# IN THE NATIONAL COMPANY LAW TRIBUNAL
## JAIPUR BENCH

**Coram: SHRI AJAY KUMAR VATSAVAYI,
HON'BLE JUDICIAL MEMBER**

**SHRI RAGHU NAYYAR,
HON'BLE TECHNICAL MEMBER**

**CP No. (IB) No. 90/9/JPR/2018**

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

**IN THE MATTER OF:**

**R.K. & Associates**
Through its partner Mr. Rohit Garg
E-31, Green Park, Main,
New Delhi- 110016

**...Applicant/Operational Creditor**

**VERSUS**

**Pranay Infrabuild Pvt. Ltd.**
Registered Office- Blue Sky Apartment 304-C 73,
Sarojani Marg, C Scheme,
Jaipur, Rajasthan- 302001

Also at: 1st Floor, above IDBI Bank,
381-382, Rawabhata Road, Shopping Centre,
Kota, Rajasthan - 324005

**...Respondent/Corporate Debtor**

**For the Applicant:** Archit Bohra, Adv.
**For the Respondent:** Amol Vyas, Adv.

**Order Pronounced on: 07.10.2021**

# ORDER

Per: Shri Raghu Nayyar, Technical Member

1. This Application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule-6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by R.K & Associates ('Applicant') claiming to be an Operational Creditor with a prayer for initiation of Corporate Insolvency Resolution Process against Pranay Infrabuild Pvt. Ltd. ('Respondent')

2. The Applicant is a Partnership firm, registered with Registrar of Firms, Delhi on 01.12.1993 under the provisions of the Indian Partnership Act, 1932 with its office at E-31, Green Park, Main, New Delhi- 110016. The Application is filed through its partner Mr. Rohit Garg authorized through Power of Attorney dated 27.10.2018.

3. The Respondent is a Private Limited Company incorporated under the provisions of the Companies Act, 2013 on 24.05.2007, duly registered with Registrar of Companies, Jaipur bearing CIN: U45201RJ2007PTC024473. The Registered Office of the Respondent is located at Blue Sky Apartment 304-C 73, Sarojani Marg, C Scheme, Jaipur-302001 (Rajasthan).

4. As per the Application, the Respondent had appointed Applicant as architect for its project, Citadel located at Budi Road, Kota, which was later named as Ridhi Siddhi Apartments by executing a work order bearing no. 116 dated 08.07.2015. Copy of work order is annexed as Annexure-B of the application. The Applicant had rendered its professional services from stage (1) to stage (8) of Clause F of work order. As per Clause E and F of the work order the payments were to be released to the Applicant upon crossing of each milestone as stipulated in Clause F. It is further stated that on account of change in design, which was duly confirmed by the Respondent, the Applicant had done certain extra work and thereby raised a bill of Rs. 9,44,000/-. The Applicant raised invoices from time to time for the service rendered.

5. As per the Application, the Applicant has maintained a current account of the Corporate Debtor, which resulted in raising statement of due account pursuant to which the Corporate Debtor made payments in ad hoc manner. The Corporate Debtor was negligent in making the payments, therefore the Applicant had sent various reminders for payment of outstanding amount and the last reminder was sent on 01.09.2018. Copy of reminders dated 27.07.2018, 17.08.2018 and 01.09.2018 are annexed with Application. Despite the various reminders sent by the Applicant, the Corporate Debtor failed to make payment of outstanding debt.

6. Thus, the Applicant has issued a notice under Section 8 of the Code on 17.09.2018 calling upon the Corporate Debtor to pay the total amount of Rs. 41,92,958/-. The Corporate Debtor issued reply dated 29.09.2018 and stated that there have been large number of disputes with the Applicant and the Applicant has not rendered services as per the requirements and conditions as stipulated in work order and thereby project got delayed.

7. The total amount claimed by the Applicant as mentioned in Part IV is a sum of Rs. 41,92,958/- including interest as an outstanding amount which is due and payable by the corporate debtor as described below:

PART IV

| Sr. No. | Particulars of Operational Debt | |
|---|---|---|
| 1. | Total amount of debt, details of transactions on account of which debt fell due, and the date from which such debt fell due. | Rs. 41,92,958/- |
| 2. | Amount claimed to be in default and the date on which the default occurred | Total amount of debt claimed to be in default is Rs. 41,92,958/- Date from which such debt fell due: 17.09.2018. |

8. The Corporate Debtor has filed reply vide Diary No. 347/2019 dated 28.02.2019 and raised pre-existence of dispute regarding the quality of services, prior to issuance of demand notice. It is stated that as per Work Order dated 08.07.2015, the Applicant must provide complete Bill of

Quantities (BOQ), Tender Documents, Bar Chart, and list of all drawings to the Corporate Debtor. Such requirements should be complied before the commencement of the construction i.e. February, 2016 but the Applicant failed to provide all the drawing before February, 2016. In reply thereof, the Applicant submits in additional affidavit that BOQ's etc as required as per the work order has been provided and such query were never raised before issuance of demand notice.

9. The Respondent submits that on discussion with company CMD it was agreed to provide all drawings by 31.03.2016 which is reflecting in trail email dated 07.05.2016. However, the Applicant submits in additional affidavit that the project was approved by the Urban Improvement Trust, Kota vide letter dated 05.11.2015 with all designs being submitted to them. Copy of said letter is annexed as Annexure-B. The Applicant also submits that no time frame is mentioned in the work order, so delay in the project cannot be attributed to the Applicant. On perusal of letter dated 05.11.2015 the Adjudicating Authority notes that Urban Improvement Trust, Kota has granted map (Manchitra) approval for Plot No. B Khasra No. 23 village Kunadi. On the other hand, on scrutiny of trail e-mails it also appears that the Applicant has delayed in providing drawings.

10. The Respondent states that the drawings provided by the Applicant were not as per the requirement. In meetings between the parties on 30th June 2016 it

was agreed that the Applicant shall provide all drawings by 31st July, 2016. Again, in the meeting held on 16th August, 2017, Applicant agreed to resolve issues and provide drawings by 26th August, 2017. Copy of meeting minutes are annexed. Again, through email dated 1st January, 2018 the Corporate Debtor raised grievances.

11. It is stated in the reply that the drawings of MEP services provided by the Applicant required lot of correction and were not fit for execution. Therefore, Respondent given instructions to another professional to provide MEP drawings. Further the drawings provided for Tower-C were also not permissible as per the law, resultantly, the Respondent had to demolish 13th floor on Tower-C. It is noted that the no documents have been annexed in support of such statement by the Respondent.

12. It is further contended that as per Clause D (i) of Work Order the Applicant shall supervise the execution of work and report the compliance / deviations but the Applicant has not performed such service of supervision. The Respondent also submits that since the drawings were not provided on time, the Respondent could not complete construction by specified time and hand over possession on time i.e. by March, 2018 resulting into the fact that the respondent could not recover consideration from customer as the respondent had to waive off the interest to the tune of Rs. 1.06 crore. Thereby respondent

had to continue the narrowed funds, which resulted in incurring more interest cost.

13. Further the respondent submits that the statement of dues dated 8th August, 2018 showing outstanding debt of Rs. 32,48,958/- cannot be accepted as the same is not acknowledged / certified by the respondent. With regard to claim of Rs. 9,44,000/- for extra work, it is stated that the Respondent has already incurred expenditure of Rs. 20 lakh due to Applicant's negligence, therefore respondent is not liable to make such payment.

14. The Applicant submits in Additional Affidavit filed vide Diary No. 1858/2019 dated 11.09.2019 that there was no delay on the part of the Applicant in providing the designs or in any other manner, however certain tweaks and corrections were done in the designs but the same cannot be said to be delaying the project. It is further submitted that as per Registration Certificate of Project dated 03.10.2017 issued by Rajasthan Real Estate Regulatory Authority and Affidavit cum Declaration dated 30.07.2017 by Mr. Neeraj Swalkha as well as in Sample Agreement to Sell uploaded by Developer in RERA, the estimated time of completion of the project was 19.11.2019. Copy of same is annexed as Annexure -A.

15. The Applicant further submits that the Respondent has not engaged anyone for the MEP services. The Applicant had sent various statement of payments due and not at any single occasion same was denied or replied by the

Corporate Debtor, it was only after serving the statutory notice, the defences has been concocted by the Corporate Debtor.

16. The Applicant states that reply to email dated 01.01.2018 was sent on 04.01.2018 denying and strongly disputing the false allegations levelled by the Respondent.

17. The Applicant has filed written submissions and referred to following cases:

    i. The order of Hon'ble Supreme Court of India in the matter of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017) dated September 21, 2017.
    ii. The order of Hon'ble National Company Law Appellant Tribunal in the matter of Manjeet Kaur Sran Vs. Tricolite Electrical Industries Ltd. (Company Appeal (AT) (Insolvency) No. 894 of 2019) dated September 2, 2019.
    iii. The order of Hon'ble National Company Law Tribunal, Mumbai Bench in the matter of Bank of India Vs. Shrenuj & Company Limited (CP No. 190/IBC/NCLT/MB/MAH/2018) dated March 12, 2019.
    iv. The order of Hon'ble National Company Law Appellant Tribunal in the matter of M/s Paharpur Cooling Towers Limited Vs. M/s Ankit Metal & Power Limited (Company Appeal (AT) (Insolvency) No. 204 of 2017) dated November 9, 2017.
    v. The order of Hon'ble National Company Law Appellant Tribunal in the matter of Alhuwalia Contracts (India) Limited Vs. Raheja Developers Limited (Company Appeal (AT) (Insolvency) No. 703 of 2018) dated July 23, 2019.

18. The Respondent has also filed written submissions and referred to following cases:

    i. The order of Hon'ble Supreme Court of India in the matter Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017) dated September 21, 2017.

ii. The order of Hon'ble National Company Law Appellant Tribunal in the matter of Shrivarad Polyfab Vs. OLAM Agro India Pvt Ltd. (Company Appeal (AT) (Insolvency) No. 261 of 2017) dated February 1, 2018.

iii. The order of Hon'ble National Company Law Tribunal, Principal Bench New Delhi in the matter of M/s One Coat Plaster Vs. M/s Ambience Private Limited (Company Application No. (IB) 08/PB/2017) dated March 01, 2017.

19. Heard the learned counsel for the parties and perused pleadings and citations relied upon by them. After analysing the pleadings the issue to be considered for discussion is *Whether there is pre-existence of dispute as per the provisions of the Code?*

20. In order to answer the above question, it is necessary to go through the definition of dispute as provided under the Code:

> ***Sec 5 (6) "dispute"*** *includes a suit or arbitration proceedings relating to–*
> *(a) the existence of the amount of debt;*
> *(b) the quality of goods or service; or*
> *(c) the breach of a representation or warranty;*

21. The interpretation of word dispute has been enlarged after substitution of words "if any, and", for the words "if any, or" in Section 8 (2) of the Code by the IBC (Amendment) Act, 2018. After amendment the existence of dispute need not be in the form of pendency of suit or arbitration proceedings only.

22. Section 8 of the Code read as follows:

***8. Insolvency resolution by operational creditor.*** -

*(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*
*(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -*
*(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;*
*(b) the payment of unpaid operational debt-*
*(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or*
*(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.*
*Explanation. – For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.*

23. The Hon'ble National Company Law Tribunal, Principal Bench, New Delhi in combined order in the matter of ***M/s One Coat Plaster vs. M/s Ambience Pvt. Ltd. and M/s Shivam Construction Company vs. M/s Ambience Pvt. Ltd. (CA No. (I.B.) 07/PB/2017 and CA No. (I.B.) 08/PB/ 2017)*** vide order dated 01.03.2017 made following observation:

*"A bare perusal of Section 5(6) of the Code show that a dispute could be proved by showing that a suit has been filed or arbitration are pending. It further elaborates that suit or arbitration should be in respect of the existence of* ***the amount debt,*** *quality of goods or services; or a breach of a representation or a warranty. It is not an exhaustive definition but an illustrative one. It becomes evident from the expression 'includes' which immediately succeeds the word 'dispute'. Moreover, under Section 8(1) of the Code adequate room has been provided for the 'NCLT' to ascertain the existence of a dispute. A*

*demand notice by an 'operational creditor' to an 'operational debtor' must be sent who has not paid operational dues and has committed default. Section 8 (2) further clarifies that the corporate debtor is obliged to bring to the notice of the 'Operational Creditor' within 10 days of the receipt of notice, the existence of a dispute and record of the pendency of the suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute. The other option is to pay the demanded amount."*

24. The Hon'ble Supreme Court in the matter of ***Mobilox Innovative Private Limited vs. Kirusa Software Private Limited (Civil Appeal No. 9405/2017)***, held as follows:

> *"It is clear, therefore, that once the operational creditor 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 operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor 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."*

25. In the instant matter the Corporate Debtor had raised the existence of dispute with respect to issue of service in reply to the demand notice and reiterated

the same issues and contentions in reply to the instant Application. It is an undisputed fact that Applicant has been appointed under a Work Order dated 08.07.2015. The Respondent has not disputed the copy of approval letter dated 05.11.2015 issued by Urban Improvement Trust, Kota which is placed on record by the Applicant. Per contra copy of emails annexed by the Respondent shows that there was delay on the part of the Applicant in providing required designs on time and the Respondent is not satisfied with the service. Also copy of the meeting minutes annexed by the respondent reflects that the services provided by the Applicant was unsatisfactory. Thus, the documents produced by the Respondent shows that there is pre-existence of dispute with respect to the providing of drawings on time and deficiency in service.

26. Nothing in this order shall be construed as an expression of opinion on the merits of controversy. Therefore, the right of the Applicant before any other forum shall not be prejudiced on account of dismissal of instant Application.

27. In view of the foregoing, CP No. (IB)-90/9/JPR/2018 stands rejected. In the circumstances of the case there is no order as to costs.

28. Let the copy of order be served to the parties.

Sd-

**SH. RAGHU NAYYAR,**
**TECHNICAL MEMBER**

Sd-

**SH. AJAY KUMAR VATSAVAYI,**
**JUDICIAL MEMBER**