

- i. The Corporate Debtor has settled and admitted the claim amount for State of Madhya Pradesh to the tune of Rs. 2,14,57,917/- as recorded in the Minutes of the Meeting dated 08.03.2017. The said Minutes of Meeting is undisputed. The aforesaid admitted amount maliciously claimed as written off by the Corporate Debtor, the said version of the Corporate Debtor was only informed to the Operational Creditor vide reply to the demand notice and subsequently by way of reply to the present Application.
- ii. The objections of the CD in the present proceedings towards the admitted amount is that these amounts have been set off by the CD. There is no provision of set-off in the Letter of Award nor the heads of purported set-off are applicable in view of the terms of the Letter of Award. The Corporate Debtor submits that the Operational Creditor agreed to set off such expenses, however no such agreement placed on record by the Corporate Debtor since no such agreement exist at all.
- iii. The Corporate Debtor had disputed the claim arising out of Letter of Award for the State of Uttar Pradesh and states that it had sold only 2,53,000 unit maliciously, however the real units sold by the Corporate Debtor is 13,25,749 units reflected via E-mail dated 07.11.2017 sent by the Corporate Debtor to the Operational Creditor showing the table containing the Stock Report from A-One Realtor Pvt. Ltd. Upto 14.06.2016 and the Ledger Account maintained by the Operational Creditor. Therefore, the submission of Corporate Debtor is false and misleading and liable to be dismissed at threshold level.

4. **Submissions of the Respondent/Corporate Debtor:**

- i. The parties have subjected themselves to Arbitration owing to the fact that a need for reconciliation of accounts was realized by the parties. Apart from the pending arbitration proceedings, there exists pre-existing disputes in between the parties evident from various communication exchanged in between the parties. The said communication have been suppressed by the Operational Creditor.

- ii. The Operational Creditor has made no attempts to satisfy the relevant questions raised by the Corporate Debtor in various communications addressed prior to issuance of Demand Notice dated 05.01.2018. The letter and E-mails dated 22.02.2017, 22.05.2017, 08.05.2017, 16.11.2017, 09.12.2017 are placed on record to establish pre-existing disputes in between the parties.
- iii. The dispute as per Sec. 5(6)(a) of the I&B Code includes a dispute as to (a) the existence of the amount of debt. Much prior to the issuance of the demand notice, the dispute with respect to the amount due was communicated to the Operational Creditor. The demand notice was served on 05.01.2018 whereas several requests for reconciliation of accounts were sent much before the receipt of first demand notice. It is a settled law that even reconciliation amounts to 'dispute' under the Section 5(6) of Insolvency and Bankruptcy Code, 2016.
- iv. The amount claimed is not crystalised and the Operational Creditor has failed to determine amount due and payable by corporate debtor. The petitioners have requested varied claims on different notices, and have failed to determine the amount "due and payable". While in their demand notice dated 05.01.2018, the amount claimed is stated as Rs. 8,71,030,501, whereas in the petition dated 05.04.2018, the claim has been calculated as Rs. 8,63,12,303/-. Therefore, the veracity of the amount claimed is disputed.
- v. The Operational Creditor has failed to substantiate the claim amount for State of Madhya Pradesh. The Minutes of Meeting dated 08.03.2017 states the amount due as Rs. 2,14,57,917/- admitted by Corporate Debtor has already been paid on various accounts and therefore, set off.
- vi. The Account Statement for the State of Uttar Pradesh was never sent by the Corporate Debtor nor the E-mail is in the knowledge of the Corporate Debtor. The Communication via E-mail dated 15.06.2016 was not sent by or on behalf of the Corporate Debtor from the official E-mail Id of the Company mentioned on the Letter of Award.
- vii. The Corporate Debtor to implement the Letter of Award hired a Man Power providing agency, which was working by the name of Om Enterprise (A Proprietorship concern of Mr. Gaurav) and a body corporate of Mr. Gaurav

namely, V3 Soft Solutions Pvt. Ltd. Mr. Anupam was employee of Om Enterprise and not the employee of the Corporate Debtor. The E-mail id was operated by him and he acted beyond his capacity and sent the Account statement. The scope of work as specified by Letter of Award was only for the districts of Mau and Ballia. However, the said tabular representation sent through E-mail includes stock details of various other districts in UP. The number of Bulbs shown in the chart as sold were much more than within the scope of work of the Letter of Award. Thus, it is clear case of unauthorized usage of E-mail Id by employee of Om Enterprise.

- viii. The Account Statement reflects the quantity of bulbs as 13,25,749 units which is beyond the ambit of the Letter of Award which states 2,68,000 units. Furthermore, the clause in the contract states that in case of any subsequent change in the quantity of the items, the same had to be communicated to the Petitioner which has not been done in the present case. Therefore, the submission with regards to the state of Uttar Pradesh ought to be nullified being beyond the scope of Contract.

5. **Analysis and Findings**

- i. We have heard the Ld. Counsels appearing for both parties. Records as well as pleadings and written submissions have been perused.
- ii. It is the case of the Operational Creditor that Letter of Awards for Distribution of LED Bulbs for the State of M.P., U.P. and Rajasthan were awarded to the Corporate Debtor and there has been a default of payment to the tune of Rs. 6,77,69,978/- and a Demand Notice under Section 8 of the Code was sent to the Corporate Debtor on 05.01.2018 to which the Corporate Debtor replied on 10.01.2018.
- iii. Ld. Counsel for the Corporate Debtor argued that the parties have subjected themselves to Arbitration which is pending before Ld. Arbitrator, Mr. Jayant Nath, Senior Advocate, (Former Judge, Delhi High Court) owing to the need to reconcile accounts between the parties as observed by this Tribunal vide Order dated 11.03.2019. The relevant part of the Order is reproduced below:

“During the further arguments it felt by the Bench that the reconciliation of accounts between the parties is required in order to

explore the possibility of settlement. The Learned Counsel for the respondent states on instructions, they are willing to have a meeting. Learned counsel for the applicant asks for time to seek instructions from the applicant and intimate about the date and venue of the meeting within a week to the learned counsel for the respondent.”

- iv.** Further on 10.04.2019, the parties sought adjournment on the ground that reconciliation statements are being exchanged. The relevant part of Order is reproduced below:

"The learned counsel for both the sides states that one meeting has been held between the parties and reconciliation statements are being exchanged and finalized hence seeks adjournment"

- v.** The scope of work of Corporate Debtor as specified by Letter of Award for the State of Uttar Pradesh was only for the districts of Mau and Ballia. However, the tabular representation sent through E-mail includes stock details of various other districts in UP. The number of Bulbs shown in the chart as sold were 13,25,749 much is beyond the ambit of the Letter of Award of 2,68,000 units. Furthermore, the clause in the contract states that in case of any subsequent change in the quantity of the items, the same had to be communicated to the Operational Creditor which has not been done in the present case.
- vi.** Ld. Counsel for the Corporate Debtor has placed on record the letters sent to the Operational Creditor dated 22.02.2017, 22.05.2017, 08.05.2017, 16.11.2017 and 09.12.2017 which were sent prior to the issue of Demand Notice dated 05.01.2018. The contents of the letters clearly state that the Corporate Debtor is not liable for payment for any payments of any work done because the units depicted to have been sold are over and above the purview of the Contract and had demanded to reconcile and settle the accounts. This clearly establishes that there has been a pre-existing dispute between the parties.
- vii.** Ld. Counsel for the Corporate Debtor relied on the Judgments of the Hon'ble NCLAT in the cases of **Amit Wadhvani v. Global Advertisers & Ors.**, (AT)(INS.) No. 616/2021 and **East India Udyog Ltd. v. SPML Infra Limited**, (AT)(INS.) No. 256/2023 wherein it was held that that even reconciliation

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amounts to 'dispute' under the Section 5(6) of Insolvency and Bankruptcy Code, 2016.

- viii. It is settled law that proceedings before NCLT are summary in nature and Adjudicating Authority is not expected to ascertain pre-existing disputes raised in a summary proceeding, if the Tribunal starts adjudicating these types of issues, then the purpose of the statute of enacting speedy disposal by the mechanism will be defeated. It is evident from the documents placed on record that there exists a pre-existing dispute between the parties and it is the mandate of law that if there exists a pre-existing dispute between the parties the Adjudicating Authority must reject the application under section 9(5)(ii)(d) of the Insolvency and Bankruptcy Code, 2016.
- ix. The Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. Vs Kirusa Software Private Limited***, reported in (2018) 1 SCC 353 and ***Transmission Corporation of Andhra Pradesh Limited VS Equipment Conductors and Cables Limited*** reported in (2019) 12 SCC 697 laid down that "IBC" was not intended to be a substitute to a recovery forum and that whenever there was existence of a real dispute, IBC provisions could not be invoked.
- x. As per the law laid down by Hon'ble Supreme Court, 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, the Adjudicating Authority being precluded from determining as to whether the Corporate Debtor would be successful or not, with regard to the said dispute, at the time of decision making.
- xi. 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.

Hence, the present application under Section 9 of the IBC, 2016 ought to be **dismissed**.

6. **Order**

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

- i.** The Application bearing **IB-367/ND/2018** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is hereby **dismissed**.
- ii.** The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India ("IBBI") for their record.

No order as to costs.

-Sd-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

-Sd-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**