

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 545/MB-IV/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

Pace India Infrastructure

...Operational Creditor/Applicant

V/s

Rite Bultec Private Limited

[CIN: U45100MH2004PTC162319]

...Corporate Debtor/Respondent

Order Dated: 06.06.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant(s) : Mr. Jeetendra Ranawat i/b Prasad
Gajbhiye, Advocates.

For the Respondent(s) : Mr. Agam H Maloo, Advocate.

ORDER

Per: Prabhat Kumar, Member Technical

1. This is an Application being C.P. (IB) No. 545/MB/C-IV/2020 filed on 10.02.2020 by Mr. Samir R. Topiwla, Partner of Pace India Infrastructure, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the matter of Rite BUILTEC Private Limited, Corporate Debtor.
 - 1.1 The Operational Creditor has claimed a debt of Rs. 50,00,000/- (Rupees Fifty Lakhs Only) as due and payable towards the work performed by the Operational Creditor alongwith interest @ 12 % from the date of filing of the application till the realization of the amount.
 - 1.2 The Operational Creditor has filed Board Resolution dated 20.04.2022 in support of authorization in favour of signatory of this Application authorising him to file the present company application on behalf of the Operational Creditor.
 - 1.3 The date of default has neither been explained nor mentioned by the Applicant in part IV of the Petition.
2. The Applicant is a partnership firm engaged in the work of Building Contractor and Construction Business.
 - 2.1 In the year 2011, one G.S.P. Developers Private Limited (GSPDPL) along with M/s Amogh Enterprises (Amogh), a partnership firm, entered into the agreement for a development of SRA project in the name of Mahakali Nagar SRA Co- Operative Housing Society Limited, which is situated at Devipada, Borivali (East), Mumbai - 400066 admeasuring about 12601.37 sq. mtrs. (hereinafter referred to as "the said property").

- 2.2 Pursuant to the development of the said property under the SRA project, the GSPDPL, vide their letter dated 11.10.2011 awarded the work contract to Pace India Infrastructure i.e. the Operational Creditor herein and accordingly it was appointed as a Contractor for civil works of SRA Tower No. 1 and 2 on the terms and conditions as mentioned in the said letter.
- 2.3 The Applicant vide letter dated 04.02.2016 informed GSPDPL, to release the amount of Rs. 4,64,92,581/- (Rupees Four Crores Sixty Four Lakhs Ninety Two Thousand Five Hundred and Eighty One only) and the details regarding the calculation were duly provided in the said letter. The Applicant again addressed a letter dated 08.04.2016 to Amogh and informed it about the true and correct position and brought on record the non-payment of their dues.
- 2.4 Meanwhile, GSPDPL, and Amogh entered into a Memorandum of Understanding (dated 03.08.2016 and accordingly the rights and liabilities of GSPDPL, and Amogh (the erstwhile developers) was admitted and accepted by Rite Developers Private Limited (RDPL). It is further stated that after signing of M.O.U., constant meetings were held between the Applicant and RDPL, and in the said meetings the Applicant was confirmed as contractor towards the civil works of the said SRA project which was pending and the same finds place in the mail correspondence dated 17.08.2016. As the rights and liabilities of erstwhile developers were taken over by the RDPL, by virtue of M.O.U. dated 03.08.2016, the said RDPL, was obligated to pay the dues of Applicant i.e. an amount of Rs. 4,64,92,581/-.
- 2.5 The Applicant took constant follow ups with RDPL, who issued 3 post dated cheques to the Applicant of Rs. 49,00,000/- (Rupees Forty Nine

Lakhs Each) dated 22.08.2016, 09.09.2016 and 25.09.2016 against pending dues. However, the first cheque bearing No. 111232 drawn on Janaseva Sahakari Bank (Borivali) Limited, Borivali (West) branch dated 22/08/2016 got bounced and the same was duly brought to the notice of RDPL, after which RDPL paid the amount of Rs. 10,00,000/- thereby, leaving the balance amount of Rs. 40,00,000/- (Rupees Forty Lakhs) towards the first cheque.

- 2.6 The said entire issue was duly brought to the knowledge of RDPL, vide Applicant's email dated 07.09.2016. In the meanwhile, the Applicant received the draft work order from RDPL, through email dated 16.09.2016. The said draft was sent for the approval of Applicant which was granted vide Applicant's letter dated 24.09.2016 after making certain clarifications regarding the work order, to which RDPL made some interpolations.
- 2.7 The Applicant did not receive its dues, therefore, sent another letter dated 17.05.2017 to RDPL.
- 2.8 The RDPL wanted to continue with the Applicant on their project, therefore, on 26.03.2018, the draft work order was forwarded to Applicant by RDPL, and accordingly the Applicant carried out handwritten corrections and forwarded the same to RDPL. The Applicant also sent their quotation regarding rehab Building No. 2 vide email dated 10.07.2018 and the bill was again sent on 16.07.2018. The Applicant vide their legal notice dated 31st January 2019 called upon the RDPL to clear the dues amounting to Rs. 5,39,65,000/- (Rupees Five Crores Thirty Nine Lakhs Sixty Five Thousand approximately) on the date of issuance of legal notice dated 31.01.2019 towards the said legal notice.

- 2.9 A M.O.U. came to be entered and executed between the Corporate Debtor and Applicant on 26.03.2019 on the representation that a resolution has been passed by RDPL, and accordingly as per the said resolution, the Corporate Debtor has entered into the said M.O.U. with Applicant for and on behalf of RDPL. As per the aforesaid M.O.U. it was agreed between the parties that the matter shall be settled at an amount of Rs. 3,70,00,000/- (Rupees Three Crores Seventy Lakhs only) and out of which the Corporate Debtor was supposed to pay the amount of Rs. 50,00,000/- (Rupees Fifty Lakhs only) in three installments i.e. 25,00,000/- on or before 10.04.2019, Rs. 12,50,000/- on before or 10.05.2019 and Rs. 12,50,000/- on or before 20.06.2019 and for the balance amount of Rs. 3,20,00,000/- it was agreed that Corporate Debtor shall allot a flat at the rate of 17,000 per sq. ft. of carpet area charges including all other charges viz. Society Charges, Contribution Legal Expenses, Registration charges, Misc. Expenses, Parking charges and Taxes in the saleable area of the property being developed by Corporate Debtor within the period of 9 months from the date of entering into the M.O.U. dated 26.03.2019.
- 2.10 The parties again executed the revised payment terms amongst themselves with respect to payment of Rs. 50,00,000/- which was due and payable within the stipulated dates. As per revised payment terms, the Corporate Debtor was supposed to make the payment of Rs. 50,00,000/- in four installments to Applicant on the i.e. following terms Rs.13,00,000/- on or before 20.05.2019, Rs. 13,00,000/- on or before 15.06.2019, Rs.12,00,000/- on or before 30.06.2019 and Rs. 12,00,000/- on or before 20.07.2019.

- 2.11 The Corporate Debtor has withheld the payment of Applicant and in turn by virtue of M.O.U. dated 26.03.2019 and thereafter by virtue of Revised payment terms dated 09.05.2019, the Corporate Debtor has admitted their liability thereby signing the M.O.U. and Revised payment terms for an amount of Rs. 50,00,000/- which has become due and payable to Applicant by Corporate Debtor.
- 2.12 That the Applicant on 14.10.2019 sent a Demand Notice claiming an amount of Rs. 50,00,000/- (Rupees Fifty Lakhs only) to the Corporate Debtor. The copy of demand notice is duly served upon the Corporate Debtor on 17.10.2019. The Corporate Debtor has neither made payment nor replied to the aforesaid Demand Notice.
3. The Corporate Debtor has filed a reply dated 01.03.2023 thereby stating that the Preliminary Objections are of a jurisdictional nature, which go to the root of the matter, and as per settled law, the same should be decided in the first instance. The Corporate Debtor submits that the petition is liable to be dismissed on the grounds mentioned hereinafter-
- 3.1 Rite Developers Private Limited (RDPL) was incharge of developing an SRA project in the name of Mahakali Nagar SRA Co- operative Housing Society Ltd., ("the said project"), after entering into an Agreement with Amogh Enterprises and GSP Developers Pvt Ltd ("erstwhile Developers") dated 03.08.2016 ("earlier MOU"). Vide the earlier MoU, it was agreed between RDPL and the erstwhile Developer that the erstwhile Developer "shall" settle with all the creditors and investors whatsoever and whomsoever, at their own costs and expenses from the payment

received from RDPL. Therefore, it was understood by and between the erstwhile developer and RDPL, that it was the erstwhile developer who had to make payments to all its creditors (including the Applicant herein). The same was also acknowledged by the Applicant herein, keeping in mind that they have placed heavy reliance on the earlier MoU.

- 3.2 It is also stated that as per the work order dated 11.10.2011 ("earlier work order") issued by the erstwhile developer it was clear that the construction work was to be supervised and checked by certain individuals and only after approval / certification from the said individuals, the amount would be payable to the Applicant herein, for the work done by them. This condition was understood and agreeable by the Applicant, which is confirmed by a letter dated 16.12.2016, issued by in the name of the Applicant.
- 3.3 It is clear that the services were utilized by RDPL and not the respondent herein, therefore, no debt is due and payable by the Corporate Debtor to the Applicant, in terms of the provisions of the Code. Even if they were sister concerns, yet liability of one corporate entity will not be fastened on to another corporate entity. It is stated the Debt as prescribed in Part IV of the present petition does not fall within the definition of 'operational debt'.
- 3.4 From the Company Petition filed by the Applicant, it appears that there were pre-existing disputes between RDPL and the Applicant. For instance, from the letter issued by the Applicant dated 17.05.2017, it appears that as against the claim of Rs. 10,01,77,059/-

(Rupees Ten Crores One Lakh Seventy Seven Thousand and Fifty Nine only), an amount of Rs. 2,60,77,404/- (Rupees Two Crores Sixty Lakh Seventy-Seven Thousand Four Hundred and Four only) was payable and the rest was disputed. It is trite law that matters pertaining to cheque bounce are an indication of 'pre-existing disputes' between the parties.

- 3.5 A letter dated 07.06.2017 was issued by RDPL to the Applicant company clearly stating that there are certain pending issues which needed to be resolved and that payment to the Applicant would only be made once registration of the project was complete. A mere perusal of the said letter indicates that there were further disputes with regards work done by the Applicant herein. It is also to be noted that the documents annexed by the Applicant indicate that the said amount is due and payable by RDPL and not the Corporate Debtor. Even the ledger annexed to the said Petition, at page 164 of the Company Petition states name of RDPL and not the Corporate Debtor herein.
- 3.6 The Applicant and Respondent herein had entered into an MoU dated 16.03.2019 ("new MoU"). However, the new MoU failed to join RDPL as a party to the said MoU and even failed to seek RDPL's consent for entering into the new MoU, therefore, the new MoU is not enforceable in the court of law.
- 3.7 The Applicant is using this hon'ble tribunal as a recovery forum and therefore the said petition be dismissed as it is not the intent with which the Code was enacted, placing reliance on decision of the

Hon'ble Supreme Court in the case of "*K Kishan vs. Vijay Nirman Company Private Limited* [2018 SCC Online SC 1013.

- 3.8 The Respondent further states that Company Petition is incomplete and defective and that date of default has neither been explained nor mentioned by the Applicant in part IV of the Petition. No working sheet calculating the alleged claim amount is attached with the said Petition which is mandatory to be provided under PART IV (2) of Form 1.
- 3.9 The Respondent further states that the Demand Notice issued by Operational Creditor itself is not in proper format and therefore, the said Demand Notice is bad in law.
- 3.10 It is trite law that an MOU is non-binding and legally non-enforceable and is only an "agreement to agree" and highlights business relationship, which, are likely to result in some contract or any formal agreement between the parties. RDPL a necessary party not joined in new MoU.
- 3.11 The new MoU could not have been executed without the consent of the promiser / RDPL, and when such consent is given, it is really a novation resulting in substitution of liabilities. Assignment by act of parties may cause assignment of rights or of liabilities under a contract. As a rule, a party to a contract cannot transfer their liabilities under the contract without consent of the other party.
- 3.12 The new MoU entered into between the Respondent and the Applicant herein is a settlement agreement, as to clearly indicating

by the wording prescribed in the new MoU. Further, it is a trite law that unpaid instalment as per the settlement agreement cannot be treated as operational debt as per provisions of section 5(21) of the Code.

4. We have carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

- 4.1 This Bench finds that the Applicant was engaged as civil contractor by M/s. GSP Developers Private Limited (GSPDPL), who had jointly with M/s. Amogh Enterprises (Amogh) undertaken to develop a certain SRA project, and the said GSPDPL owed Rs. 4,64,92,581/- during the year 2016 to the Applicant against civil construction work. Amogh and GSPDPL entered into a MOU dated 03.08.2016 to convey development rights of said SRA project to M/s. Rite Developers Private Limited (RDPL). Clause 7 of the said MOU provides that all creditors or flat buyers of GSPDPL shall be amicably settled by GSPDPL and Amogh at their own expense and any failure to do the same shall be accounted from the area allotted to the existing developers (GSPDPL) as per the percentage of sharing stated in the MOU. It further stipulated that there shall be no objection whatsoever in the project by the flat buyers or the creditors and the incoming developer (RDPL) will be indemnified from any claim received from such purchasers or creditors. All cost and expenses required to settle such claims will be deducted proportionately from the accounts of the said GSPDPL. In other words, RDPL had not undertaken liability of GSPDPL on its account and this is further

confirmed from email dated 17.08.2016 sent by the Applicant to RDPL. It is further noticed that Applicant had followed up for payment with RDPL vide mail dated 07.09.2016 and thereafter on many events as well, but, only Rs.10,00,000/- were paid.

- 4.2 It is found that finally, the Applicant issued a legal notice dated 31.01.2019 upon RDPL asking it to clear the dues, whereupon a MOU dated 26.03.2019 was entered between the Applicant and the Corporate Debtor which contains representation from the Corporate Debtor that *“Initially communication was in the name of Rite Developers Private Limited, which resolution has been passed and the new MOU with the earlier developer is now by new name, Rite Bultec Private Limited”*.

This MOU is signed by Mr. Samir Dadia as Director of Corporate Debtor and MOU dated 03.08.2016 was also signed by Mr. Samir Dadia as director of RDPL. In other words, the liability of RDPL towards the Applicant is stated to be taken over by the Corporate Debtor and the said liability is agreed to be settled for a sum of Rs.3,70,00,000/-, out of which Rs.50,00,000/- was agreed to be paid in cash and balance of Rs.3,20,00,000/- was settled against allotment of area. It is this amount of Rs.50,00,000/- that is claimed in default in the present petition.

- 4.3 This Bench finds that RDPL, the principal operational creditor, is not a party to the MOU dated 26.03.2019 and no evidence has been placed by the Applicant in the form of any Board Resolution having been passed by the Corporate Debtor authorizing Mr. Samir Dadia to acknowledge the liability of RDPL as liability of the Corporate Debtor. Further, the Applicant has also not filed any

document evidencing the Assignment of rights and obligations from RDPL to the Corporate Debtor.

- 4.4 Accordingly, this Bench is of considered view that the existence of debt is itself in dispute. Besides this, even if it is admitted that the Corporate Debtor has agreed to settle the claim of Applicant under MOU dated 26.03.2019, taking over the amount payable to Applicant by RDPL, this Bench is of the considered view that the amount payable by the Corporate Debtor under MOU towards discharge of liability of RDPL cannot said to be an “Operational Debt” u/s 5(21) of the Code, because such debt came into existence from Corporate Debtor’s undertaking to pay and not from supply of any goods or services to it.
- 4.5 We are of the considered view that the Company Petition is incomplete as no date of default has either been explained or mentioned by the Applicant in part IV of the Petition.
- 4.6 It is observed that the Operational Creditor has filed an Affidavit under Section 9(3)(b) of the Code as required by law to the present Application to affirm that there has been no dispute or any notice of dispute from either parties w.r.t. the debt as mentioned in Part 4 of the petition. This Bench is of the view that even if there exists no dispute in relation to the amount of debt, but, there certainly exists a dispute as to who is liable to make payment of such debt to the Operational Creditor.
5. In view of the above, we find that the present case is not fit for admission under Section 9 of the Insolvency and Bankruptcy Code, 2016 in view of and deserves to be **Dismissed**.

ORDER

6. This Application being C.P. (IB) No. 545/NCLT/MB/C-IV/2020 filed under Section 9 of I&B Code, 2016, filed by Pace India Infrastructure, Operational Creditor/ Applicant against Rite Bultec Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed**.
7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the Applicant before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
/LRA Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)