IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.275/BB/2018
U/s 9 of IBC, 2016
R/w Rule 6 of I&B(AAA) Rules, 2016

In the matter of:

M/s./ Shakti Developers Pvt. Ltd,
(Erstwhile Pranay Developers Pvt..Ltd.
(RJ Lake Gardenia),
No. 35/16, IInd Floor,
Langford Road Cross,
Bangalore-560 025 - Petitioner

Versus

M/s. R.J.Rishikaran Projects Pvt. Ltd.
CIN : U45209KA2013PTC068127
Pent House, R.J.Manor Apartments,
#11/A 80 Feet Road,
3rd Block, Koramangala
Bangalore-560 034. - Respondent

Date of Order: 8th January, 2019

Coram: 1) Hon'ble Shri Rajeswara Rao Vittanala, Member (J)

2) Hon'ble Dr.Ashok Kumar Mishra, Member (T)

Counsel/Parties Present:

For the Applicant	:	Shri Dharmendra Chatur along Shri Madhur A Kalyanshetty
For the Respondent	:	None

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. CP(IB) No. 275/BB/2018 is filed by **M/s. Shakti Developers Pvt. Ltd,(Petitioner/Operational Debtor)**U/s 9 of IBC, 2016, R/w Rule 6 of the I&B(AAA) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of **M/s. R.J.Rishikaran Project Pvt. Ltd. (Respondent/Corporate Debtor),** on the ground that Corporate Debtor has failed to pay an

outstanding amount of Rs 58,50,220/-(Rupees Fifty Eight Lakhs Fifty Thousand Two Hundred and Twenty Only).

2. Brief facts of the case, as mentioned in the petition, are as follows:

a) M/s.Shakti Developers Pvt. Ltd (Petitioner/Operational Creditor) is a Company Registered Karnataka Bangalore. The Operational Creditor is a Company is engaged in the business of inter alia general contracting services involving construction activities of entire structure along with finishes and MEP(Mechanical Electrical Plumbing) (i.e. HVAC design, electrical design and plumbing design by mechanical and electrical engineers).

b) M/s.R.J.Rishakaran Projects Pvt. Ltd.,(Respondent/Corporate Debtor) incorporation dated 07.03.2013, nominal shares Capital Rs. 1,00,00,000/-(Rupees One Crore Only), Paid up share capital of Rs. 30,00,000/-(Rupees Thirty Lakhs Only). The Corporate Debtor is engaged in the business of building complete constructions or parts thereof.

c) The Respondent has issued a letter of intent dated 18.03.2015 for civil & Structural works construction of Compound, Entrance canopy & security block. As per your quoted rates the total value of the project will be Rs. 1,44,70,002/-(Rupees One Crore Forty Lakhs Seventy Thousand and Two Only) plus VAT@ 14.5% on 70% and ST @ 12.36% on 40%. For Steel @ 5%.

It contains the following terms and conditions;

1) Type of contract: This is an item rate contract.

2) The Final contract value of the work order will be based on BOQ quantity which may vary as per site conditions. Any increase in quantities a variation order will be issued before raising the bills. Rates indicated in BOQ are inclusive of all materials, labour, escalation (except

for agreed basic rates of materials), duties, royalties, levies input VAT etc. Output VAT & Service tax will be paid as per prevailing statutory law. Labourcess is not a part of the Contract amount and shall be reimbursed at actual. VAT will be based on production of VAT returns on monthly basis.

3) Compliance:PF&ESI compliance is mandatory and should cover all staff as well as labourers on site. All the other compliance as mentioned in the tender agreement should be adhered to including submission of FF and ESI challan, attendance and wage register (for the month of work executed) without which no payment can be made.

d) The Operational Creditor upon the completion of works issued RA Bill No. 1 dated 03.03.2016 for an amount of Rs. 55,47,230/- (Rupees Fifty Five Lakhs Forty Seven Thousand Two Hundred and Thirty Only) for the project RJ Lake Gardenia and RA Bill No. 1 dated 30.04.2016 and for another amount of Rs. 3,02,990/- (Ruppes Three Lakhs Two Thousand Nine Hundred and Ninety Only) for the project RJ Broke Square to the Corporate Debtor. The Corporate Debtor defaulted in repaying the amounts.

e) When the Corporate Debtor failed to pay total outstanding amount of RS. 60,61,856/-(Rupees Sixty Lakhs Sixty One Thousand Eight Hundred and Fifty Six only), issued a Demand Notice dated 05.09.2018, under Section 8(1) of the I&BC, 2016 for repayment of amounts due under Invoices for works done at RJ Lake Gardenia, RJ Brooke Square and RJ Manor, and which consists of 3 bills

SL No.	Project	Invoice No.	Date of Invoice	Amount Due (in rupees)	Interest accrued (in rupees	Total (in rupees)
1.	RJ Lake Gardenia	RA Bill No. 01-Complied (Tax Invoices No.2	03.03.2016	47,79,454	7,01,575 (at 18% per annum on a sum of RS. 13,02,585 from	54,81,029

					03.03.20016 to 02.09.2018)	
2.	RJ Brooke Square		30.04.2016	3,02,990		3,02,990
3.	RJ Manor		10.05.2016	2,67,837.17		2,76,837
			Total			60,61,856

f) In pursuant above Demand Notice, the Respondent issued a reply dated 14.09.2018 by controverting various contentions raised in the Demand Notice by raising serious disputes with regard to the claim made by the Petitioner, and also mentioned that they have filed a suit in O.S No. 6726/2016, against the above said Ms. Radika Shah, D/o Ravindra Shah, with prayer for recovery of Rs. 20,72,927/- in the City Civil Court, Bengaluru. Therein, Ms. Radika Shah has made a counter claim against the Respondent for a sum of Rs. 1,33,66,065.03/-.

g) Aggrieved by nonpayment of outstanding amount claimed in the Demand Notice, present Company Petitioner is filed.

3. Heard Shri Dharmendra Chatur along with Shri Madhur A.Kalyanshetty, Learned Counsels for Operational Creditor. We have carefully perused the pleadings of all material documents have filed in support of the Company Petition along with extant provisions of Code and law on the issue.

4. Shri Dharmendra Chatur, learned Counsel for Operational Creditor, while pointing out various averments made in the Company Petition, and also material of documents, has further submitted that a debt and default in question are not in dispute and the Respondent has not raised any dispute before issuing the impugned Demand Notice. All the allegations made in their reply are not tenable and there are baseless. The petitioner is filed in accordance with law, a qualified Resolution Professional namely

Mr. Srikanth Shivaswamy is suggested to appoint as IRP etc. Therefore, the instant petition is fit case to admit.

5. By perusal of material documents filed along with petition, it is noticed that the Respondent has issued a reply dated 05.10.2016, by inter alia stating that the following :

a) 07.11.2015 Amount paid to IJM Concrete Products vide cheque No. 001072 dated 07.11.2015 on behalf of Pranay Developers Rs. 2,31,000/- Invoice No. 513/15-16
b) 22.12.2015 Amount paid to Golecha Ceramics on behalf of Shakti Developers Pvt. Ltd. Amount – Rs. 54,000/- Invoice No. 650/15-16
c) 03.02.2016—Amount paid to Terraco Marketing on behalf of Shakti Developers Pvt. Ltd. Rs, 37,200/- Invoices No. 851/15-16.
d) 01.07.2016- Amount paid to Bharath RMC Products vide cheque No. 546988 of Rs. 2,56,280/- dated 01.07.2016 on behalf of Shakti Developers Pvt. Ltd. Invoice No 356/15-16.

Another reply dated 05.10.2016 was issued to the Counsel for the Petitioner, by inter alia stating that the Petitioner failed to execute the compound work entrusted to him. Another E-mail Dated 19.10.2017 stated to have sent to the respondent by inter alia stating that they have not received Rs.44,53,119/- (Rupees Forty Four Lakh Fifty Three Thousand One Hundred and Nineteen Only) and TDS (Tax Deducted at Source) of Rs. 89,063/- (Rupees Eighty Nine Thousand and Sixty Three Only) was deducted on 02.09.2016 this e-mail contends Disclaimer & Caveat which reads as under:

> *"This email in an internal and private conversation between the sender and the specific recipient addressed to in this communication. The author of this email categorically cautions and restrains any person/institution/club/POAs/press or a statutory body in any form without the written permission of the sender."*

6. The Petitioner issued a legal notice dated 08.09.2016 to the Respondent, by inter alia stating that M/s. Pranaya Developer Pvt. Ltd is changed as M/s.ShaktiDevelopers Pvt. Limited with effect from 22.08.2015; has claimed an amount of Rs.47,79,454/- along with interest @ of Rs.10,03,685/- totalling to Rs.57,83,139 /- and also terminated this work order. In pursuant to the above notice, the Respondentgot issued a reply dated 05.10.2016,by inter alia stating they have issued a letter of intent dated 18.03.2015 for construction of compound wall, entrance gate canopy works weeping wall and security cabin only. However, without completing the work, they left workplace and stopped theconstruction, thus incurred losses by engaging another contractor by purchasing steel and required material. It is further contented that they have committed a breach of contract.As per the contract terms, the petitioner was liable to submit to bills with vouchers to the Engineer, engaged by them, who on verification, would certify the bills for payment. And also stated that they have entrusted the work of construction of residential/commercial building belonging to Radhika Shah at Koramangala for which architects/ Engineering are same. Payment made to the petitioner for Kormangala project is excess and needs to be refunded to the respondent. The following details are furnished with regard to payments made by the Respondent:

a) 07.11.2015 Amount paid to IJM Concrete Products vide cheque No.001072 dated 07.11.2015 on behalf of Pranay Developers Rs.2,31,000/- Invoice No.513/15-16
b) 22.12.2015 Amount paid to Golecha Ceramics on behalf of Shakti Developers Pvt. Ltd. Amount – Rs.54,000/- Invoice No. 650/15-16
c) 03.02.2016—Amount paid to Terraco Marketing on behalf of Shakti Developers Pvt. Ltd. Rs.37,200/- Invoices No. 851/15-16.
d) 01.07.2016- Amount paid to Bharath RMC Products vide cheque No. 546988 of Rs.2,56,280/- dated 01.07.2016 on behalf of Shakti Developers Pvt. Ltd. Invoice No 356/15-16.

Therefore, the Respondent asked the Petitioner to provide correct picture of the issue so as to examine and to take appropriate action.

7. The Petitioner has got issued another legal issued notice dated 08.09.2016 by inter alia stating out of total work order of Rs.21,50,140, they claimed to have executed for an amount of Rs.3,02,990/- and thus demanded the amount to pay it by stating that they are not interested to continue the work. In pursuant to this notice, the Respondent issued reply dated 13.10.2016,by inter alia stating that the Petitioner left the work abruptly and the bills are not properly submitted even to consider those bills. As per the terms of the contract, the Petitioner has to submitbills with vouches first to the Engineer engaged by the Respondent, who on verification would certifypayment.

8. As stated supra, the Respondent has given a reply dated 14th September, 2018 to the statutory Demand Notice issued by the Petitioner on 05thSeptember, 2018. By perusal of the reply given by the Respondent, it is clearthat there are serious disputes with regard to the transaction made between the parties. There are several terms and condition in the impugned Letter of Intent dated 18.03.3015. The Letter of Intent has reference offer07thMarch, 2015 followed by your e-mail conformational and all other correspondence including sharing of tender conditions, tender drawings, BOQ's, specification etc. However, the correspondence along with final offer dated 7th March, 2015 was not placed before this Tribunal to examine issue whether debt in question is crystallised leading for default at later stage. It is also stated that final contract value of the work order will be based BOQ's quantity, which may vary as per site condition. It is further stated in the letter of intent that time is essence for this contract and advised to strictly adhere the period of completion of three months for front compound wall works including resolution of any unforeseen issuesthat might arise on site. Therefore, the above facts and circumstances clearly show that there is serious dispute raised by the Respondent even before issuance of statutory demand in question issued

under the Code. And the petitioner failed to place all the relevant documents to consider with reference to debt and default in question are concerned.

9. The Hon'ble Supreme Court of India, in a recent case, in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*[1], has categorically laid down that IBC is not intended to be substitute to a recovery forum. It is also laid down whenever there is existence of real dispute, the IBC provisions cannot be invoked.

In another latest judgement rendered in *Transmission Corpn. of AP Ltd Vs. Equipment Conductors and Cables Ltd.*[2] it has inter alia held that existence of un-disputed debt is sine qua non of initiating CIRP. As per para 34 of judgement, it is stated that Adjudicating Authority, while examining an application under Section 9 of Code, will have to determine:

i. Whether there is an 'operational debt' as defined exceeding Rs. 1 lakh?
ii. Whether documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
iii. Whether there is existence of dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of demand notice of the unpaid operational debt in relation to such dispute? If any one of afore said conditions is lacking, the application would have to be rejected.

10. As stated supra, as per the Letter of Intent dated 18.03.2015 (Page 27 to 33 of theCP) contains several terms and conditions, which inter alia stipulates time for completion of the work, three calendar months from the Letter of Intent, Liquidated Damages, Mobilisation Advance, Payment of Retention Money etc. Time for payment which reads as under:

[1] (2018) 1 SCC 353)
[2] (CA No.9597 of 2018) dated 23rd October, 2017, (20181 IBJ(JP) 641 (SC)

"Progressive RA Bill is to be submitted once in a month, there is no subject to adherence to Clause of minimum bill value. Bills to be submitted with specific date of valuation complete with all necessary documentation and detailed measurement sheets in full.

50% of net certified value shall be released as adhoc within 10 working days from the date of acceptance of bill.

Balance payment shall be paid within 30 days from the date of acceptance of bill. All bills to be submitted before 5th of every Month keeping 30th as cut off date for measurements. Weekly certification of measurement's to be done jointly."

There are several documents to be submitted along RA Bills as check list and bills carry no interest on delayed payment.

11. In view of the fact and circumstances of the case, the debt and default in question is in serious dispute even prior to issuance of statutory Demand notice as stated supra. The Adjudicating Authority, cannot adjudicate/enter into disputed question(s) under the provisions of Code, which is admittedly a summary procedure. Therefore, we are of the considered view that the instant case is not a fit to admit, and it is liable to be rejected.

12. In result CP (IB) No.275/BB/2018 is hereby rejected as devoid of merits. However, this order will not come in the way of invoking any other remedy available under any other Act. No order as to costs.

(Dr. Ashok Kumar Mishra)
Member (T)

(Rajeswara Rao Vittanala)
Member (J)

Raushan