

IN THE NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH
COURT NO. 1

ITEM No.301
TP 244 of 2019 [CP(IB) 30 of 2017]

Proceedings under Section 9 IBC

IN THE MATTER OF:

United Project Construction Ltd
V/s
Aerocon Buildwell Pvt Ltd

.....Applicant

.....Respondent

Order delivered on 09/09/2022

Coram:

Dr. Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

-Sd-

**KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

-Sd-

**DR. MADAN B. GOSAVI
MEMBER (JUDICIAL)**

Braj Mohan

**BEFORE THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH**

TP 244 of 2019 [CP(IB) 30 of 2017]

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the Matter of:

United Project Construction Limited

28, Shanti Nagar,
Shri Nagar Extension, Khajrana Road,
Indore, M.P.

**Applicant/
Operational Creditor**

Versus

M/s Aerocon Buildwell Private Limited

“Johri Mantion”, First Floor,
26/2, Chain Singh Ka Bagicha,
New Palasia, Indore, M.P.

**Respondent/
Corporate Debtor**

Order reserved on: 04.08.2022

Order pronounced on:08.2022

Coram: Hon’ble Dr. Madan B Gosavi, Member (J)

Hon’ble Kaushalendra Kumar Singh, Member (T)

Present:

For the Applicant: Ld. Adv. Mr.Vivek Dalal a.w. Ld. Adv. Mr. Amit T.

For the Respondent: Ld. Adv. Mr.Manoj Munshi a.w. Ld. Adv.
Mr.Lucky Jain

ORDER

1. The instant Application is filed by United Project Construction Limited (**‘the Applicant’**) through Mr. Hemant Gupta-Director of the company, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**‘Code’**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 claiming to be an Operational Creditor for initiation of Corporate Insolvency Resolution

Process (**'CIRP'**) against the M/s Aerocon Buildwell Private Limited (**'Corporate Debtor'**). The claimed amount of debt in default is Rs.3,42,09,590/- (Rupees three crore forty-two lakhs nine thousand five hundred and ninety), including interest of Rs.68,25,821/- and the loss of profit of Rs.24,89,434/- due to non-payment. The date of default is 15.09.2015.

2. The respondent was incorporated on 29.11.2012 and is duly registered with Registrar of Companies, Gwalior having CIN: U45200MP2012PTC029608. The authorized and the paid-up share capital of the respondent is Rs.7,23,00,000/-.

3. The averments made by the applicant/operational creditor in its application and presented/argued by the learned Counsel for the applicant are summarized hereunder:

(i) The operational creditor is a civil contractor company and the corporate debtor vide e-mail dated 14.05.2013, requested the operational creditor to submit the rates for the construction of the factory building at Ujjain. Pursuant to the rates provided by the operational creditor, the corporate debtor after negotiations submitted the lay-out plan through e-mail dated 29.05.2013, for initiation of work.

(ii) The operational creditor executed the said contractual work by the year 2014, for which the invoices amounting to Rs.6,30,06,740/- were raised against the corporate debtor on time to time basis. As against the amount of Rs.6,30,06,740/-, the corporate debtor supplied material amounting to Rs.1,65,47,000/- to the operational creditor for executing the said work and paid the amount of Rs.2,15,74,192/-. Therefore, the balance outstanding debt of Rs.2,48,94,335/- is due on corporate debtor's part.

(iii) The operational creditor issued a demand notice dated 03.04.2017 under Section 8 of the Code which was delivered to the corporate debtor on 05.04.2017 however, no reply was received from the corporate debtor.

(iv) That there is a difference in the dues reflected in the audited balance sheet and the amount claimed by the operational creditor, since the operational creditor maintained its accounts as per Accounting Standard-7 which states that the income which is probable that the economic benefits associated with the contract will flow to the enterprise shall be recognized. Further, the balance sheet of the operational creditor contains a note which is reproduced hereunder:

“In the opinion of the board, the current assets, loans & advances have a value on realisation in the ordinary course of business atleast equal to the amounts at which they are stated in the balance sheet and that the provision for non-liability is adequate and not in excess of amount reasonably necessary .”

4. In the context, the submissions made by the respondent/corporate debtor and as presented/argued by the learned Counsel for the respondent are summarized as under:

(i) The present application is filed alleging the amount of Rs.2,48,94,335/- along with interest @ 24% and loss of profit due to non-payment amounting to Rs.68,25,821/- and Rs.24,89,434/- respectively. The operational creditor has produced bogus RA bills from bill No. 5 to 16 and has neither accounted for those bills in their books of accounts nor submitted those bills along with the application to prove their claim. That vide letter dated 10.10.2016 the corporate debtor

raised dispute regarding the quality of the work done by the operational creditor stating the following:

..... some platforms, which was constructed by you are broken and could not be able to start the working properly, hence we suffer heavy losses, in production as well as factory

(ii) The operational creditor has not paid the amount of GST for the RA bills No. 5 to 16 which shows that the said bills are afterthought. The corporate debtor has submitted the copy of the audited balance sheets of the operational creditor for the financial year 2014-15, 2015-16, 2016-17 & 2017-18. In all the said balance sheets the outstanding balance of the corporate debtor is shown as Rs.8,02,833/-. Even though the audited balance sheet for the year 2016-17 and 2017-18 were finalized and filed with RoC after filing the present application i.e. after 25.05.2017, the operational creditor has shown the outstanding balance of Rs.8,02,833/- in its audited balance sheets.

(iii) The corporate debtor is a manufacturer of AAC Blocks and the operational creditor used to purchase it from the corporate debtor for its construction works. The amount of purchase of the said blocks has been accounted for in the audited balance sheet of the operational creditor under the head trade payable. However, as per the audited balance sheet of the operational creditor as on 31.03.2016, the amount payable by it to the corporate debtor was Rs. 3,31,738/- and therefore, the net amount receivable by the operational creditor from the corporate debtor as on 31.03.20216 was Rs. 4,71,095/- (trade receivable Rs. 8,02,833/- less trade payable Rs. 3,31,738/-).

(iv) That a sum of Rs. 4,71,095/- was payable by the corporate debtor to the operational creditor as per the audited balance sheet of the operational creditor as on 31.03.2016, 31.03.2017 & 31.03.2018 which were uploaded on the MCA portal after filing of the present application. The present application was filed by the operational creditor on 25.05.2017.

The corporate debtor has offered to make the payment of the outstanding amount of Rs. 4,71,095/- through a demand draft dated 20.03.2019 in the name of the operational creditor, however, the operational creditor denied to accept the said demand draft as according to him the total outstanding amount in default is Rs. 3,42,09,590/-.

(v) The Adjudicating Authority has vide its order dated 31.07.2017 rejected the application of the operational creditor under section 9 of the Code on the ground of pre-existing dispute. However, the Hon'ble NCLAT vide order dated 13.11.2017 has remanded it back to reconsider the case.

5. It is noted that the said application was initially rejected by the Adjudicating Authority vide its order dated 31.07.2017 on the ground of pre-existing dispute. However, the applicant filed an appeal before the Appellate Tribunal, wherein, the Appellate tribunal vide its order dated 13.11.2017 set aside the order dated 31.07.2017 of the Adjudicating Authority and remitted the case to the Adjudicating Authority for reconsideration, stating that since no document was placed on record by the corporate debtor to prove that the letter dated 10.10.2016 raising the dispute was ever issued and served to the operational creditor and therefore no document for existence of dispute was found. The relevant para of the NCLAT Judgment is reproduced hereunder:

4 “..... As we find no record of ‘existence of dispute’ we are of the view that the matter requires reconsidering by Adjudicating Authority and to decide whether there is any document available on record to suggest ‘existence of dispute’ prior to notice of demand served on Appellant-‘Operational Creditor’ and whether the respondent created certain documents to stall triggering of the ‘Corporate Insolvency Resolution Process’ against it.

5 For the reasons aforesaid, we remit the case to the Adjudicating Authority

6. We have heard the learned counsels appearing from both the sides and have perused the relevant documents available on record. It is noted that the corporate debtor has raised an issue prior to the demand notice, regarding the quality of the work performed by the operational creditor through its letter dated 10.10.2016 and has also mentioned that the payment will not be made until the issue is resolved by the operational creditor.

7. It is also noted that the audited financial statement for the financial year 2017-18 of the operational creditor as uploaded on the MCA portal depicts the trade receivable of Rs.8,02,833/- from the corporate debtor and trade payable of Rs.3,31,738/- to the corporate debtor. Therefore, the net receivable from the corporate debtor is Rs.4,71,095/-. Further, an offer was made by the corporate debtor to pay Rs.4,71,095/- by way of demand draft dated 20.03.2019, however the operational creditor denied the acceptance of the said amount as against the claim of Rs.3,42,09,590/-. The balance sheets of the operational creditor itself does not support the claim so made by the operational creditor as genuine, since the net amount payable by the corporate debtor as per the balance sheet of the operational creditor is Rs.4,71,095/- and hence, the claim of the operational creditor is not supported by its own balance sheets.

8. It is further noted that the audited balance sheets of the operational creditor were uploaded on the MCA Portal after filing the present application. In order to substantiate the difference in the dues reflected in the audited balance sheet of the operational creditor from the amount claimed by the operational creditor, the operational creditor contended that there is a note given in the audited balance sheet. However, it is noted that the said note is a general statement and nowhere has it specified the unrecorded debt of the corporate debtor, if any.

9. As per the balance sheets of the operational creditor only Rs.4,71,095/- is payable which was paid by the corporate debtor though not accepted by the operational creditor on the ground that its total debt amount is Rs.3,42,09,590/-.

10. From above evidence on record, it is seen that the operational creditor claims debt amount as Rs. 3,42,09,590/- whereas the corporate debtor claims that sum of Rs. 4,71,095/- is only due and payable to the operational creditor. There is a vast difference in both amounts claimed by respective parties.

11. Both the operational creditor and corporate debtor has their own explanation to justify their respective claims. Real question is whether this Adjudicating Authority in its limited jurisdiction can dwell upon to evaluate the entire material on evidence produce by the parties to sustain their respective claims?

12. When Hon'ble NCLAT considered the Appeal on 13.11.2017, the ruling of the Apex Court in case of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited, explaining the scope of jurisdiction of this Adjudicating Authority while considering the application under Section 9 of the IBC was not pronounced. Obviously

Hon'ble NCLAT did not have opportunity to consider the facts and evidence of this case, as discussed above on touchstone of the ratio of the Hon'ble Supreme Court in case of “*Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*”. Hon'ble Apex Court in case referred above in para 40 has held that:

It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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.

13. In view of above, now we come back to the facts of this case. The corporate debtor brought to our notice that the operational creditor in its balance sheet for three consecutive years i.e. 2015-16, 2016-17 & 2017-18 showed the amount of Rs.4,71,095/- as a receivable from the corporate debtor. The corporate debtor raised before us the same contention. In short corporate debtor's defence cannot be said to be furious or afterthought, exact what amount toward operational debt is payable by the corporate debtor to the operational creditor is a disputed question of fact before us. This Adjudicating Authority does not have mechanism to resolve such disputed question of fact for which the parties have to approach proper forum.

14. As a result, the application, i.e. TP 244 of 2019 [CP(IB) 30 of 2017] is rejected and disposed of with no cost. Registry is directed to serve a copy of this order to the applicant and the respondent.

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Kaushalendra Kumar Singh
Member (Technical)

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Dr. Madan B. Gosavi
Member (Judicial)

Swati-LRA