IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

CP (IB) 09/MB/C-II/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of

Mithalanchal Constructions

Through its Partner Mr. Abhishek Kumar

[Reg. No: GBN/0001352]

Shop No. 1/Ground Floor, Plot No. 6, Previously Gali No. 4, Now Gali No. 3, Royal Apartment, Hinson Vihar, Sector-49, Baroda Noida, District- Gautam Budh Nagar-201301, Uttar Pradesh.

… Operational Creditor/Applicant

Versus

Shreyasi Infra Private Limited

[CIN: U45400MH2013PTC250578]

Shop No. 1, Shiv Heights Apartments, Prithvirajnagar, Beltarodi Road, Nagpur-440034.

…Corporate Debtor/Respondent

Order Delivered on 25.01.2022

Coram:

Hon'ble Member (Judicial)	:	Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor : Mr. Gunjan Chaubey, Advocate.

For the Corporate Debtor : Mr. Shyam Kapdia, Counsel.

ORDER

Per: Shyam Babu Gautam, Member

1. This is a Company Petition filed under section 9 ("**the Petition**") of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by **Mithalanchal Constructions** through its Partner Mr. Abhishek Kumar **("the Operational Creditor")**, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Shreyasi Infra Private Limited ("the Corporate Debtor")**.

2. The Corporate Debtor was incorporated 29.11.2013 under the Companies Act, 1956. Its Corporate Identity Number (CIN) is **U45400MH2013PTC250578**. Its registered office is at Shop No. 1, Shiv Heights Apartments, Prithvirajnagar, Beltarodi Road, Nagpur-440034.

Brief Facts of the case:

3. Operational Creditor is a partnership concern duly registered vide Registration No. GBN/0001352 vide certificate of registration dated 20.09.2018. Pursuant to the work order bearing SIPL/MIPL/Delhi/MCS dated 23.08.2016 issued by the

Corporate Debtor, the Operational Creditor carried out contractual works of construction of residential apartments 'Utkarsh Heights' in Sector 71, Sarfabad, Noida, U.P. and other works related thereto in terms of work order in letter and spirit till Corporate Debtor stopped making regular payments to the bills raised by the Operational Creditor from time to time.

4. Operational Creditor completed the work worth Rs. 3,42,83,614 (Rupees Three Crores Forty-Two Lakhs Eighty-Three Thousand Six Hundred Fourteen only) as per the total invoices raised by the Operational Creditor. Out of which, the Corporate Debtor admittedly has paid a sum of Rs. 1,00,89,000/- (Rupees One Crore Eighty-Nine Thousand only) to the Operational Creditor. Thus, for the work completed by the Operational Creditor, there exists outstanding amount of Rs. 2,41,94,614/- being legally payable by the Corporate Debtor.

5. The Operational Creditor has complied the terms and conditions of the work order in letter and spirit. Due to high efficiency rate of working by the petitioner within 3 months of 1st RA Bill the second RA Bill of Rs. 86.73 lakhs could be raised. The operational creditor has completed five floors in totality and the column for the sixth floor has been erected which is evident with the photographs annexed with the affidavit in reply in internal page no. 27 and 28.

6. The Corporate Debtor falsely alleged that invoices were not certified by the engineer. No Engineer was ever by appointed by the

Corporate Debtor. No information was ever given by the Corporate Debtor to the Operational Creditor regarding appointment of any Engineer. That is why all previous bills raised by the Operational Creditor to the Corporate Debtor were never objected by the Corporate Debtor on the ground of being not certified by its Engineers.

7. The petitioner being a small contractor stopped its work since July 2017 due to non-payment of its bills by the Corporate Debtor.

8. The Corporate Debtor through the affidavit in reply dated 02.09.2021 filed by its Director before this Tribunal as reply to the application of the Operational Creditor has categorically admitted the unpaid operational debt to be about Rs. 49 lakhs, in para 17 internal page 8, where Corporate Debtor has admitted the cost of the construction of alleged unfinished flats should be only Rs. 1.5 crores and admittedly the Corporate Debtor has paid a sum of Rs. 1 Crore 89 Thousand only. The Corporate Debtor has not paid even this admitted debt which is still due, of course the actual due amount is Rs. 2 crores 41 lakhs.

9. The corporate debtor while replying to the statutory notice in internal page no. 130 and 131 admitted that Rs. 1,49,450/- is due.

10. The conduct of the corporate debtor is contradictory, in affidavit in reply dated 02.09.2021, the corporate debtor admitted that Rs.49,00,000/- is unpaid whereas in reply to the notice it admits of

Rs.1,49,450/-. In any case the present petition is entitled to be admitted as admitted amount is more than Rs. 1 lakh as the present petition has been filed before the amendment applicable with effect from 24.03.2020.

Reply Submitted by the Respondent Corporate Debtor:

11. **Denial of the veracity of the 3rd and 4th RA Bills:**

i. The Respondent vehemently denies the veracity of the purported 3rd RA Bill dated 31st July 2017 ("**3rd RA Bill**)*(@Pg.27, Petition)* and the 4th RA Bill dated 26th September 2018 ("**4th RA Bill**") *(@Pg.29, Petition)*. It is submitted that the said bills were never raised or submitted by the Petitioner to the Respondent. A perusal of the said Bills clearly shows that the Respondent never admitted or acknowledged the said Bills. In fact, the 4th RA Bill dated 26th September 2016 does not even bear the signature of the Petitioner itself.

ii. Without prejudice to the aforesaid, it is pertinent to note that Clause 20(c) *(@Pg.18, Reply)* of the Agreement dated 29th April 2016 ("**the Agreement**") and the 'Payment Terms' of the W.O. *(@Pg.19, Petition)* expressly stipulate that the bills raised by the Petitioner shall be certified by the Engineer, who shall check the work done for their compliance to the drawing, plans, agreed terms & conditions. Only the bills so certified shall be submitted for onward payment. The purported 3rd and

4th RA Bill have not been certified by the Engineer. Additionally, it is pertinent to note that the Petitioner completely stopped the work in July, 2017. The same can be evidenced from the photographs *@Pg.27, Reply*which clearly show that the work was abandoned. The purported 4th RA Bill is dated 26th September 2018 which is more than one year after the work was completely stopped by the Petitioner (July, 2017) for no work and that too when the purported 3rd RA Bill was never admitted or acknowledged by the Respondent in the first place. From the aforesaid, it is clear the that the 3rd RA Bill and the 4th RA Bill are not genuine and therefore, the Petitioner's claim under the alleged bills is not maintainable.

12. **Suppression of material Documents by the Petitioner:**

i. The Petitioner has approached the NCLT with unclean hands and is guilty of *suppressioveri* and *suggestiofalsi.* It is submitted that the Petitioner has intentionally suppressed material/key facts and documents as the Petitioner is well aware that captioned Petition is not maintainable in light of the suppressed documents. The Petitioner has suppressed the following key documents:

- Letter dated 4th October 2018: The Petitioner has deliberately suppressed the said letter which was addressed by the Respondent to the Petitioner prior to the issuance of the Demand Notice. Vide the said letter, the Respondent *inter alia* raised disputes pertaining to the bills, quality and quantity of work done along with delay in completion of work by the Petitioner *(@Pg.23, Reply)*.

- Agreement dated 29th April 2016: The Agreement was not produced by the Petitioner even though it is the governing document containing the terms and conditions pursuant to which the W.O. was placed upon the Petitioner (*@Pg.14, Reply)*.
- Annexure-I of the W.O.: The Petitioner intentionally did not annex, 'Annexure-I' of the W.O., as it lays out the complete scope of work which the Petitioner failed to perform *(@Pg.19, Reply)*.

ii. The Hon'ble Supreme Court in *S.P. Chengalvaraya Naidu (Dead) by L.Rs. v. Jagannath (Dead) by L.Rs. &Ors., (1994) 1 SCC 1,* held as follows:

> *"8…A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage…Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the*

litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party…"

13. **Pre-Existing Disputes:**

i. At the very outset, the Section 9 petition preferred by the Petitioner is not maintainable as a pre-existing dispute was raised by the Respondent prior to the issuance of the Demand Notice. It is submitted that the Respondent raised a pre-existing dispute vide its letter dated 4th October 2018. Upon receipt of the said Letter when the Petitioner realized that no amounts were due to it, the Petitioner preferred the Demand Notice dated 8th October 2018 and the captioned Petition only to pressurize the Respondent into paying the unlawful claims of the Petitioner.

ii. Vide its letter dated 4th October 2018 *(@Pg.23, Reply)*, the Respondent raised *inter alia* the following grievances and disputes:

a. The 1st RA Bill dated 2nd December 2016 was issued by the Petitioner without any measurement sheet/supporting documents or engineer's certificate as contemplated in Clause 20(c) *(@Pg.18, Reply)* of the Agreement and

'Payment Terms' of the W.O. *(@Pg.19, Petition)*. Payments under the 1st RA Bill were released only to avoid delay in progress of work;

b. The 2nd RA Bill dated 31st March 2017 was also issued by the Petitioner without any measurement sheet/supporting documents or engineer's certificate. Neither did the Petitioner share the test report as required under the terms of the W.O. *(@Pg.19, Petition)* for verification of the quality / standards of the material used in construction;

c. Inordinate delay in completion of work by the Petitioner. The Petitioner completely stopped work in July, 2017 causing immense monetary loss to the Respondent;

d. The fake 4th RA Bill is dated 26th September 2018 i.e., after a lapse of one year from abandonment of work and that too for no/nil work done;

e. The 3rd RA Bill dated 31st July 2017 was never accepted / received / acknowledged by the Respondent;

iii. The abovesaid was reiterated by the Respondent in its Reply dated 24th October 2018 *(@Pg.128, Petition)* to the Demand Notice. The Hon'ble Supreme Court in *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353,* has held,

> *"24…What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be…"*

Further, the Apex Court in *K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd., Civil Appeal No.21824 of 2017,* held as follows:

> *"13…it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardize an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the Arbitral Award passed against it, and the mere factum of challenge would be sufficient to state that it disputes the Award. Such a case would clearly come within para 38 of Mobilox Innovations (supra), being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in terrorem to extract this sum of money of Rs. Two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist."*

iv. It is respectfully submitted that the instant matter is essentially a money recovery suit filed in the garb of a Section 9 Petition. This is buttressed by the fact that the Petitioner deliberately suppressed the documents which showed the existence of a pre-existing dispute. The Petitioner has sought to trigger the provisions of the IBC with *mala fide* intention only to extrapolate concocted claims from the Respondent.

14. **Sums Payable by the Petitioner to the Respondent:**

i. It is submitted that amounts are due from the Petitioner to the Respondent and not the other way round. Clause 11 *(@Pg.16, Reply)* of the Agreement states that if the Petitioner fails to complete the building and deliver the completed structure of 'Utkarsh Heights' within the stipulated period of 18 months then the Petitioner shall be liable to pay a sum of Rs.5,00,000/- per month to the Respondent as compensation penalty. Further, the Work Order stipulates that on delays attributed to the Petitioner, liquidated damages at 0.50% per week of delay or part thereof shall be levied on the Petitioner for delays beyond the completion time mentioned in the Work Order *(@Pg.20, Petition)*.

ii. It is not in dispute that the Petitioner did not complete the work and stopped all work from July, 2017. The Petitioner completely abandoned work causing huge financial losses to the Respondent (*@Pg.27, Reply)* in dereliction of the terms of the Agreement and the Work Order which clearly stipulated that the construction work was to be completed in all respects within 18 months, i.e. from September 2016 to March 2018 *(@Pg.18, Petition)*. Failure of the same, entitles the Respondent to compensation in terms of Clause 11 of the Agreement and the terms of the Work Order Therefore, it is not the Petitioner rather the Respondent who is entitled to recover claims from the former.

Findings:

15. We have heard the submissions of Applicant as well as the Respondent and perused the records.

16. The Corporate Debtor while replying to the statutory notice admitted that Rs. 1,49,450/- is due. Therefore, the present petition is entitled to be admitted as admitted amount is more than Rs.1 lakh as the present petition has been filed before the amendment applicable with effect from 24.03.2020.

17. The Corporate Debtor contended that as per section 9(3)(b) of the I&B Code, there is dispute among parties, but that contention is after thought as until demand for payment raised by the Operational Creditor, the Corporate debtor accepted services supplied and enjoyed the same.

18. The application made by the Operational Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount stipulated under section 4(1) of the IBC. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this

Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

19. The petition bearing **CP (IB) 09/MB/C-II/2019** filed by **Mithalanchal Constructions** through its Partner Mr. Abhishek Kumar**,** the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Shreyasi Infra Private Limited [CIN: U45400MH2013PTC250578],** the Corporate Debtor, is **admitted**.

20. There shall be a moratorium under section 14 of the IBC, in regard to the following:

    i. The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

    ii. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

    iii. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;

iv. The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

21. Notwithstanding the above, during the period of moratorium: -

i. The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;

ii. That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;

22. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

23. Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

24. **Mr. Dhiren S. Shah**, Registration No. IBBI/IPA-001/IP-P00220/2017-18/10419, Email Id: dss@dsshsh.in, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as mentioned under IBC. The IRP shall carry out functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC. The fee payable to IRP/RP shall be compliant with Regulations, Circulars and Directions issued by the Insolvency & Bankruptcy Board of India (IBBI) as may be applicable.

25. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

26. The Operational Creditor shall deposit a sum of Rs.1,00,000/- (Rupees one lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

27. The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

28. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Pune, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

29. Ordered accordingly.

Sd/-	**Sd/-**
SHYAM BABU GAUTAM	**JUSTICE P. N. DESHMUKH (RETD.)**
Member (Technical)	**Member (Judicial)**

25.01.2022
SAM