

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
ALLAHABAD BENCH,
ALLAHABAD
CP No. 68/ALD/ 2018**

IN THE MATTER OF:

Section 9 read with Section 13, 14 & 33 and other applicable provisions of the Insolvency and Bankruptcy Code, 2016

Hazrat Ali S/o Mr. Niyaz Ahmad Resident of H.No. 10 Ward No.10, Purab Mohal, Robertsganj, District Sonbhadra, Uttar Pradesh.

...Operational Creditor

VERSUS

M/s Samrat Infra Estate Private Ltd.

CIN No.U70102UP2009PTC036647) Regd. Office: KV/B-405. Kaveri Apartment, River View, Sector 4 Gomti Nagar Vistar, Lucknow.

....Corporate Debtor

JUDGMENT/ORDER DELIVERED ON 10.07.2018

**CORAM : SH. V.P SINGH, MEMBER (J)
MS. SAROJ RAJWARE, MEMBER (T)**

For the Operational Creditor : Sh. Ashish Kumar Srivastava, Advocate
alongwith Ms. Babita Jain, PCS.

For the Corporate Debtor : Sh. P.K. Mittal, Advocate

PER SE : SH. V.P. SINGH, MEMBER (J)

ORDER/JUDGMENT

1. Petitioner has filed this insolvency petition under section 9 of the Insolvency and Bankruptcy Code 2016 for initiating Corporate

Insolvency Resolution Process (herein after referred as CIRP) against the Corporate Debtor/Respondent Company.

2. Brief facts as stated in the petition are that:

2.1 The Operational Creditor Mr Hazrat Ali S/o Mr. Niyaz Ahmad and Resident of H.No. 10 Ward No.10, Purab Mohal, Robertsganj, District Sonbhadra, Uttar Pradesh is carrying on the business of Civil Construction Contractors and having certified solvency certificate by the U.P. State Government to participate in Government Tenders for construction of civil projects like Roads etc. in all Government Department including PWD.

2.2 The Corporate Debtor is a Company which was incorporated under the provisions of Companies Act, 1956, CIN No U70102UP2009PTC036647 having Registered Office KV/B-405, Kaveri Apartment, River View, Sector 4, Gomti Nagar Vistar, Lucknow 226010 The authorized share capital of the said Company as per the information derived from the website of the Registrar of Companies (ROC) is Rs.100,00,000/-, with paid up capital of Rs.41,88,000/-.

2.3 The corporate debtor had approached the operational creditor and requested him to participate in Government Tender on Partnership basis by attaching his solvency certificate to enable the Corporate Debtor qualify to participate in the Tender and supply the material, engage Plant & Machinery as required in the Tender No. 4954/183COM-Varanasi Circle 2015 dated

30.07.2015 to be applied by corporate debtor by Superintending Engineer(SE) Varanasi Circle, PWD, Varanasi.

2.4 That as a part of aforesaid Contract in order to qualify for aforesaid tender, corporate debtor issued an Authority Letter dated 01/05/2013 to operational creditor with implied terms of the contract from PWD, State of U.P. Thereafter, he has been appointed as non executive Director of the corporate debtor on 20/08/2014 to represent before the PWD Authorities and more specifically to secure the Tender agreement conditions.

2.5 That the above mentioned tender no, 4954/183COM-Varanasi Circle 2015, PWD, Varanasi was awarded by an implied subcontract between Mr Hazrat Ali and Corporate Debtor by engaging the following documents and assets of Operational Creditor in the company to avail the tender:

- 1) Character Certificate
- 2) Solvency Certificate
- 3) Documents in relations to the assets in the name of the Operational Creditor such as Two Teeper, One Hot Mix Plant, One Road Roller, One Tanker, One JCB, One JCB Loader, One tar Boiler and compressor, One ICC Vibrator, One Trolley jack, Three trailer and One Bolero Jeep.

That the Superintending Engineer, Varanasi Circle vide Letter dated 13th December, 2017, in context with the Request letter sent by Operational Creditor Mr Hazrat Ali dated 10.07.2017 and 21.08.2017, inspected and declared that the abovementioned documents and assets were attached by the corporate debtor company for availing tender.

2.6 That as per the Part of Work obligation and as per implied subcontract with the corporate debtor for engaging his Client Solvency, Plant & Machinery and

supervision and supply of material for a Total Consideration of Rs.3,50,80,050/- (Rupees Three Crores Fifty Lacs Eighty Thousand Fifty only) as required in the Tender No. 4954/183COM-Varanasi Circle 2015 dated 30.07.2015 was awarded to corporate debtor by SE, Varanasi Circle, PWD, Varanasi.

2.7 The Operational Creditor had undertaken and completed the said amount of work assigned by the company, as described in the tender notice against bill of quantity in all respect, and that the competent authority has made substantial payment out of work contract to the company from time to time.

2.8 Operational creditor supervised and completed the work, supply material and engaged labour, plant & machinery for a period from 09/11/2015 to 21/12/2016 for a Total Consideration of Rs 350,80,050/- as required in the Tender No. 4954/183COM-Varanasi Circle 2015 dated 30.07.2015 against Bills of Quantity in all respect and the competent authority has made substantial payment out of work contract to the corporate debtor from time to time. The operational creditor on every occasion had completed the contract as per the requirement and specifications provided in the tender above, awarded to the corporate debtor for strengthening of Road work, Alinagar Sakaldiha Road, Varanasi up to the satisfaction of SE, Varanasi Circle, PWD, Varanasi, accordingly substantial payments were released to the Corporate Debtor.

2.9 The operational creditor maintains running statement of accounts in respect of the work completed under aforesaid tender and the corporate debtor during the normal and regular course of its business transferred Total amount of Rs 2,68,50,000/- (Rupees Two Crores Sixty Eight Lacs Fifty Thousand only) from time to time by RTGS in operational creditors HDFC bank and Allahabad Bank account and balance amount of Rs.82,30,050/-/- (Rupees Eighty Two Lacs Thirty

Thousand and Fifty Five only) is still outstanding and payable by the corporate debtor to the operational creditor.

2.10 Operational creditor repeatedly requested the corporate debtor for clearing the outstanding debts, but despite repeated assurances of payment, the corporate debtor has failed to make due payments and only made some part payments leaving thereby the balance sum as outstanding which is claimed herein.

2.11 The operational creditor sent the Legal Notice to Corporate Debtor on 29/03/2017 & 02/05/2017 with copy to Superintending Engineer PWD Varanasi and Assistant Engineer PWD Chandauli by Speed Post. Operational Creditor didn't receive any reply for Legal Notice dated 29/03/2017, only oral assurances given to him. Further, operational creditor sent another Legal Notice dated 16th October 2017 which was delivered to corporate debtor on 19/10/2017 which also remained UNREPLIED from corporate debtor.

2.12 The Operational Creditor states that the Corporate Debtor is indebted to the Operational Creditor for a totaling principal sum of Rs.82,30,050/-(Rupees Eighty Two Lacs Thirty Thousand and Fifty Five only) and whole amount is due and payable in regard of material and services completed by operational creditor in Tender above No. 4954/183COM-Varanasi Circle 2015 dated 30.07.2015. But despite of repeated reminders and legal notices for payment, corporate debtor has failed to make the payment in this regard and hence this petition. The operational creditor contends that it is entitled to receive and corporate debtor is liable to pay the aforesaid due amounts, along with 75% profit of the 2.5% of the over the estimated and revised cost of the work awarded to corporate debtor. The corporate debtor had made a part payment of Rs.2,68,50,000/- upto 21/12/2016 from time to time and after that no payment has been received by the operational creditor.

2.12 That It is to be pointed out that Operational creditor Mr Hazrat Ali was taken into confidence, to participate & share the profit of the tender awarded to the Company and hence appointed as non executive director with his consent on 20/08/2014 was removed from Directorship of the corporate debtor by filing Form DIR 12 by his forged Resignation Letter with malafied intention with sole motive not to pay his dues to make undue wrongful gains.

2.13 The Operational creditor company as a last resort leaving behind with no option sent a statutory Demand Notice dated 12/12/2017 under Section 8 of Insolvency and Bankruptcy Code, 2016 thereby demanding the pending dues through Registered Post at the Registered office of the company and the present directors of the company i.e.Mr. Ramashanker Dubey, Director and Mr. Rabindra Yadav, Director.

2.14 That the said notice was duly received and served upon the corporate debtor and Directors on December 16, 2017. However, within ten days as provided under the code even after receipt of the said notice, the corporate debtor failed to bring to the notice of the operational creditor; existence of any dispute or proof of repayment of unpaid operational debt as claimed by the applicant / operational creditor.

2.15 That since the corporate debtor Company has not paid the admitted dues to the operational creditor within the stipulated period, it is obvious under such circumstances that the corporate debtor Company is not capable enough or no more solvent to pay its debts/outstanding. Needless to mention that no dispute was raised by the corporate debtor about the entitlement of the Operational Creditor Company to get the said out standing dues paid after service of notice under section 8 of Insolvency & Bankruptcy Code, 2016 and within the stipulated time

frame. It is clear from the facts above and circumstances that the corporate debtor is intentionally not clearing its outstanding dues towards the operational creditor.

2.16 That in the facts above and circumstances, a sum of **Rs.82,30,050/- (Rupees Eighty Two Lacs Thirty Thousand and Fifty Five only)** remains due and payable by the corporate debtor to the operational creditor.

2.17 That despite of receiving the said notice issued on behalf of the operational creditor under section 8 of the Code, the corporate debtor has failed to issue or bring to the notice of operational creditor existence of any dispute regarding the provisions of the Insolvency and Bankruptcy Code, 2016.

2.18 The amount claimed is **Rs.82,30,050/- (Rupees Eighty Two Lacs Thirty Thousand and Fifty Five only)** in default since 21/12/2016 Plus Interest@18% till the payment.

3. Advocate/ PCS representing the Corporate Debtor filed its reply, raising some formal objections, which are stated as under:

3.1 There is no legal and valid service of the legal notice within the meaning of Section 8 of the IBC Code.

3.2 That the alleged and purported claim of Rs.82,30,050/- is completely baseless, frivolous, purported and without any slightest evidence on record. On the contrary, it is submitted that the Respondent Company has to recover a sum of Rs.1,06,00,000/- from the Applicant, a copy of the Statement of Account duly certified by the Chartered Accountant is attached with reply. The Applicant was entrusted a sum of Rs.1,62,50,000/- for purchase of materials and out of which, the Applicant failed to render the account, and consequently the Respondent Company filed a Police Complaint dated 20.09.2017 with the Police Authorities,

Gomti Nagar Police Station, Lucknow. There is no debt due and payable by the Respondent Company to the Applicant.

4. Counsel on behalf of Operational Creditor filed its rejoinder to give a reply to various objections made by Corporate Debtor, Averments made by counsel on behalf of Operational Creditor are stated as under :

4.1 That the Legal Demand Notice is legal, valid and issued by operational creditor himself duly delivered by the provisions of the Code and under Section 8 of the IBC.

4.2 Operational creditor supervised and completed the work, supply material and engaged labour, plant & machinery for a period from 09/11/2015 to 21/12/2016 for a Total Consideration of Rs.350,80,050/- as required in the Tender No. 4954/183COM-Varanasi Circle 2015 dated 30.07.2015 and **submitted all the details to the Corporate Debtor and the competent authority has made full payment of work contract to corporate debtor.**

4.3 That the Corporate Debtor has deceitfully submitted the false statement in the Reply which is apparent on record, from the annual accounts for the FY 2016-17 filed on MCA portal on 19.02.2018. Accordingly, Note No 2.13 of the Accounts on Page No.10 of Annual accounts annexed herewith as **Annexure RA 3**, the Trade Receivable of More than Six months amount to Rs.43,68,694/- others Rs.72,20,630/-, total amount to Rs.1,15,89,324/- details thereof not provided, however, it is factually wrong as aforesaid details did not include the receivable from Hazrat Ali Account.

5. Heard the counsels for both the parties and perused the material on record. Demand notice dated 12.12.2017 of unpaid amount, has been delivered by the

Operational Creditor. In that total amount of Debt is mentioned as Rs.3,50,80,050/- and amount claimed to be in default is Rs.82, 30,050/-.

Compliance of Sec 9, 3(b) & (c) are also complied by the Applicant/Operational Creditor. An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt is attached with the present application and a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is also annexed to the present application.

The term Debt is defined in Section 3(11) of the Insolvency and Bankruptcy Code, 2016:

3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

Further term default is defined under 3(12) of the Code as under:

"default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;

As per Section 8 of the Code 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 and 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 existence of a dispute or pay the unpaid debt. In the present case, Corporate Debtor neither replied to the demand notice nor paid the unpaid debt till the expiry of 10 days from the delivery of Demand Notice. Therefore, Operational Creditor filed the present Petition. As per Section 9(5)(i) of the Code

adjudicating authority admit the application and communicate such decision to the operational creditor and the corporate debtor if,—(a) the application is complete; (b) there is no repayment of the unpaid operational debt; (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor; (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and (e) there is no disciplinary proceeding pending against any resolution.

Counsel representing the Corporate Debtor objected to the present Petition stating that there is no legal and valid service of demand notice from the side of Petitioner hence they have not replied to the demand notice. Further corporate Debtor has denied, that any amount is due to Operational Creditor, on contrary Corporate Debtor is claiming that he has to recover money from applicant.

6. For the sake of arguments, even if we assume that there is valid and legal service of notice as per Section 8 even then only on the basis that Corporate Debtor has not raised any dispute within the statutory time limit of 10 days, this application cannot be admitted in spite of being complete. As Operational Creditor has failed to demonstrate that any amount is due and default has been committed by Corporate Debtor. Operational Creditor has failed bring any invoice/bills showing when debt fell due, and default has occurred and as stated by the Corporate Debtor did not even render account of advance paid by him. Further in the application Applicant, failed to place on record any document/ agreement entered between him and Corporate Debtor to demonstrate supply of goods and services.

As in the present matter, there is no evidence on record to show that Rs.82,30,050/- is due to the Operation Creditor. On contrary Corporate Debtor is claiming that he has to recover money from applicant. Hence in the present case debt is not proved, therefore the date on which amount fell due and payable, cannot be

ascertained. Thus on the part of Corporate Debtor, there is no default, which is sine qua non for admission of the application under Section 9 of the Code. As in present case, Operational Creditor is not able to bring material on record to show amount of debt and date on which debt became due and payable. Hence, present petition deserves to be rejected at the very threshold.

Order

As, in present case Operational Creditor is not able to bring material on record to show amount of debt and date on which debt became due and payable and default has occurred. Hence Present Petition is rejected.

Dated: 10.07.2018

**SAROJ RAJWARE,
MEMBER (T)**

**V.P. SINGH,
MEMBER (J)**