



**THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT-III**

Item No.01

IB – 514(ND)/2022

IN THE MATTER OF:

M/s. GEOCON INFRA PRIVATE LIMITED

..... Applicant/Operational Creditor

VERSUS

M/s. BRIJ GOPAL CONSTRUCTION COMPANY PRIVATE LIMITED

..... Respondent/Corporate Debtor

SECTION

U/s 9 of IBC, 2016

Order Pronounced On: 27.07.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES

For the Applicant : Mr. Gaurav Verma, Adv.

For the Respondent : Dr. Anurag Kr. Agarwal, Mr. Prateek Agarwal,
Ms. Suhani Yadav, Advs.

ORDER

Order pronounced in open court vide separate sheets. IB-514(ND)/2022 is
allowed.

-SD-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

-SD-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT-III
IB – 514/ND/2022**

Order 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:

M/s. GEOCON INFRA PRIVATE LIMITED

Having Its Registered Office at:

B-711, World Trade Tower, Sector 16,
Noida, Uttar Pradesh-201301.

Through Its Authorised Representative

(Mr. Pawan Tripathi, Managing Director)

..... Applicant/Operational Creditor

VERSUS

M/s. BRIJ GOPAL CONSTRUCTION COMPANY PRIVATE LIMITED

Having Its Registered Office at:

A-7/2, Shivaji Apartments, Sector-14,
Rohini, New Delhi -110085

..... Respondent/Corporate Debtor

Order Pronounced On: 27.07.2023

CORAM:

**SHRI BACHU VENKAT BALARAM DAS,
HON'BLE MEMBER (JUDICIAL)**

**SHRI ATUL CHATURVEDI,
HON'BLE MEMBER (TECHNICAL)**

APPEARANCES

For the Applicant : Mr. Gaurav Verma, Adv.

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For the Respondent : Dr. Anurag Kr. Agarwal, Mr. Prateek Agarwal,
Ms. Suhani Yadav, Advs.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This Application was filed by M/s. Geocon Infra Private Limited, the Applicant/Operational Creditor on 05.07.2022, before this Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), declaring moratorium and for appointment of Interim Resolution Professional ("IRP"), against M/s. Brij Gopal Construction Company Private Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding amount of Rs. 1,55,06,384/- (Rupees One Crore Fifty Five Lakh Six Thousand Three Hundred and Eighty Four Only).

2. **Submissions of the Applicant:**

- i. The Operational Creditor is primarily engaged in the infrastructure business and was approached by the Corporate Debtor for the construction of RE Walls with Discrete Panels Facing and Geo-Composite Drain Behind and Crash Barrier with Friction Slab on Top for construction of approaches to CUPs & VUPs for "Four Laning of Bineka (Km. 193+450) to Goharganj (Km. 255+300) of Bhopal - Jabalpur (NH-12) Highway Project in the State of Madhya Pradesh".

The Corporate Debtor issued a Work Order No. BGCCPL/WO/BH/00017/2018-19 dated 18.04.2018 for the aforesaid work on the terms and conditions mentioned therein.

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- ii.** The Operational Creditor completed its work as per mandate in terms of the Work Order mentioned above and within the period of March, 2019 to December, 2021 and further raised invoices from time to time i.e., Invoice No. 1 dated 31.03.2019 for an amount of Rs. 97,78,966/-, Invoice No. 2 dated 30.09.2019 for an amount of Rs. 1,44,82,116/-, Invoice No. 3 dated 31.03.2021 for an amount of Rs. 1,27,34,440/-, Invoice No. 003 dated 13.12.2021 for an amount of Rs. 2,49,84,801/- totaling to Rs. 6,19,80,323.00/- against which, the Corporate Debtor made irregular payments to the tune of Rs. 4,50,90,450.00/- from time to time. The payments received from the Corporate Debtor were adjusted towards the pending invoices. Further, Form 16A for TDS equivalent to Rs. 4,12,182.00/- (in respect of payments received till date) has not been deposited to the concerned department.
- iii.** Since, the date of the last payment i.e., 27.05.2022, despite acknowledging its liability, the Corporate Debtor has deliberately chosen not to make payment against the pending invoice. The deductible retention amount of 5% on monthly invoices accumulates to Rs. 27,66,979.00/- out of which 50% of the retention amount accumulating to Rs. 13,83,490.00/- was due and payable upon completion of work and the balance 50% is due and payable after 1 year from completion of work. However, the said 50% retention amount payable after 1 month of completion of work also remains outstanding.
- iv.** Hence, upon receipt of the last payment of Rs. 19,60,000.00/- (Form 16A not submitted) on 27.05.2022 from the Corporate Debtor, an amount of Rs. 1,55,06,384.00/- (Rupees One Crore Fifty Five Lakh Six Thousand Three Hundred and Eighty Four Only) remains due and payable as on date, in addition to the balance 50% amount payable after 1 year from completion of work.



- v. Various reminders have been sent by the Operational Creditor to Corporate Debtor, however, despite acknowledging the liability and without raising any objection/dispute, the Corporate Debtor has deliberately chosen not to honour the payments.
- vi. Despite reminders and service of demand notice in Form-3 dated 13.06.2022 by post on 14.06.2022 and electronic mail sent to the Managing Director of Corporate Debtor and official e-mail address of the Corporate Debtor, the Corporate Debtor has failed to make the payment.
- vii. Pursuant to the said demand notice, the Operational Creditor has received a response dated 23.06.2022 wherein, for the first time, the Corporate Debtor has denied its liability by raising issues for the first time on a frivolous and unsubstantiated basis and has relied upon certain forged and fabricated documents, which have never been received or acknowledged by the Operational Creditor.

3. Submissions of the Respondent:

- i. The Present Insolvency proceedings cannot be initiated against the Corporate Debtor as and by way of recovery. It is not the case of the Operational Creditor that the Corporate Debtor is not able to pay. The Corporate Debtor is a solvent company having a net worth of Rs. 6,51,62,96,997/- as on 31.03.2021 duly reflected in its audited balance sheet for F.Y. 2020-21. The said net worth is Rs.10,02,62,97,323/- as on 31.03.2022 as per the provisional balance sheet for the F.Y. 2021-22.
- ii. The Corporate Debtor had placed a work order dated 18.04.2018 upon the Operational Creditor in respect of the construction of RE Walls with Discrete Panels Facing and Geo-Composite Drain Behind and Crash Barrier with Friction Slab on Top for the Construction of approaches to CUPs & VUPs for "Four Lanning of Bineka (Km. 193+450) to Goharganj (Km. 255+300) of Bhopal



- Jabalpur (NH-12) Highway Project in the state of Madhya Pradesh.

- iii.** As per clause 4.01 of the work order dated 18.04.2018, the said work was required to be completed within a period of 15 months from 01.05.2018 to 31.07.2019. Needless to mention the said work was delayed by the Operational Creditor abnormally for about 29 months and was completed only in the month of December 2021 for reasons solely attributable to the Operational Creditor
- iv.** As per clause 9.03 of the work order dated 18.04.2018, the Corporate Debtor is entitled to impose liquidated damages at the rate 2% per month which shall not exceed 10% of the total cost of Bill of Quantity (BOQ) of the work. Accordingly, the Corporate Debtor had invoked the said clause and imposed liquidated damages to the tune of Rs. 2.14 Crores being 10% of the total cost of BOQ vide letter dated 11.06.2022.
- v.** In the said demand notice, the Operational Creditor has claimed an amount of Rs.1,55,06,384/- based on the following four invoices: -

S No.	Invoice No.	Date	Invoice Amount (in Rs.)
1.	1	31.03.2019	97,78,966/-
2.	1	30.09.2019	1,44,82,116/-
3.	3	31.03.2021	1,27,34,440/-
4	003	13.12.2021	2,49,84,801/-
Total			6,19,80,323/-

Needless to mention that first three invoices were running bills while the last invoice i.e., Invoice No.003 dated 13.12.2021 was a final bill.



- vi.** As per clause 6.04 of the work order, the final bill could only be raised after satisfactory completion of the defects liability period which was one year after the date of completion of the contract as per clause 4.04 of the work order. Needless to mention, the defects liability period of one year was to be over by December 2022 and as such the raising of the final bill by the Operational Creditor was premature. Apart from this, any amount payable under the final bill would be paid after taking into consideration all dues and deductions under the work order after three months of submission of the final bill including all related documents such as submission of a performance bond for a period of fifteen years and finalization of measurements. The last bill raised by the Operational Creditor is, therefore, neither tenable nor payable as none of the aforesaid stipulations were complied with by the Operational Creditor in raising the said bill.
- vii.** All four bills raised by the Operational Creditor and considering the amount already paid to the Operational Creditor and further adjustment towards GST, TDS, Retention money, etc., the Operational Creditor would be required to pay an amount of Rs.2,79,80,166/- to the Corporate Debtor. After adding the aforesaid amount of Rs. 5,17,51,562/-, the Operational Creditor would be liable to pay Rs. 7,97,31,728/- to the Corporate Debtor.
- viii.** In the aforesaid circumstances, the Corporate Debtor had requested the operational creditor to come forward for reconciliation of accounts vide its reply dated 23.06.2022. However, instead of getting any reconciliation done with the Corporate Debtor, the Operational Creditor had chosen to prefer the present application before this Tribunal which is not maintainable as no amount is due and payable to the Operational Creditor.



ix. The Corporate Debtor had received a demand notice dated 13.06.2022 which was duly replied by the Corporate Debtor vide reply dated 23.06.2022, wherein the Corporate Debtor mentioned all facts along with requisite documents and mentioned that the first three invoices were running bills while the last invoice i.e., Invoice No.003 datedt.13.12.2021 was a final bill.

4. In Rejoinder, the Operational Creditor submitted that vide reply to the demand notice dated 23.06.2022, the Corporate Debtor denied its liability by raising issues for the first time on the frivolous and unsubstantiated basis and has relied on false and fabricated documents where the signatures and the stamps of the Operational Creditor have been fraudulently used by the Corporate Debtor to somehow make a case of pre-existing dispute between the parties. It is submitted that none of the false and fabricated documents have been issued, endorsed, received, or acknowledged by the Operational Creditor. It is submitted that a Police Complaint has also been lodged by the Operational Creditor on account of forgery committed by the officials of the Corporate Debtor. The contents of paragraph No. 9 are admitted to the fact that an amount of Rs. 1,55,06,384.00/- (Rupees One Crore Fifty Five Lakh Six Thousand Three Hundred and Eighty Four Only) remains due and payable as per the Demand Notice. It is submitted that the Corporate Debtor, while admitting the correctness of the amount due, is misleading this Tribunal by making out a sham defence by alleging a difference in the nature of the Invoice. It is denied by the Operational Creditor that raising of the unpaid Invoice by the Operational Creditor is premature. It is submitted that the retention money has not been included in the Invoice dated 13.12.2021 as stipulated under Clause 6.04 of the work order dated 18.04.2018 and therefore, the plea taken by the Corporate Debtor is untenable. It is evident that the Corporate



Debtor has never raised any real dispute regarding its liability towards the Applicant.

5. **Analysis and Findings**

- i.** We have heard the Ld. Counsels appearing for both parties and also perused the documents on record.
- ii.** It is relevant to mention that in the present matter, the date of default has not been specifically mentioned neither in the Demand Notice nor in Part-IV of the application. On perusal of Invoice no. 003 dated 13.12.2021 issued by the Operational Creditor to the Corporate Debtor, it appears that the goods were delivered on 13.12.2021. The payment by the Corporate Debtor was to be made within 30 days i.e. by 12.01.2022, as per Invoice no. 003 which has not been made. Therefore, the default occurred and thus we assume the date of default in the present matter to be 12.01.2022. Hence, we observe that the non-mentioning of the Date of Default does not affect the merits of the present case. Further, we note that as per the submissions of the Operational Creditor, Invoice no. 003 dated 13.12.2021 remained unpaid, owing to which default was committed by the Corporate Debtor.
- iii.** The Corporate Debtor has not denied receipt of the invoice dated 13.12.2021 sent vide email dated 16.12.2021. Further, the Corporate Debtor does not dispute or deny the ledger account of the Applicant reflecting the payments/unpaid amount after adjusting part-payments received from the Corporate Debtor pursuant to the Invoice dated 13.12.2021.
- iv.** We are of the opinion that the Corporate Debtor has merely sought to rely upon the notional application of various clauses of the Agreement, without even placing a single document on record to establish that any issue or dispute as raised at any time when the Invoice was raised by the Operational Creditor,



reminders were sent or part-payments were made by the Corporate Debtor.

- v. The scope of IBC is limited to see whether there is a debt due and if any default has occurred in the payment/re-payment, hence the application is filed.

Having regard to the facts of the case, we are of the considered view that the debt arises out of the work order dated 18.04.2018, the said amount is a debt disbursed against the consideration owned by the Operational Creditor, hence it is covered under the definition of "Operational Debt" as defined under Section 5(21) of the Code and the Applicant will be treated as "Operational Creditor" as defined under Section 5(20) of the Code.

- vi. From the bare perusal of the definition of "Operational Debt", it is amply clear that for a debt to be classified as an Operational debt, the claim amount should be in respect of sales of any goods or rendering of contractual services or employment. Admittedly, the claim made by the Applicant is in respect of the provision of goods or services. Accordingly, the work done by the Applicant as per mandate in terms of the Work Order be treated as an "Operational Debt" as defined under section 5(21) of the Code.
- vii. Thus, the present application is legally tenable even after the argument of the Respondent is taken into consideration.
In view of the above, we are inclined to **admit** this application.

6. Order

In view of the above facts and circumstances and the foregoing discussion, It is hereby ordered as follows: -

- a) The Application bearing **IB-514/ND/2022** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is hereby **admitted**.

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- b) We also declare a moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14(1)(a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:
- i. *“The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
 - ii. *Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
 - iii. *Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
 - iv. *The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.*

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]”



- c) It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14(3)(b) of the Code.
- d) Since section 9(4) of the code does not make it mandatory for the Operational Creditor to propose the name of the Resolution Professional along with the application to act as Interim Resolution Professional for the Corporate Debtor, the Operational Creditor has not proposed any name of the Resolution Professional. Therefore, this Adjudicating Authority appoints Mr. Mukesh Kumar Jain, as the Insolvency Resolution Professional of the Corporate Debtor from the available list of panel of Resolution Professionals as maintained by IBBI. The registration number of the IRP is IBBI/IPA-001/IP-P-01960/2020-2021/13089, the address of the IRP is T-1, 3rd Floor, Front Right Portion, Pankaj Arcade, Pocket MLU, Plot No. 16, Sector-5, Dwarka, Delhi-110075 and the e-mail id of the IRP is fcacfs19@gmail.com. Therefore, the IRP shall file a valid Authorization for Assignment along with Written Consent in Form-2 and Registration Certificate within 3 days of the pronouncement of this order.

Accordingly, Mr. Mukesh Kumar Jain is appointed as IRP.

- e) In pursuance of Section 13(2) of the Code, we direct the IRP, as the case may be to make a public announcement immediately with regard to the admission of this application under Section 9 of the Code. The expression immediately



means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow. There shall be no future opportunity given in this regard.
- g) The IRP is expected to take full charge of the Corporate Debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
- h) The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- i) The Operational Creditor shall deposit a sum of Rs. 2,00,000/- (Rupees Two Lakhs only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to the approval of the Committee of Creditors ("CoC").
- j) In terms of the Code, the Registry is hereby directed to communicate a copy of the order to the Operational Creditor, the Corporate Debtor, the IRP and the Registrar of Companies, NCT of Delhi and Haryana, by Speed Post and by email, at the earliest but not later than seven days from today. The Registrar of Companies shall update his website by updating the status of the Corporate Debtor and specific mention regarding admission of this petition must be notified.



k) The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.

No order as to costs.

-SD-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

-SD-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**