

**IN THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”**

CP No.40/Chd/Hry/2018

**Under Section 9 of the
Insolvency and Bankruptcy
Code, 2016.**

In the matter of:

M/s. Nice Projects Pvt. Ltd.,
having its registered office
at 201, Aggarwal Okhla Plaza,
2nd Floor, Building No. 15,
Community Centre, Okhla
Industrial Area, Phase-1,
New Delhi-110020.

...Petitioner-Operational Creditor

Vs.

M/s. Nayati Healthcare & Research Pvt. Ltd.,
Having its registered office at 404, Tower-B4,
Tech Park, Sohna Road, Sector 49,
Gurgaon-122002, Haryana.

Also at:

M/s. Nayati Healthcare & Research Pvt. Ltd.,
Through its Managing Director,
Village-Jai Singh Pura, Bangara,
Tehsil Sadar, Main Mathura Highway,
Mathura-281001.

...Respondent-Corporate Debtor.

Judgement delivered on:13.06.2018

**Coram: Hon'ble Mr. Justice R.P. Nagrath, Member(Judicial).
Hon'ble Mr. Pradeep R. Sethi, Member(Technical)**

For the petitioner : 1. Mr. Faisal Zafar, Advocate.
2. Mr. Mohd. Danish, Advocate.
For the respondent : Mr. Ravinder K. Rawat, Advocate.

Per: Pradeep R. Sethi, Member (Technical)

JUDGEMENT

The instant petition is filed by M/s. Nice Projects Private Limited, New Delhi, Operational Creditor (hereinafter referred to as 'petitioner') by filing application in Form 5 under Section 9 of the Insolvency and Bankruptcy Code, 2017 (hereinafter referred to as the Code) for initiation of corporate insolvency resolution process (CIRP) in the case of M/s. Nayati Healthcare and Research Private Limited, corporate debtor (hereinafter referred to as 'respondent'). The corporate identification No. of the respondent is U85100HR2013PTC048389. The registered office is situated at 404 Tower-B4, Tech Park, Sohna Road, Sector 49, Gurgaon-122002, Haryana. Therefore, the petition lies within the territorial jurisdiction of this Bench of the Tribunal.

2. It is stated that the petitioner provided to the respondent the services of "structure and block masonry and plaster (RCC Frame and Shell works) for 200 Bed Hospital" for hospital building at Khasra No. 11 of Village Jaysinghpura Bangar, Tehsil Sadar and District Mathura, UP under contract dated 17.10.2013 and the petitioner mobilised its resources at the site and started to execute its obligations in terms of the contract. It is stated that the meeting was held between the petitioner and the respondent on 16.10.2015 and it was agreed that 16.10.2015 would be treated as the date of completion of project work for the petitioner and till that date, the petitioner had executed the work under the contract for a sum of ₹ 17,13,28,065 and the same was admitted by the respondent vide its e-mail dated 01.06.2017. It is submitted that the "defect liability period" for the petitioner expired on 15.10.2016. It is further stated that the respondent paid to the petitioner only a sum of ₹

15,79,95,922/- leaving a balance of ₹ 1,33,32,143 due and payable which includes retention money of ₹ 68,31,243/-. It is also stated that after rigorous follow up by the petitioner for release of its dues, a meeting was held between it and the respondent on 08.05.2017, where the respondent took advantage of its position of vantage and made several unjustified deductions of ₹ 56,00,000/- leaving a balance of ₹ 77,32,143 and in view of the precarious position of the petitioner, it agreed to the unilateral and unjustified deductions of the respondent. It is stated that the petitioner vide its letters/e-mails dated 22.05.2017, 14.06.2017, 30.06.2017, 11.08.2017, 30.08.2017, 18.09.2017, 23.09.2017, 26.10.2017 etc. demanded its admitted dues payable by the respondent to which the respondent neither replied to the said demand nor made the payment of its admitted dues. It is stated that the 'defect liability period' expired on 15.10.2016 and the operational debt became due and payable by the respondent to the petitioner on 16.10.2016. Notice under Section 8 of the Code seeking payment of ₹ 77,32,143 along with interest at 18% per annum was sent on 18.11.2017. It is stated that the respondent vide its reply dated 18.11.2017 disputed the operational debt payable to the petitioner on false and frivolous pretext of not settling the dues of its employees which are devoid of any truth. It is stated that the defence put forward by the respondent are moonshine and after thought and aimed to prevent the initiation of the present proceedings. The petition for initiation of CIRP in the case of the respondent has been requested.

3. Vide order dated 27.02.2018, the following defects were pointed out :-

- “ i) Petitioner has not filed the statement of its bank account where the deposits are made or credits received from the corporate debtor in respect of the debt of the corporate debtor;*
- ii) Copy of ledger account of the corporate debtor being maintained by the petitioner has not been filed;*
- iii) The affidavit to the effect that no dispute has been received from the corporate debtor relating to the unpaid operational debt as per requirement of Section 9(3)(b) of the code is required;*
- iv) Certificate has not been filed from the financial institution where the account of the corporate debtor is being maintained that there is no payment of unpaid debt made by the corporate debtor, and*
- v) There is no specific resolution of the Board of Directors of the petitioner authorising the filing of this petition under the I&B Code, 2016 which is necessary.”*

It was directed that the petitioner shall remove the defects and file affidavit with necessary documents within seven days. The compliance was made by Diary No. 672 dated 07.03.2018. Notice of the petition was directed to be issued to the respondent to show cause as to why the petition be not admitted.

4. The respondent filed the reply to contest the petition. It is stated that the petitioner has neither submitted the final invoice for the work done under the agreement nor the petitioner has provided an affidavit confirming that all the outstanding dues of the workmen/employees have been paid by the petitioner and consequently, no completion certificate under the agreement have been issued to the petitioner. It is also stated that the petitioner did not complete the work in time because the work was to be completed within 9 months and admittedly, the petitioner took almost two years before it abandoned the work under the agreement and though the petitioner has for

such delay alleged hindrance by the respondent but no proof thereof has been submitted by the petitioner. According to the respondent the work done by the petitioner was defective and the same was being highlighted by the respondent repeatedly and therefore, the petitioner had chosen to abandon the work under the agreement without completing the work as per the agreement that compelled the respondent to engage the other contractors to complete the work and for such third party works, an amount of ₹ 28,00,000/- was debited to the running account of the petitioner with the respondent and that the petitioner has, after agreeing to the debit of this amount in the final reconciliation between the parties on 01.06.2017, stated that the said deductions were unjustified and this itself shows that there is dispute between the parties that requires adjudication.

5. It is further averred that the petitioner has relied on e-mail dated 01.06.2017 to prove that the it is entitled to ₹ 77,23,143 from the respondent and that the important contents of the email are that the total amount payable to the petitioner (net of retention money) is ₹ 80,549.58; retention money is ₹ 68,31,243 and the due date for the payment of retention money is June, 2017. It is submitted that the respondent had denied the claim of the petitioner for ₹ 6,76,000 towards scaffolding used by the respondent on 01.06.2017 itself but the petitioner has concealed this fact. It is submitted that in the petition, the petitioner stated that the retention money became payable in October, 2016 but the e-mail clearly shows that the retention money became due to the petitioner only in June, 2017 which was not paid by the respondent due to discovery of further defects in the work done by the petitioner. It is submitted that as part of the work purportedly completed by the petitioner, the petitioner

was supposed to do work relating to construction of bunker for LINAC (linear accelerator device most commonly used for external beam radiation treatments for patients with cancer) and that the design of bunker for LINAC is always approved by the Atomic Energy Regulatory Board constituted under Section 27 of the Atomic Energy Act, 1962. It is stated that around June, 2017, Elekta Medical Systems India Private Limited (Elekta) started the installation of LINAC but sighted certain reservations on the quality of work done in the bunker. Elekta was, however, requested to install and commission LINAC but during the said process, Elekta reported by e-mail dated 24.07.2017 that the defective work may cause leakage of radiation from the bunker.

6. It is further alleged that the respondent intimidated the petitioner about the defective work but the petitioner conveniently blamed the design of bunker for such leakage without realising the fact that all designs were approved by the Atomic Energy Regulatory Board. It is submitted that the respondent was forced to spend another 2-3 months and nearly ₹44 lacs for getting the defective work rectified besides loss of business and risk to human lives due to the defective work. Despite reminders to the respondents, the petitioner did not settle the dues of its employees and the employees association repeatedly wrote to the respondent to clear the dues as the respondent was principal employer.

7. It is further pleaded that the respondent is entitled to receive the liquidated damages at 10% of the contract value amounting to nearly 1.71 crores and that itself shows that no amount is payable by the respondent to the petitioner. It is submitted that assuming without admitting, that even if the

'defect liability period' was over in June, 2017, the defect in the work by the petitioner was latent defect (i.e. hidden or concealed defects that would not be discovered in the course of a reasonable inspection) during the 'defect liability period' but it does not mean that the respondent is not entitled to recover damages for such latent defect from the petitioner upon its discovery after the 'defects liability period' both under law and tort. There is not only a dispute between the parties but the respondent is also entitled to recover money from the petitioner that will require adjudication by the Arbitrator as per the provisions of the agreement.

8. Without prejudice to the above, it is alleged that the petitioner used illegal means to get the work under the agreement from the respondent because the petitioner agreed to pay a sum of ₹20,00,000 as bribe to the architect of the respondent i.e. M/s. Helix Healthcare Architecture and out of the aforesaid amount ₹ 6,00,000 was paid by the petitioner to M/s. Helix Healthcare Architecture and that the call was recorded by the Managing Director of the petitioner in front of the executives of the respondent while complaining about the architect and the said Managing Director himself provided the call recording to the respondent. It is submitted that thereafter the proprietor of M/s. Helix Healthcare Architecture conveyed his apology for such misconduct of its employee Mr. Manish Tiwari. The prayer was thus made that the petition may be dismissed with costs.

9. During the course of the arguments, learned counsel for the petitioner has pleaded that the date of completion of the project work on 16.10.2015 was agreed between the petitioner and the respondent and that 12 months of 'defect liability period' expired on 15.10.2016 and therefore, the complete

debt including the retention money was payable by the respondent to the petitioner on 16.10.2016. The payment was not made and therefore, the demand notice under Section 8 of the Code seeking payment of ₹ 77,32,143 along with interest @18% per annum was sent on 18.11.2017. It is pleaded that the reply dated 28.11.2017 of the respondent is based on false and frivolous pretexts and does not have any substance. The learned counsel for the respondent has pleaded that the contentions raised in the reply dated 28.11.2017 to the notice under Section 8 of the Code clearly brought out that no money was owed to the petitioner pending the adjudication of the disputes raised. In rejoinder, the learned counsel for the petitioner stated that the disputes raised are only moonshine and therefore, the petition may be admitted.

10. We have carefully considered the arguments of the learned counsel for the parties and have also perused the record. Admittedly, both the parties entered into a contract dated 17.10.2013 for “structure and brick masonry and plasters (RCC Frame and Shell works) for 200 Bed Hospital” for proposed hospital building at Khasra No. 11 of Village Jaisinghpura Bangar, Tehsil Sadar and District Mathura (UP). As per para 4.2 of the agreement (Annexure A-3 of the petition), the time for completion of the entire work was 11 months from 26.11.2013. Both the parties held a meeting on 16.10.2015. The minutes of the meeting are Annexure A-4 of the petition. It is recorded therein that the petitioner and respondent have come to a joint agreement that 16.10.2015 date would be treated as the last working day for the petitioner for completion of the scope of work. Both the petitioner and the respondent have referred to the final computation of the amount due as per the calculations

submitted vide e-mail dated 01.06.2017 (Annexure A-5 of the petition). The amount due from the respondent to the petitioner is claimed at ₹ 77,23,143 in the petition. The e-mail dated 01.06.2017 (supra) shows the balance payable to the petitioner (net of retention money) of ₹ 80,549.58 and the retention money of ₹ 68,31,243. The major part of difference is regarding an amount of ₹6,76,000/- claimed by the petitioner towards scaffolding used by the respondent. The respondent's contention is that it denied the claim of the petitioner on 01.06.2017 itself and has relied on e-mail dated 01.06.2017 (Annexure R-3 of the reply) in this regard. The petitioner has not controverted the denial of its claim by the respondent. Therefore, a dispute about the amount of ₹6,76,000/- exists.

11. The balance disputed amount is primarily in respect of the retention money of ₹ 68,31,243. The petitioner's contention is that the 'defect liability period' was of one year and it was agreed in the meeting of 16.10.2015 that the date of 16.10.2015 would be treated as the date of completion of project work for the petitioner. Therefore, the 'defect liability period' for the petitioner expired on 15.10.2016. On the other hand, the respondent has relied on the e-mail dated 01.06.2017 in which it is stated that the retention money would become due to the petitioner only in June, 2017. Therefore, the dispute exists with reference to the date on which the 'defect liability period' expired. This is relevant because the claim of the respondent is that around June, 2017, Elekta started the installation of LINAC and it came to notice that defective work by the petitioner in construction of bunker for LINAC may cause leakage of radiation from the bunker. The reply of the petitioner was that the design of the bunker was to be blamed. The respondent's contention is that the

design was approved by the Atomic Energy Regulatory Board constituted under Section 27 of the Atomic Energy Act, 1962. Therefore, a dispute exists regarding the cause of the defective work. It is the respondent's contention that after coming to know that the defective work may cause leakage of radiation, the respondent was forced to spend another 2-3 months and nearly ₹44 lacs for getting the defective work rectified, besides loss of business and risk to human lives.

12. We may add that along with the reply, the respondent has enclosed e-mail dated 24.07.2017 of Elektra (Annexure R-4 of the reply) being bi-weekly project update at Nayati Hospital, Mathura and informing about Elektra's installer resuming installation at site on 10.07.2017. It is further stated that radiation leakage was found at one of the primary and this was confirmed during visit at site on 20.07.2017 by Elektra's Regulator Director and RSO. These dates falls in July, 2017 whereas the 'defect liability period' as per the respondent expired in June, 2017. However, in view of the serious nature of the defect having the potential of leakage of radiation and the respondent's explanation that around June, 2017 Elektra at first sight cited certain reservations on the quality of work done in the bunkers and that, however, Elektra was requested to install and commission LINAC, a reasonable and plausible dispute can be said to arise.

13. Another issue of dispute is the clearance of dues of the employees. The claim of the respondent is that the Employees Association had repeatedly written to the respondent to clear the dues as the respondent was the principal employer and that despite request by the respondent through e-mail, the petitioner did not submit the proof of payment to its employees along with

proof of payment of ESI/EPF etc. In this context, the petitioner has only stated in the petition that this is a false and frivolous pretext and is a moonshine and afterthought.

14. As already noted above, the demand notice under Section 8 of the Code was sent by the petitioner on 18.11.2017 and was replied to by the respondent on 28.11.2017. In this reply, the respondent denied the claim and disputed all the allegations of the petitioner. It was stated in the reply that when the final statement of accounts was prepared, an amount of ₹ 80, 000/- was payable by the respondent to the petitioner, subject to the petitioner paying dues to all its employees. It is seen from Annexure 1 of the demand notice reply (page 144 of the petition) that it was stated therein that the respondent would also like the petitioner to settle the payments to the labour contractor who had raised their claims with copy of proof of payment to them for the records of the respondent. Therefore, the settlement of payments to the labour contractor by the petitioner was an issue even on 01.06.2017. The dispute in this regard cannot, therefore, be said to have been raised for the first time in the reply to the demand notice.

15. Further, the issue regarding sub-standard services with reference to construction of bunker for LINAC raised in the reply to the demand notice had been taken up much earlier. As per the enclosures to the demand notice reply (page 150 and 151 of the petition), the issue was the subject matter of exchange of e-mails between 03.08.2017 to 10.08.2017. It was stated in the reply to the demand notice that the respondent did not owe any money to the petitioner, pending the adjudication of all the disputes.

16. We, therefore, find that the disputes raised by the respondent in the reply to the demand notice as well as the petition exist much before the date of institution of the petition. Notice of dispute was, therefore, already in existence before the institution of the petition and the dispute was reiterated in the respondent's reply to the demand notice under Section 8 of the Code.

17. The Hon'ble Supreme Court in **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017)** has held as under:-

"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."

18. On a detailed examination of the submissions of both the petitioner and the respondent as well as the facts of the case, we conclude that a dispute truly exists in this case and it is not spurious, hypothetical or illusory. Therefore, in view of the provisions of Section 9(5) of the Code, we reject the petition filed for initiation of CIRP in the case of the respondent M/s. Nayati Healthcare and Research Private Limited.

Copy of this order be communicated to both the parties.

Sd/-
(Justice R.P.Nagrath)
Member (Judicial)

Sd/-
(Pradeep R. Sethi)
Member (Technical)

June 13, 2018
Saini