IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-IV

IB-170/(ND)/2020

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

In the matter of:

Rajiv Tiwari

...Operational Creditor/Applicant

Versus

M/s Umang Town Planner Pvt. ltd.

...Corporate Debtor/Respondent

Coram:

MR. DHARMINDER SINGH, Hon'ble Member (Judicial)

MR. PRASANTA KUMAR MOHANTY, Hon'ble Member (Technical)

Order Delivered on: 21.12.2021

ORDER

Per Dharminder Singh, Member (Judicial)

1. This is an application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of Respondent Company, claimed to be the corporate debtor.

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2. The applicant, Rajiv Tiwari has filed the present application claiming as the operational creditor with the prayer for initiation of Corporate Insolvency Resolution Process under the provisions of the Code.

3. The details of transactions leading to the filing of this petition as averred by the petitioner are as follows:

a. That the Operational creditor is the proprietor of M/s Rajiv Enterprises and is engaged in the business of labour supply, civil construction and other allied work.

b. It is the case of the applicant that DMRC awarded work to M/s Metcon India Reality and Infrastructure Pvt. Ltd and further work was awarded to the corporate debtor by the said agency for DMRC Project CC-95. Further corporate debtor approached operational creditor for the supply of Labour to execute some part of job for the Project CC-95, thereafter operational creditor supplied labour from February 2017 to April 2017.

c. Apart from the above said corporate debtor awarded work order to the operational creditor bearing no. LMRC/LKC007/01 dated 19.06.2017 for their Project at Lucknow which was awarded to corporate debtor by M/s L & T ltd, pertaining to the said project i.e L & T Project the entire payment was released by the corporate debtor.

d. Further during the above said period, the operational creditor supplied labour for Rs. 9,30,126/- which was also certified by

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the corporate debtor against the said work the corporate debtor released an amount of Rs. 75,000/- vide cheque and Rs. 10,000/- by cash further an amount of Rs. 93000/- was deducted towards TDS and an amount of Rs. 4244/- was debited by the corporate debtor on account of store debit leaving the outstanding balance of Rs. 8,31,582/-.

e. The operational creditor sent various reminders, follow ups to which the corporate debtor failed to release the outstanding payment of Rs. 8,31,582/- and further the corporate debtor handed over a letter dated 13.10.2017 to operational creditor which was addressed to the contractor of corporate debtor namely M/s Metcon India Reality and Infrastructure Pvt. Ltd requesting to release the payment of the Operational creditor.

f. It is submitted that the operational creditor visited the office of M/s Metcon India Reality and Infrastructure Pvt. Ltd and submitted all documents along with the said letter dated 13.10.2017 but even after the lapse of more than one and half year they failed to release the outstanding payment of the operational creditor. Further the petitioner sent legal notice dated 08.03.2019 to which the corporate debtor has again assured the operational creditor that the corporate debtor shall release the payment of Rs. 8,31.582/- within span of 15 to 20 days but again corporate debtor failed to fulfil the commitment even after repeated assurance.

g. The operational creditor sent a Demand Notice dated 17.07.2019 demanding payment of an unpaid operational debt as per provisions under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 via Speed Post. Copy of the Demand Notice dated 17.07.2019 demanding payment in prescribed Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 duly served upon the address as per the website of Ministry of Corporate Affairs, Government of India, where the operational creditor supplied services to the Corporate Debtor which was neither replied to.

4. The Corporate Debtor in its reply to the application submits that:

a. It was agreed between the parties that the net payable amount due to operational creditor was Rs, 34,781/- in lieu of cheque no. 018661 dated 17.10.2018 issued in favour of the operational creditor Rajiv Enterprise of amount of Rs. 34,781 as full and final settlement of the dues of Rajiv Enterprises. Copy of the letter dated 17.102.2019 confirming the full and final settlement sent by the operational creditor has been annexed.

b. The operational creditor wilfully and knowingly concealed in the application that the full and final statement of its dues had already taken place and that such non-

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disclosure of payment of debt by the operational creditor constitutes an offence under section 76 of Code.

c. It is submitted that cheque issued by the corporate debtor in pursuance of full and final settlement of the dues of operational creditor has been encashed and the amount so mentioned in the cheque has been received by the operational creditor. Further a cheque no. 018611 dated 17.102.2018 of Rs. 34,871/- issued by the corporate debtor was encashed by the operational creditor on 19.10.2018 and consequently such amount stood transferred when the cheque was honoured by the bank. Copy of the bank statement of the corporate debtor's account in HDFC Bank has been annexed along with.

5. In this regard, the applicant has denied the allegations made in the reply of the corporate debtor and further submitted in rejoinder that:

   a.) It is submitted that the applicant filed the said petition for non- receipt of amount of Rs. 8,31,582/- along with interest @ 18% on the basis of Invoice certified by the corporate debtor for the period February 2017 to April 2017.

   b.) It is further submitted that the petition is filed only with respect to the work carried out by the operational creditor in DMRC CC-95 Project. However, the corporate debtor is trying to mislead this Tribunal by stating the facts of different project (Lucknow Metro Rail Corporation) LMRC

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CC-07, which was awarded to L&T Ltd and further some part of the work was awarded to corporate debtor and further corporate debtor awarded work for Labour Supply to Operational Creditor for the Project CC-07 at Lucknow. Furthermore, the documents filed as Annexure R/1 also clearly shows that the said documents pertain to CC-07 LMRC Project, which has no bearing in the present case.

c.) It is submitted that in the entire reply the corporate debtor has not replied about the petition which is filed for the Project CC-95. Furthermore, the operational creditor sent a legal notice dated 08.03.2019 for release of payment and also written various letter to the officials of DMRC for non - receipt of payment from corporate debtor.

d.) Further in respect to the full and final statement of the dues which was already taken place and that such non-disclosure of payment of debt by the operational creditor constitutes an offence under section 76 of Code, it is submitted that the corporate debtor is referring the (LMRC, CC-07) L& T Ltd, Project at Lucknow which has no relevance in the present case.

6. Both the parties have filed their written submissions. The applicant in its written submission has submitted that:

   a) That two projects were given by respondent to applicant for supply of labour for CC-07 at LMRC, Lucknow and CC-95 DMRC at Delhi. The CC-07 Lucknow was awarded by L7T

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Limited to respondent and CC-95, Delhi was awarded by Metcon India Reality & Infrastructure Pvt. Ltd.

b) It is stated that payment in respect of CC-07 has already been received and present application is filed for claims regarding CC-95. Against CC-95 the respondent has paid Rs. 75,000 through cheque and Rs. 10,000 cash and Rs. 93,000 debited towards TDS. Thereafter, on 13.10.2017 the respondent issued letter to Metcon India Reality & Infrastructure Pvt. Ltd. to release payment to applicant against the final Bill upto April 2017.

c) It is stated that the respondent has not denied any document filed by applicant and page no. 38 and 47 are kind of acknowledgement by respondent.

7. The corporate debtor has filed the written submissions and stated the following:

a. That the operational creditor did not place any documents for award of work from DMRC to M/s Metcon Realty and Infrastructure Pvt. Ltd and for sub-contract from M/s Metcon Realty and Infrastructure Pvt. Ltd to M/s Umang Town Planner Pvt. Ltd and for award of sub-sub-contract from M/s Umang Town Planner Pvt Ltd to the operational creditor Rajiv Tiwari.

b. It is submitted that as per the brief synopsis the operational creditor Rajiv Tiwari submitted all documents relating to his claim to M/s Metcon Realty and Infrastructure Pvt Ltd on

13.10.2017 wherein the operational creditor did not place on record all the documents.

c. That the operational creditor placed on record one letter dated 13.10.2017 from M/s Umang Town Planner Pvt. Ltd to m/s Metcon Realty and Infrastructure Pvt Ltd it is alleged that the said letter is forged and fabricated. The language of the letter says *"Release amount"* and it does not specify which amount. The content of the letter is *"We are requested to you that please release amount against on behalf of Umang Town Planner Pvt. Ltd debited amount in our account Rs. 700478/-, to give Rajiv Enterprises against final bill upto Arpil, 2017."*

d. It is further submitted that the operational creditor annexed a letter dated 17.102.2018 as ANNEXURE P/2 at page 17 of the Rejoinder which says "we *hereby affirms that nothing is payable to us on account of the above contract*". Hence, it is claimed that since the operational creditor did not file any case of fraud/ forgery/impersonation against his employee Mr. Vikas Tripathi till date, this makes it clear that the contents of the letter dated 17.12.2018 are true.

8. We have heard the arguments of Ld. Counsels for the applicant and all the respondents and perused the case records.

9. Though on behalf of the respondent, it is being contended that the respondent had already made entire payment, and nothing is due against the Corporate Debtor. In order to substantiate this case, the

respondent placed reliance on a letter dated 17th October 2018 i.e. Annexure R-1 and one letter dated December 2017 and cheque dated 17th October 2018 i.e annexure R-2, apart from the statement account i.e. annexure R-3. After going through the entire record, it is established on the record that there were two contracts entered into Rajiv Enterprises as well as Corporate Debtor i.e. Lucknow Project i.e. CC-07 as well as DMRC Project i.e. CC-95 pertains to Delhi. Though, the respondent had made stress upon the letter dated 17th October 2018 which is written by Rajiv Enterprises to M/s Umang Town Planner Pvt. Ltd. wherein para no. 2 it is mentioned as under:

> *"We are satisfied that the final bill and certificated given to us are proper and the final accounts of the above contract stand settled and closed. We hereby affirm that nothing is payable to us on account of the above contract".*

10. However, from the bare perusal of the annexed letter dated December 2017, whereby an amount of Rs. 34,781/- were stated to be net payable amount by the respondent to the Rajiv Enterprises, in fact, pertains to CC-07 Project i.e. Lucknow Project. Thus, vide annexure R-2 i.e. cheque dated 17th October 2018, an amount of Rs. 34,781/- were paid to Rajiv Enterprises from the account of HDFC bank i.e. annexure R-3 of the respondent. Apparently, the letter dated 17th October 2018 i.e. annexure R-1 pertains to Lucknow Project i.e. project CC-07 and has no concern with respect

to DMRC Project i.e. CC-95. Thus, the contentions raised on behalf of respondent is without any merits because both the projects are different i.e. Lucknow Project and DMRC Project and there is no claims of the present petitioner with respect to project CC-07 i.e. Lucknow Project. The petitioner is demanding dues with respect to DMRC Project i.e. CC-95.

11. On behalf of the respondent, no such document has been placed on record that any such payment as demanded and the invoices raised by the petitioner have ever been cleared. Rather, the Corporate Debtor paid an amount of Rs. 75,000/- through cheque which is also reflecting in the bank statement of the Operational Creditor. Further, vide letter dated 13th October 2017, respondent/Corporate Debtor issued letter to the contractor M/s Metcon India Realty and Infrastructure Pvt. Ltd. to release an amount of Rs. 7,00,478/- which was duly signed by the authorized signatory of the M/s Umang Town Planner Pvt. Ltd. No such evidence has been placed on record on behalf of respondent that the said document was forged and fabricated one. Mere that such plea has been taken, does not take place of proof, unless the same is not supported by documentary evidence. In the absence of same, the presumption is otherwise that the said letter dated 13th October 2017 bear the signature of the authorized signatory of the respondent, the same goes against the respondent. Although, Learned Counsel for the respondent relied upon the citations "**Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited and Ors. dated. 24th**

February 2020 in Company Appeal (AT) (Insolvency) No. 1354/ND/2019. However, the same is not applicable in the present facts as on behalf of the respondent, the entire demand as per the letter issued for April 2017, with respect to the DMRC Project i.e. CC-95. The contractor has duly signed the bills and even the letter dated 13th October 2017 also supports the case of the petitioner that M/s Metcon India Realty & Infrastructure Pvt. Ltd. was also there and engaged by the respondent. Although, the payment was to be made by the Respondent herein, but the respondent asked M/s Metcon India Realty & Infrastructure Pvt. Ltd. to make the payment. Even, the petitioner also approached the said contractor, but ultimately the liability pertains to respondent herein, therefore, once the liability has been admitted by specific letter dated 13th October 2017 issued on behalf of the respondent to the petitioner, whether the Form-3 and Form-4 has filled hardly matters. Hence, the petitioner herein succeeded in proving that there were dues against the respondent company and respondent failed to make the payment of the said amount, in spite of the demand raised. Therefore, it could not be said that there was pre-existing dispute between the parties. Rather, there was a clear dues with respect to CC-95 i.e. DMRC Project, Delhi. Moreover it is settled proposition, if the 'dispute' does not exist truly and is illusory, hypothetical or spurious, "the application cannot be rejected". Thus, reference can be made to "**Henan Boom Gelatin Co. Ltd. Vs. Sunil Healthcare Limited in Company Appeal (AT) No. 256 of 2021 dated 17th**

November 2021 by National Company Law Tribunal, New Delhi", wherein it is laid down as under:

"the pre-existing dispute which may be ground to thwart an application under Section 9 has to be real dispute, a conflict or controversy, a conflict of claims or rights should be apparent from the reply as contemplated by Section 8 (2). The Corporate Debtor is not to raise bogie of disputes but there has to be real substantial dispute. It is true that the Adjudicating Authority has to see the reply and the contents therein and has not to enter into adjudication of the dispute. He is only required to look into the substance of the pleading to find whether there is a real dispute decipherable from the reply."

12. As noted in the abovesaid discussions; qua this matter that no genuine dispute has been raised by the respondent prior to issuance of demand notice, the prayer of applicant deserves to be allowed.

13. In view of the above, the application is admitted in terms of Section 9(5) of the Code.

14. The applicant has not proposed the name of an IRP, therefore, this bench appoints Mr. Kapil Aggarwal, as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-001/IP-P02297/2020-21/13440 and email id. kapil_gsp@yahoo.com. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating

Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.

15. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Kapil Aggarwal to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by the Interim Resolution Professional, and shall be paid back to the Operational Creditor.

16. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.

17. A copy of the order shall be communicated to the Applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC

for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

-Sd-

(PRASANTA KUMAR MOHANTY)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)