

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -V**

C.P. (I.B) No. 393/MB/2022

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Shreenathji Infrastructure

Through its representative, Amit Kumar Malpani, Having its registered address at A-3/605, Aakriti Green Bhopal- 462 042

...Operational Creditor/Applicant

Vs

M/s Namasthetu Infratech Pvt. Ltd

Office No.513, Rainbow Plaza Rahatani
Pune,411 027 (MH)

...Corporate Debtor/Respondent

Order Dated:17.05.2024

Coram:

Madhu Sinha

Reeta Kohli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances: Physical/ VC

For the Petitioner: Adv. Vishal Bhatnagar

For the Respondent: Adv. Chirag Chanani

ORDER

1. This Company Petition is filed by **Shreenathji Infrastructure** (hereinafter referred as **“the Operational Creditor”**) seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as **“CIRP”**) against **M/s Namasthetu Infratech Pvt. Ltd** (hereinafter called **“Corporate Debtor”**) by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy code, 2016 (hereinafter called **“Code”**) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for an Operational Debt of **Rs.1,54,56,473** plus 24 % p.a interest i.e. Rs.80,37,366/-.The date of default is stated to be 31st Day from the date of each invoice, as 30 days credit was admissible to the Corporate Debtor Company as per part IV of the Company Petition. Demand Notice dated 07.12.2019 was sent by the Petitioner and the same was not replied by the Respondent neither the balance amount was paid. Thereafter, the Operational Creditor filed an FIR in the concerned Police station vide FIR no. 0244 dated 23.08.2020 against the Corporate Debtor’s company under section 420, 294 and 506 IPC and charge sheet has also been filed on the said FIR. The Operational Creditor subsequently filed the present Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 before this Hon’ble Adjudicating Authority.

BRIEF FACTS

2. The present petition reveals that Operational Creditor is engaged in the business of Civil Construction & Engineering Works, Mining & Drilling, Earth Work & Material Suppliers and takes contract of the said work. The Corporate Debtor i.e. Namasthetu Infratech Pvt. Ltd

has approached Vishal Infrastructure regarding the contract of upgradation of Jabalpur Airport, subsequent to the same a letter of Acceptance dated 19.02.2018, was issued by AAI (AIR AUTHORITY OF INDIA) to Vishal Infrastructure. The Corporate Debtor executed a sub-contract with one Vishal Infrastructure for the upgradation of Jabalpur Airport to make it suitable for operation of AB 320 type Aircraft, Extension of Runway, Construction of New Apron , Taxi Track and isolation bay i.e. Link Taxi, GSE AREA PERIMETER ROAD AND ALLIED WORKS (Civil & Electrical) at Jabalpur Airport, Jabalpur CA No. AAI/ JABALPUR/W-29/RWY-APRON/ENGG.(C)/2018 dated 05.03.2018 By Airport Authority of India ("herein after AAI") and the Agreement dated 20.03.2018 was executed between Vishal Infrastructure and Corporate Debtor.

3. It is further submitted by the Operational Creditor that the Corporate Debtor vide work orders, work order No. NIPL/NMUM/JBL/WO/09/17-18 dated 14.09.2018, work order No. NIPL/NMUM/JBL/WO /18-19 dated 10.12.2018 and work order No. NIPL/NMUM/JBL/WO/11A/19-20 dated 05.01.2019, engaged the Operational Creditor for installation of stone crushing plants and supply of the crushed aggregate, as per the grading requirements, earthwork in excavation of hard rock and supply and filling suitable earth. The Corporate Debtor assured the Operational Creditor that all necessary permission has been obtained from authorities and the site is fit for the installation.
4. It is submitted that after receiving the assurance, the Operational Creditor started the work in 2018 and invested 1.5 corers in order to complete the work assigned. Further the Operational Creditor states that vide letter dated 03.09.2019 from M/s Vishal Infrastructure Ltd. the Corporate Debtor authorized the Operational Creditor to seek permission from the director mines. Vide latter dated 12.09.2019 the District Collector (MINES) Jabalpur has granted the permission for excavation.

5. The Operational Creditor states, in second week of 2019 the AAI, stopped the working of crusher. After having inquired the Operational Creditor got to know that the installation was not allowed and no approval was acquired for the same. The Operational Creditor asked for the copy of agreement between AAI and Vishal Infrastructure, but the same was not provided by the Corporate Debtor. Eventually, it came into the knowledge of the Operational Creditor that vide agreement dated 19.02.2018, no such permission for installation or approval by AAI to Vishal Infrastructure. Therefore, vide letter dated 03.09.2019, the AAI asked Vishal Infrastructure for removal of the Crushers. The Operational Creditor through its representative Amit Malpani filed an RTI seeking information regarding the award of work at Jabalpur Airport. Vide letter dated 09.03.2020 the CPIO transferred the RTI Application to AAI and AAI vide a letter dated 28.01.2021, replied to the Application stating that no permission is given for blasting and that item for excavation in hard rock was not available in the first contract.
6. The Operational Creditor submits that the first work order was presented in the year 2018 and for the said order the Corporate Debtor cleared the Amount of Rs.4,61,01,411.50/- of the Operational Creditor and the Corporate Debtor asked the Operational Creditor to continue the process of infrastructure in the said site of AAI. The Corporate Debtor has not cleared the payments of the Operational Creditor since September 2019. The total outstanding amount as per the books of Accounts is Rs.1,54,56,473/- .There has been no existing dispute with respect to the outstanding payment.
7. On several repeated requests and reminders, the Corporate Debtor only continued to cite evasive responses to wriggle out of its obligation to duly pay the operational debt as due to the Operational Creditor.
8. The Operational Creditor on 07.12.2019 served a demand notice in Form- 3 under section 8 of the Insolvency and Bankruptcy Code 2016 through its Advocate. The said notice was dispatched to Corporate

Debtor via courier and via email dated 17.012.2019. However, no response was received thereafter, also no notice/communication has been served upon the Operational Creditor by the Corporate Debtor indicating existence of any dispute within 10 days of the delivery of notice.

9. It is submitted by the Operational Creditor that the Corporate Debtor has received the amount from AAI through Vishal Infrastructure but have not cleared the outstanding payments to the Operational Creditor and thus the Corporate Debtor is liable to pay the Outstanding amount together with interest. In this background, an FIR No. 0244 dated 23.08.2020 under Section 420,294, and 506 IPC at Police Station, Khamaria, Jabalpur, M.P. was filed. Hence, this Petition.
10. The Corporate Debtor denies each and every allegations, contention, averments, statements and submissions made by the Operational Creditor in the present Company Petition. Further the Corporate Debtor states that Operational Creditor has wrongly issued the said Notices and invited the provision of the Insolvency and Bankruptcy Code, 2016 in view of the fact that there is pre- existing dispute. The Operational Creditor has failed to perform its obligations under the terms and conditions agreed between the parties as per the work Orders dated 14.09.2018, 16.12.2018, 05.01.2019 which stated scope of work, prices, duration etc. according to which the work was to be performed. Hence, the amount claimed by the Operational Creditor by way of the said notice are misconceived and untenable.
11. The Corporate Debtor submits that, Operational Creditor was required to commence business with the required facilities and the same had to be made available for commercial operations within a period of 6 months from the date of the issuance of the Work order dated 14.09.2018 and 16.12.2018. However, the Operational Creditor failed to commence business of the installation of the mobile stone

crushing plant at Jabalpur site and supply the crushed aggregate as per the grading requirement form WMM and GSB mix and also failed to provide the contractual amount of the crushed aggregate as per the work order dated 14.09.2018 with all required facilities in compliance with the work order dated 14.09.2018. The Validity of the said work order was for 12 months.

12. It is submitted by the Corporate Debtor that as per the work order dated 14.09.2018, the Operational Creditor was supposed to supply GSB quantity of 50,40,000 cft. However, the quantity supplied by Operational creditor was 1,31,444 cft. only, leaving a balance of 49,08,556 cft, which the Corporate Debtors had to acquire from other agencies and it had to incur additional costs Rs. 8,88,67,952/- for acquiring the balance 49,08,556 cft.
13. It is the case of the Corporate Debtor that if the Operational Creditor had done their work on time, then the Corporate Debtor would have not spent Rs. 8,88,67,952/- for acquiring the balance 49,08,556 cft. Therefore, the Corporate Debtor has incurred a loss of Rs. 2,87,38,141 excluding GST and the Corporate Debtor reserves its right to recover the same from Operational Creditor. The Corporate Debtor further states that they further also had to incur extra costs with various work done in respect to the work order dated 05.01.2019.
14. Under the said work order dated 05.01.2019 due to non-completion of Moorum Embankment of the runway, the period of the contract/work had to be extended by 31.03.2020 for completion of Embankment. It is the case of the Corporate Debtor that the total quantity of Moorum to be supplied was 2,00,000 cubic meters however the OC only supplied 1,40,645 cubic meters, hence because of the non-supply of the Moorum as per the agreement, the Corporate

Debtor had to deploy various machineries for which they had to pay Rs. 53,55,000/- and diesel worth Rs. 39,29,800/-.

15. Further the Corporate Debtor submitted that the excavated stuff stacked in the runway portion were not utilized for crushing till the expiry of period of crushing i.e. 14.03.2019 and hence the question of granting permission on 12.09.2019 does not arise in any event. It is the case of the Corporate Debtor that the erection of the crusher was not objected by AAI till September, 2019 and asked to remove crusher because the place where excavated stuff was stacked by Operational Creditor for crushing, work was to be started by AAI. Thus, the period of completion for the work was up to 14.03.2019 and since the same was not completed in time the Operational Creditor is liable for the delays. The agreement between Corporate Debtor and Vishal Infrastructure and one between Vishal Infrastructure and AAI, both of which in no way are concerned to Operational Creditor and hence providing a copy of the same is out of question.
16. The Corporate Debtor stated that they had incurred extra labor charges due to deployment of labor for removing boulders from the Moorum supplied by Operational Creditor from 01.03.2019 to 14.06.2019. The Corporate Debtor states that the Moorum supplied by Operational Creditor were containing boulders not permissible as per the specifications of the work order and the Corporate Debtor reserves its right to recover the same from Operational Creditor.
17. It is the case of the Corporate Debtor that they wrote many letters to the Operational Creditor viz. 11.06.2019, 14.06.2019, 20.06.2019, 25.06.2019, 26.06.2019, 05.07.2019, 08.08.2019, 21.10.2019, 15.11.2019 not only disputing the quality of work done but also the miniscule quantity being supplied by the Operational Creditor under the said contracts/work orders. In these letters the Corporate Debtor time and again called upon the Operational Creditor to rectify his

mistakes in executing the contract, to provide GST returns as after claiming GST from the Corporate Debtor the Operational Creditor did not deposit the same with the Department. Further by the letters dated 05.07.2019 and 15.11.2019 the Corporate Debtor terminated the contract and cancelled the orders given to the Operational Creditor as the Operational Creditor had only provided about 2% of the quantity under the Orders 14.09.2018, 10.12.2018 and 05.01.2019. Hence the Corporate Debtor submits that, the Operational Creditor's purported claim is not a 'debt' at all under the provisions of the Section 3(11) and/or operational debt under Section 5(21) of the Insolvency and Bankruptcy Code, 2016, thus the question of any default under Section 3(11) of the IBC does not arise, since there is no amount that has become due and payable.

18. Further, the Corporate Debtor states that the pre-existing disputes are clear from the above letters of the Corporate Debtor and other correspondence exchanged between the parties where in the Corporate Debtor categorically disputed its liability. Moreover, the Operational Creditor has not returned the security deposit to the Corporate Debtor.

Findings/Conclusion

19. Upon thorough consideration of the arguments presented by both the Operational Creditor and the Corporate Debtor, as well as a review of the provided records, the following key points have emerged
20. The Corporate Debtor company executed the agreement with other company namely Vishal Infrastructure Ltd was awarded the contract for execution of upgradation of Jabalpur Airport to make it suitable for operation of ab-320 type of aircraft, extension of runway, construction of new apron, taxi track and isolation bay, perimeter road and allied works (civil & electrical) at Jabalpur Airport, by Airports Authority of India. In the said Agreement the Corporate

Debtor company agreed to execute the work as sub-contractor for Vishal Infrastructure Ltd.

21. It is the case of the petitioner that some part of the said work was assigned to the them by the Corporate Debtor vide work orders, dated 14.09.2018, 10.12.2018 and 05.01.2019 which included installation of stone crushing plants and supply of the crushed aggregate, as per the grading requirements, earthwork in excavation of hard rock and supply and filling suitable earth following which the Operational Creditor performed the said work in the year 2018 to 2019 with the assurance from the Corporate Debtor that all necessary permissions have been obtained from authorities and the site is fit for the installation. Hence the Operational Creditor started the work in 2018 and invested 1.5 corers in order to complete the work assigned, but eventually in September 2019 the officials of AAI stopped the working of the crushers installed by Operational Creditor and informed that the installation of crusher was not allowed in the said site from the very beginning and no approval has been obtained from the same.
22. It is submitted by the Counsel for petitioner that eventually, it came to Operational Creditor's knowledge that in consonance with the agreement dated 19.02.2018 between AAI and Vishal Infrastructure Ltd. The Corporate Debtor's Company without acquiring the requisite permission, ordered the Operational Creditor to start installing stone crushers in the said site. To substantiate the same, the counsel for petitioner also referred to the letter dated 28.01.2021 vide which he received information from Airport Authority of India categorically submitting that no permission was granted for the installation of stone crushers and for excavation etc.
23. The Counsel for petitioner placed reliance on the balance sheet entries so as to prove that payments were made by the corporate debtor to the petitioner in lieu of the performance of the tasks

assigned on regular basis. On the other hand, while appreciating the contention of the Corporate Debtor that the balance sheets placed on record are not counter signed by the Corporate Debtor, we are of the considered view that even if these Balance Sheets are not signed but the fact that there was reconciliation attempts between the parties on 09.08.2019 and the petitioner was asked to raise invoices proves the fact that the Corporate Debtor has accepted that there is a debt due.

24. On the other hand, counsel for the corporate debtor drew attention to clause (G) and point 2 of the terms and condition of work order dated 14.09.2018 which are as under:

Clause (G): "Scope of work includes, collection and loading of boulders from our excavation site, transportation upto crusher, crushing and the boulder as per required grading requirement of WMM and GSB as per approved design mix, loading into tipper/Hywa from crusher/ or stock yard. Crusher capacity should be 100 TPH or more, to be increased as per site requirement."

- 2. Prices offered shall remain firm & no escalations in prices are acceptable. Any increase in prices due to statutory implications shall be borne by supplier/ Manufacturer.*

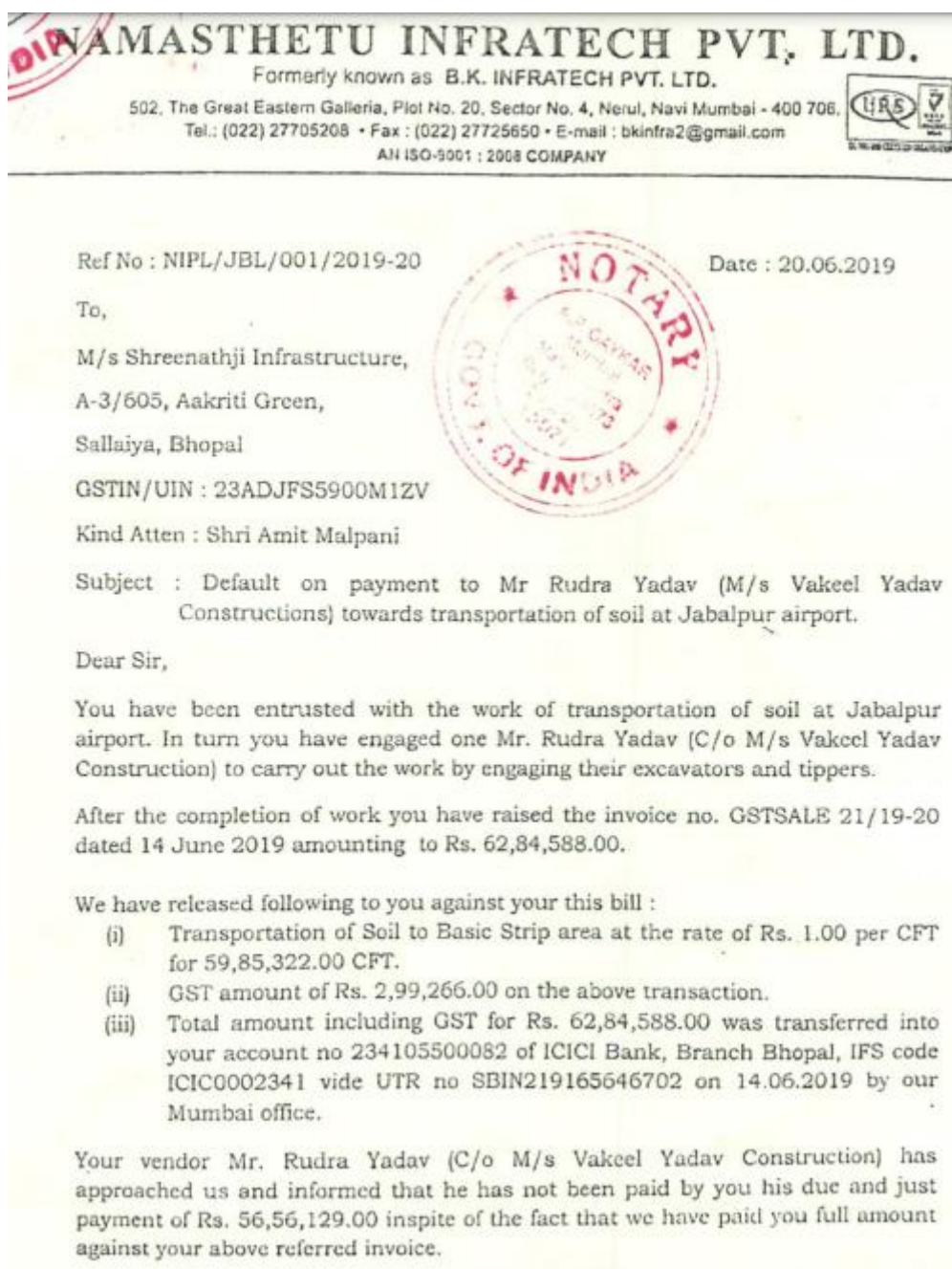
25. The attention was also drawn on Clause 16(2) which stated as under

Completion: - Material dispatch should start within 45 days from the date of this order and total time period for completion of supply is 6 months from the date of this Order.

26. Thus, from the perusal of the above stated clauses it is evident that the work was to be completed on or before March 2019 as the work order was dated 14.09.2018. Therefore, the contention of the Corporate Debtor is that reference by the Petitioner to the letter of the Airport Authority of India dated 03.09.2019 is absolutely baseless and cannot be referred to appreciate the case of the petitioner as the

petitioner was given the task which had to be accomplished by March 2019. The incomplete task on the part of the petitioner clearly shows that it is the petitioner who has failed to perform his assigned task within stipulated time period.

27. In addition, counsel for the Corporate Debtor also drew attention to the fact that the excavated stuff stacked in the runway portion were not utilized for crushing till the expiry of period of crushing i.e. 14.03.2019 and hence the question of granting permission on 12.09.2019 does not arise in any event.
28. Further with regards to the letters dated 11.06.2019 and 14.06.2019 which was communicated by the corporate debtor to the operational creditor regarding non-filing of the GST return. The reference by the corporate debtor was that GST return were not filled by the Operational Creditor. Despite Corporate Debtor having paid the claimed GST by the Operational Creditor.
29. The Counsel for the Corporate Debtor also drew our attention to the communication dated 20.06.2019 showing that in fact operational creditor never carried out any task rather he further sub- contracted the work to be completed to one Mr. Rudra Yadav and failed to pay amount due Rs. 56,56,129/- who in turn approached the corporate debtor to get amount released. The said letter is reproduced as under-



30. The perusal of this letter clearly shows that it was the corporate debtor who requested the operational creditor to realize the pending amount to Mr. Rudra Yadav.
31. Further the attention of the Bench was also drawn to the letter dated 25.06.2019 and 05.07.2019 so as to show that it is the operational creditor who had completely abandoned the work. The attention was also drawn to the slow speed of the work of the operational creditor

particularly the reference was made to the following part wherein it stated as under:

“Your supply of GSB to site upto March 2019 was only 1,19,425 cft against the 50,40,000 cft mentioned in work order. Due to slow speed of your supply, we could not do progress of GSB at site and our work is badly affected”

32. Thus from the perusal of the above evident that there was a pre-existing dispute between the parties because of the conduct and manner of the work of the operational creditor. In fact, vide letter dated 05.07.2019 at one stage the corporate debtor had specifically said that they reserve the right to terminate the contract with immediate effect and it was pursuant to this that they had cancelled the work order dated 14.09.2019 vide letter dated 15.11.2019. Further the perusal of the letter dated 21.10.2019 shows that the work was closed in the month of June 2019 and some of the invoices too have been disputed by the Corporate Debtor.
33. Further the Counsel for the Corporate Debtor also drew the attention to the payment scheduled having been agreed between the parties on 08.08.2019. The said schedule had been signed not only by the corporate debtor and operational creditor but also by Mr. Rudra Yadav who was performing the work for the operational creditor.
34. Therefore, after considering and perusing the facts and circumstances of the present case the Bench is of the considered view it is clear that pre-existing disputes exists between the parties. There is no debt due to the Operational Creditor and not only there is dispute raised by the Corporate Debtor before the issuance of the Demand Notice, Corporate Debtor has categorically disputed the purported debt. Thus in consequence thereto, there is no existence of any debt. In connection to not responding to the Demand Notice is not fatal to the case of Corporate Debtor. In fact, there was no

occasion whatsoever available to the Operational Creditor to issue a Demand Notice under IBC 2016.

35. In view of the foregoing findings, the present C.P.(IB) No. 393/MB/2022 filed by Shreenathji Infrastructure, the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 for initiating CIRP in case of M/s. Namasthetu Infratech Pvt. Ltd, the Corporate Debtor is hence rejected.
36. However, the rejection of this petition shall not cause any prejudice to the right of the petition before any other judicial forum for recovery of amount due in the eyes of law.

The Registry is directed to serve copy of the order on the parties.

SD/-
MADHU SINHA
MEMBER (TECHNICAL)
/Aakansha/

SD/-
REETA KOHLI
MEMBER (JUDICIAL)