THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT III

IA-1734/2022, IA-3831/2022
In
(IB) 424/ND/2021

IN THE MATTER OF:

SPML INFRA LIMITED

……APPLICANT/CORPORATE DEBTOR

VERSUS

NAVKAR BUILDERS LIMITED

……RESPONDENT/OPERATIONAL CREDITOR

Oder Pronounced on: - 02.11.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS

HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI

HON'BLE MEMBER (TECHNICAL)

Parties / Counsels present

For Applicant : Mr. Ashish Makhija, Advocate

For the Respondent : Mr. Pavan S. Godiawala, Advocate

O R D E R

Per: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. The application has been filed under Section 60(5) of the Code, 2016 read with Rule 11 of the NCLT Rules, 2016 by Applicant/Corporate Debtor seeking following prayers: -

a) Dismiss the Application bearing IB – 424(ND)/2021 filed by Respondent as not maintainable.

2. Briefly stated the facts of the present case are that Respondent/Operational Creditor has issued Work Order dated 04.12.2018 upon Applicant/Corporate Debtor for various civil work services for demolition & dismantling, fixing fencing works. The Respondent paid an advance of Rs. 10,85,75,153/- during the period starting from 29.12.2018 to 19.02.2019. The Applicant failed to commence the work as per the work Order.

3. Further, due to non-commencement of work the Applicant has returned Rs. 7,04,36,886/- to the Respondent company. The remaining amount of Rs. 3,81,38,227/- is still outstanding and after several reminders the due amount is not paid by the Applicant.

4. In response, Ld. Counsel for Applicant submitted that, the outstanding amount is not an 'Operational Debt' within the meaning of the Code as the

Respondent herein has never had a commercial relationship with the Corporate Debtor in terms of supply of goods and services.

5. Ld. Counsel for Applicant vehemently argued that, claim of refund of Advance Payment Amount will not be qualify as an ‘Operational Debt’ within the meaning of Section - 5(21) of the IBC,2016.

6. We have heard the argument advanced by the Ld. Counsel appearing for both the parties.

7. In the light of the arguments advanced and the documents submitted before this Adjudicating Authority, we are called upon to answer an important question which arise for our consideration: -

I. Whether a claim of refund of Advance Payment is an ‘Operational Debt’ or not?

8. As regards, to the issue raised by the Applicant relates to the fact that, for the purpose proving a debt to be an ‘Operational Debt’ there must exist a claim *“in respect of the provisions of goods and services”.* The Respondent/ Operational Creditor has placed on record Work Order Dated 04.12.2018 wherein various civil works were allotted to Applicant Company. The contents of the said work orders are reproduced below reference: -

Sr. No.	Service Description	Qty.	Uom	Rate (INR)	Amount INR
1.	Service Approach Road SAC 995421	1	LS	3,83,77,970	3,83,77,970
2.	STP – Mics Work in LS	1	LS	2,20,68,541	2,20,68,541
3.	Demolition & Dismantling - others	1	LS	5,29,97,198	5,29,97,198
4.	Providing & Fixing Fencing Works	1	LS	1,70,10,771	1,70,10,771
5.	STP – Mics Works in LS	1	LS	3,83,77,970	3,83,77,970
	TOTAL :			**14,38,94,695**	**14,38,94,695**

Thus, the above mentioned work Order specifically provides 'Service Description' which were to be executed by the Applicant Company. To answer it more specifically we are presently concerned with the definition of term "operational debt" as defined in section 5(21) of the Code. Section 5(21) of the Code says that "operational debt" means a claim in respect of the provision of goods and services including employment or a debt in respect of the repayment of the dues arising under any law for the time being in force and payable to the Central Government or State Government or any local authority. The Operational Creditor has annexed ledger account which shows that an advance was paid to the Corporate Debtor and while perusing the records we find that, the Corporate Debtor has returned amount of Rs. Rs. 7,04,36,886/- to the Operational Creditor and failed to pay Rs. 3,81,38,227/-. The above-annexed work order dated 04.12.2018 makes it abundantly clear that the Operational Creditor has placed a work order and paid advance money to get the services in return from the Corporate Debtor. While perusing the work order carefully, it can be observed that the Operational Creditor has specifically mentioned the nature of services with quantity and rate and Corporate Debtor was fully aware of these services. So, we are not convinced by the

Applicant argument that there was no commercial relationship between the parties in terms of supply of goods and services. So, we are of the considered view that claim of refund of Advance Payment is an 'Operational Debt'.

9. It is pertinent at this stage, to refer decision of Hon'ble Supreme Court given in ***M/s. Consolidated Construction Consortium Limited vs. M/s Hitro Energy Solutions Private Limited (Civil Appeal No 2839 of 2020).*** The relevant paragraph is reproduced below for reference: -

> 43. *First, Section 5(21) defines 'operational debt' as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from*

*the corporate debtor. Finally, the judgment of this Court in Pioneer Urban (supra), in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that "examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". **Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt**.*

10. In the light of above findings, we are of the considered view that, IB – 424 (ND)/2021 is maintainable.

11. In the above mentioned terms I.A – 1734 (ND) 2022 stands, ***dismissed*** and I.A – 3831 (ND) 2022 also stands ***disposed of*** as I.A – 1734 (ND) 2022 is already decided by the virtue of this Order.

SD/-

(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

SD/-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)