IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA

C.P (IB) No. 987/KB/2020

An application 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:

Sterling and Wilson Private Limited[CIN U31200MH1974PTC017538] having its registered office at 9th floor, Universal Magestic, P.L. Lokhande Marg, Chembur Mumbai – 400043.

...Operational Creditor

Versus

Bridge and Roof Company (India) Limited [CIN U27310WB1920GOI003601**],** having its registered office at 2/1, Russel Street, 5th floor, Kolkata – 700071.

...Corporate Debtor

Date of Hearing: 20.05.2022
Date of pronouncing the order: 07.06.2022

Coram:

Shri Rajasekhar V.K.	:	***Member (Judicial)***
Shri Balraj Joshi	:	***Member (Technical)***

Appearances (through Video Conferencing)

For the Operational Creditor	:Mr. Sanjeev Kumar Tyagi, Advocate.
	: Mr. Jaydeep Ghosh, Advocate.
For the Corporate Debtor	:Mr. DhirendraNath Sharma, Advocate.
	:Ms. Neelina Chatterjee, Advocate.
	:Mr. Suvadeep Chakraborty, Advocate .

ORDER

Rajasekhar V.K., Member (Judicial)

Prologue

1. The Court convened *via* hybrid mode.

2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ***('the Code')*** read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Jaydeep Ghosh (Contracts and Legal), Sterling and Wilson Private Limited ***('Operational Creditor')***, duly authorised *vide* Board Resolution dated 30 July, 2020[1] for initiation of Corporate Insolvency Resolution Process ***('CIRP')*** against Bridge and Roof Company (India) Limited ***('Corporate Debtor')***.

3. The present Petition was filed on ***30 August, 2020*** before this Adjudicating Authority. The total amount claimed in default is Rs.1,43,06,317/- (Rupees One Crore Forty Three Lakh Six thousand Three Hundred Seventeen*[Principal - Rs.97,80,494/- and Interest – Rs.45,25,823/-]*, inclusive of interest calculated @ 7.5% from 01 June, 2014 till 31 July, 2020.

4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.60,00,00,000/- (Rupees Sixty Crore only) with subscribed share capital of Rs.5,49,87,155/- (Rupees Five Crore Forty Nine Lakh Eighty Seven Thousand One Hundred Fifty Five only).

5. ***Submissions by the Ld. Advocate appearing on behalf of the Operational Creditor***.

5.1 The Operational Creditor was given the work to carry out electrical works in connection with the construction and development of Phase-I of west campus of Gurugobind Singh Indraprastha University Campus at Sector-16 C, Dwarka, Delhi ***('Project'),*** by the Corporate Debtor.[2] However, the same was executed and delivered to the Corporate Debtor around April/May, 2012.

[1] Annexure – P, page 280 of the Petition.
[2] Letter of Intent dated 10 July, 2007.

5.2 The Operational Creditor from time to time raised its running account invoices for the said project. The final bill was raised on 30 December, 2013 *vide* Ref. No. DEL/052A/13-14/0138/07. The detailed break-up of the bill is as follows;[3]

(inRs.)

Bill Value	2,38,59,346/-
Cumulative Certified Value	9,67,04,185/-
Escalation Cost and EMD	1,66,601/-
Total	***9,68,70,706/-***

5.3 The Corporate Debtor has released payments to the tune of Rs.8,70,90,292/- (Rupees Eight Crore Seventy Lakh Ninety Thousand Two Hundred Ninety Two only) with <u>last payment released on 31 October, 2014 for a sum of Rs.6,72,924/-</u> (Rupees Six Lakh Seventy Two Thousand Nine Hundred Twenty Four only), nevertheless, the Corporate Debtor has failed to release an outstanding of Rs.97,80,494/- (Rupees Ninety Seven Lakh Eighty Thousand Four Hundred Ninety Four only).

5.4 On failure of the Corporate Debtor to release the outstanding several reminders were sent by the Operational Creditor. Thereafter, on 13 July, 2017 a meeting was heldbetween the parties, wherein a letter dated 09 August, 2017 was hand delivered to the Corporate Debtor demanding to make outstanding payment of Rs.97,80,494/- (Rupees Ninety Seven Lakh Eighty Thousand Four Hundred Ninety Four only) plus interest from 01 June, 2014 till its realization.

5.5 In pursuance to the said letter dated 09 August, 2017, the Corporate Debtor *vide* its letter dated 25 September, 2017 requested the Operational Creditor to bear with the Corporate Debtor till the Arbitration proceedings between the Corporate Debtor and GGIPSU are concluded.[4]

5.6 In April, 2019, it came to the notice of the Operational Creditor that the arbitration between the Corporate Debtor and GGIPSU got concluded and an

[3]Annexure B of the Petition.
[4]Annexure – F of the Petition.

award dated 28 September, 2018 has been passed in favor of the Corporate Debtor.

5.7 On 19 May, 2020, the Operational Creditor sent a legal notice to the Corporate Debtor for clearance of the outstanding dues but no response was received from the Corporate Debtor. Subsequently, on 06 August, 2020 a demand notice under section 8 of the Code was sent to the Corporate Debtor and the same was duly delivered on 10 August, 2020 and 13 August, 2020.[5] However, the Corporate Debtor did not replied to the said notice also.

***6. Submissions by the Ld. Advocate appearing on behalf of the Corporate Debtor*.**

6.1 The Operational Creditor have suppressed the fact that the Operational Creditor has filed an application under section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator to adjudicate the disputes and differences between the parties and the same is pending before the Hon'ble High Court at Calcutta*(A.P. No. 259 of 2020 – Sterling & Wilson Private Limited v. Bridge & Roof Company India Limited).*

6.2 By filing the said application before the High Court at Calcutta, the Operational Creditor on its own is accepting the fact that there is a dispute with respect to the claim between the parties. Hence, the Operational Creditor is not entitled to recover any claim from the Corporate Debtor under the Code. Further the dispute between Corporate Debtor and GGIPSU is still pending adjudication before the High Court at Delhi.

7. Supplementary Affidavit filed by the Corporate Debtor duly notarized on 07 May, 2021

7.1 The Hon'ble High Court at Calcutta *vide* its order dated 04 February, 2021 had appointed Hon'ble Justice Dr. Sambuddha Chakrabarti (Retd.) as the sole arbitrator to the arbitration matter pending between the parties.

7.2 The Operational Creditor being the claimant had already filed its statement of claim in terms of the Arbitral Tribunal order passed on 05 March, 2021. The Operational Creditor has claimed a sum Rs.97,80,494/- (Rupees Ninety Seven

[5] Annexure – K of the Petition.

Lakh Eighty Thousand Four Hundred Ninety Four only) in its statement of claim and the same amount has been claimed in this instant application under section 9 of the Code.

8. Supplementary Affidavit filed by the Corporate Debtor duly notarized on 04 January, 2022

8.1 As per the special condition of contract the project was to be completed within twelve months from the date of the Letter of Intent ***('LOI')*** however, in this instant case the LOI is of 10 July, 2007 but the project was delivered to the Corporate Debtor around April/May, 2012.

8.2 The copy of the 'final bill' as annexed by the Operational Creditor is not complete. The Operational Creditor had received a sum of Rs.4,20,494/- (Rupees Four Lakh Twenty Thousand Four Hundred Ninety Four only) from the Corporate Debtor on 29 March, 2014 and 30 May, 2014 towards the full and final settlement of its claim.[6]

9. Issue

9.1 Is the application barred by limitation?

9.2 Is there any pre-existing dispute between the parties?

Analysis & Findings

10. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.

11. As envisaged under section 3(11) a 'debt' is a liability or obligation against a claim which is due from any person, whereas, a default occurs when there is a non-payment of such debt, partly, or wholly, by the debtor. To identify such default the most pivotal point that comes into picture is ***'date of default'*** i.e., the date on which the debtor has failed to pay the debt.

12. The date of default is crucial to determine the date when the cause of action aroused[7] because the right to sue under the Code occurs only when the default

[6]Annexure SA-2 and SA-3 of the Supplementary Affidavit filed by the Corporate Debtor duly notarized on 04 January, 2022

[7]B. Prashant Hegde v. State Bank of India &Anr., para 21[Company Appeal (AT) (Insolvency) No. 68 of 2019] decided on 14 October, 2020

occurs. Further, it is a settled law now that limitation does not commence when the debt becomes due but only when a default.[8] However, in this instant case there is no date of default given by the Operational Creditor.

13. Nevertheless, in this instant matter, even if the date of the final invoice i.e., 30 December, 2013 is to be taken as the date of default then also it is clear that as per Article 137 of the Limitation Act, three year would end in 2016. Further, on a toothcomb reading of the letter dated 25 September, 2017 by the Corporate Debtor nothing in the said letter would construe as an acknowledgement of debt.

14. With respect to the pre-existing dispute, it is pertinent to mention that an arbitration proceeding was already initiated by the Operational Creditor in the year 2020. Further, upon perusal of the record at page 20 of the Supplementary Affidavit filed by the Corporate Debtor duly notarized on 04 January, 2022, it would be apparent that one of the issues framed by the Ld. Sole Arbitrator is whether the Operational Creditor defaulted in performing its obligations under the contract or not?.

15. In light of the above facts and circumstances the ***C.P (IB) No. 987/KB/2020*** is ***dismissed.*** However, the petitioner is at liberty to pursue its remedy under the law available, if any. Further, the observations made herein shall not in any way prejudice the arbitration proceedings pending between the parties.

16. File be consigned to record.

BALRAJ JOSHI
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Date: 2022.06.07 17:17:31 +05'30'

Balraj Joshi
Member (Technical)

Rajasekhar V K
Digitally signed by Rajasekhar V K
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Date: 2022.06.07 16:59:36 +05'30'
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Rajasekhar V.K.
Member (Judicial)

The order is pronounced on 07th day of June, 2022

Safura A., [LRA]

[8] B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates [(2019) 11 SCC 633]