

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

C.P. (IB) 3585/MB/2019

Under Section 8 &9 of the IBC, 2016

In the matter of

Karam Enterprise

Ground Floor- 004, C-17, Anuroop
C.H.S., Shanti Nagar, Sector No. 11,
Mira Road (East), Thane, Mumbai-
401107

.... Petitioner

v/s.

Adhiraj Constructions Private Limited

303-506, Sharda Chambers, 15 New
Marine Lines, Mumbai, Maharashtra-
400020

.... Corporate Debtor

Order Delivered on 11.08.2020

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri V. Nallasenapathy, Member (Technical)

For the Petitioner: Adv. Amrendra Sinha, Adv. Birendra Kumar

For the Corporate Debtor: Adv. SarrahKhambah, Adv. Krina Gandhi, Adv.
Sameer Pandit

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. This Company Petition is filed by Karam Enterprise (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Adhiraj Constructions Private Limited (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default in making payment of ₹20,34,39,283/- inclusive of interest at the rate of 12% per annum on the delay in payment by invoking the provisions of Section 8 and 9 of the Insolvency & Bankruptcy Code (hereinafter called "Code") read with Rule 5 and 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Petition is filed on 10.10.2019 for initiating Corporate Insolvency Resolution Process (CIRP).
2. The Petition reveals that the Petitioner along with other companies participated in the tender process advertised by the Corporate Debtor. The Corporate Debtor, on 27.05.2016, entrusted the work of

construction and awarded the work order to the Petitioner for construction of 8,77,965 sq. feet at the rate of ₹1170 per square feet, totaling the estimated amount to ₹102,72,19,050/-.

3. The Petitioner accepted the said work order and continued to work till the Corporate Debtor terminated the work order on 26.02.2019 by an email. In this period, the Petitioner completed 100% work of plinth and raised six invoices upon the Corporate Debtor pursuant to the work done. The official of the Corporate Debtor certified the invoices and issued certificate of payment to the Corporate Debtor, but the payments were never released by the Corporate Debtor.
4. The Counsel for the Petitioner submitted that the invoices raised by the Petitioner were total value of ₹26,37,44,735/-, out of which the Corporate Debtor managed to pay only ₹8,19,63,690/- despite issuing certificate of payment. Hence, a balance of ₹20,34,39,283/- inclusive of interest at the rate of 12% per annum is due to be recoverable from the Corporate Debtor.
5. Despite several requests made by the Petitioner, the Corporate Debtor failed to clear its dues. Thus, on account of non-payment of outstanding dues, the Petitioner issued Demand Notice dated 05.08.2019 in Form 3 under Section 8 of the I&B Code, 2016 to the Corporate Debtor which was not in its prescribed format as per the Code. The Corporate Debtor sent an evasive reply dated 23.08.2019 to the said notice to which the Petitioner also replied on 16.09.2019. Then, the Petitioner sent a new demand notice dated 21.09.2019 to the Corporate Debtor in Form 3 under Section 8 of the I&B Code, 2016 demanding a sum of ₹20,34,39,283/- including interest calculated at the rate of 12% per annum on the delay in payment to which the Corporate Debtor failed to reply.
6. The Corporate Debtor in its reply to the Petition raised the following contentions:
 - a. It was submitted that the Petitioner has falsely contended that the Corporate Debtor did not reply to the demand notice dated 21.09.2019. The Corporate Debtor replied to the said notice on 02.10.2019 and the Petitioner had received the Corporate Debtor's reply to the demand notice long before filing of this Petition. However, the Petitioner had deliberately suppressed this document and did not annex the same to the Petition even though the reply to the demand notice was filed within a period of 10 days stipulated under Section 8(2) of the Code. Also, the

Petitioner had responded to the Corporate Debtor's reply on 16.10.2019.

- b. It was submitted that the Petitioner falsely alleged that the amounts claimed by it are due under 'eligible invoices' for ₹26,37,44,672/- raised by the Petitioner during the period of the contract. The contract between the parties was terminated on 26.02.2019. Thereafter, the Petitioner raised its final bill labelled as "RA Bill: Final" on 11.03.2019 in which amount shown was ₹37,73,844.10/-. The Petitioner raised additional claims after its final invoice by falsely alleging that these claims also arose out of the same invoices.
- c. It was submitted that the proceedings under Section 9 (1) of the code can only be initiated in respect of an 'operational debt'. In the present case, there are only three certified bills/ certificates of payment that are jointly signed by both the parties aggregating to ₹7,68,24,634/- and payments towards the same have already been made by the Corporate Debtor. The remaining claims raised by the Petitioner are not based on any certificate of payment and have never been admitted by the Corporate Debtor. It is a well settled position of law that a non-crystallized demand or a claim for damages/ compensation is not a 'debt' until and unless the claim is duly adjudicated upon by a competent court/authority and hence, the claim by the Petitioner do not fall within the definition of an 'operational debt' under Section 5 (21) of the Code.
- d. It was submitted that the Petitioner is required to furnish an affidavit to the effect that no notice relating to a dispute of an unpaid operational debt has been given by the Corporate Debtor as per Section 9(3)(b) of the Code. But, the Petitioner, in the present case, has failed to file any affidavit to state that the Corporate debtor has not given any notice disputing the operational debt.
- e. It was submitted that the Petitioner's work was sub-standard and was not carried out in accordance with the agreement between the parties and industry norms. For instance, there were several issues regarding safety of laborers at the site. On 22.08.2016, the Corporate Debtor was constrained to complain about the absence of appropriate work permits and the ignorance of the site engineer appointed by the Petitioner. On 25.10.2016, the Corporate Debtor again pointed out the unsafe working conditions

at site. As the Petitioner failed to improve the working conditions of site, speed of work and quality, the Corporate Debtor addressed various emails along with pictures of the site between the period 28.12.2016 to 10.04.2018 repeatedly asking the Petitioner to take necessary action to rectify the same. Despite repeated requests and reminders, the Petitioner did not adhere to the contractual norms.

- f. It was further submitted that the Corporate Debtor repeatedly complaint regarding breach of obligations on account of slow progress of work at the site, failing to adhere to various terms of the work order, labor strike at site hindering the work progress, insufficient deployment of manpower at site, poor quality of work at site and other defaults. The Corporate Debtor repeatedly complained about these breaches to the Petitioner vide emails from 30.07.2016 to 19.10.2016.
 - g. It was then submitted that the Petitioner had also failed to appoint a representative to conduct quality checks at the site. Further, the site execution team members appointed by the Petitioner were thoroughly incompetent and there were also frequent changes to the Petitioner's execution team and project manager. These problems were highlighted in the Corporate Debtor's emails dated 24.11.2016 and 01.12.2016.
 - h. It was submitted that the work at site was also stopped on several occasions due to labor strikes by the Petitioner's labourers on account of non-payment of salaries and food issues. Also, the Petitioner remained in breach of its obligations and failed to complete the project in accordance with the Contract. The Corporate Debtor addressed several emails between 04.01.2017 and 27.10.2017 for the same.
 - i. It was submitted that the Petitioner failed to adhere to the quality norms as set out in the work order. The Corporate Debtor through its emails dated 19.03.2018 and 25.04.2018 pointed out the Petitioner's failure to pay attention to the quality related issues.
7. Ongoing through the pleadings filed by the parties and hearing the Counsel for the Petitioner and Corporate Debtor, this Bench observes as follows:
- a. Before issuance of the demand notice, the Corporate Debtor vide email dated 26.02.2019, informed the Petitioner to remove all site establishments and equipment along with the material from

the site immediately. The Petitioner was requested to coordinate with the team for signing the documents relating to joint records of the survey carried out by the Petitioner and terminated the contract.

- b. There has been an exchange of series of emails wherein the Corporate Debtor has alleged breach of contractual obligations to complete the project, provides safety to workers at site, absence of appropriate work permits, failure on the part of Petitioner to improve work conditions at site, failure of the Petitioner to appoint representative to have the quality check, constant labor strike, breach of general terms and conditions of contract more particularly clause 14.2(1) and (3) which categorically states that all RA bills shall have an attach duly certified material reconciliation statement.
- c. The Corporate Debtor further raised disputes, vide email dated 19.04.2019, regarding RA Bill no. 4 submitted by the Petitioner and disputed the claim and specifically stated that all payments made previously on the basis of signed joined measurement records and the claim raised under RA Bill no. 4 do not correspond to the actual work carried out. The Petitioner has raised RA Bill no. 4 after the final bill was closed and final payment was made. The Corporate Debtor vide email dated 10.06.2019 sought for certified documents to support the claim from the Petitioner.
- d. All the above emails clearly demonstrate that the claim of the Petitioner is not a debt and does not demonstrate as the debt under Section 5(21) of the Code. The Corporate Debtor has raised disputes regarding quality of the Petitioner's work, the bills raised by the Petitioner were not duly certified on the basis of joint measurement, non-following due process of certificate of payment and RA Bill no. 4 was issued after issuance of final bill. Therefore, by no stretch of imagination, the Petitioner is entitled to any relief under IBC Code when there are serious disputes raised about the admission of the claim by the Corporate Debtor.
- e. It is beneficial to refer the judgement of the Hon'ble Supreme Court in the case of ***Mobilox Innovations Pvt. Ltd. v/s. Kirusa Software (P) Limited- 2017 (SCC Online SC 1154)*** wherein in para no. 40, it was held as follows:

"40. It is clear, therefore, that once the Petitioner has filed an application, which is otherwise complete, the

adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Petitioner or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the Petitioner the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

8. When the ratio laid down in the judgement cited supra is applied to the facts of the present case on hand wherein the Corporate Debtor vide email dated 26.02.2019, 19.04.2019 and 10.06.2019 clearly raised disputes, thus tantamount to a pre-existing dispute between parties and the Petition deserves to be dismissed.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Suchitra Kanuparthi
Member (Judicial)