

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT
CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 213 of 2021

**(Under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 read
with Rule 11 of the NCLAT Rules, 2016)**

**Against the Impugned Order dated 16.04.2021 in CP(IB) No.60/BB/2020
passed by the Adjudicating Authority, (National Company Law Tri,
Bengaluru Bench, Bengaluru)**

In the matter of:

1. Jain Heights and Structures Pvt. Ltd.

Represented by its Director
Jain Kishore @ Kishore Kumar
Office at – Solus Floor 11,
No.2, 1st Cross, J C Road,
Bangalore – 560 027.

2. Mr. Jain Kishore @ Kishore Kumar, Director

(Of the Suspended board) of Corporate Debtor
Metrik Infraprojects Private Limited,
432, Flat 102, 1st Floor, 30th Cross, 7th B Main,
Jayanagar, 4th Block,
Bangalore Urban District
Karnataka – 560 011

...Appellants

V

Bheemasamudra Land Developers and Builders

A Partnership Firm
Office at No.225, Sneha Apartments,
Flat No.102, 18th Cross, Sadashivanagar
Bengaluru – 560 080
Represented by its Managing Director
Mr. G. S. Shivakumar

...Respondent/Operational Creditor

Present for Parties:

For Appellant : Mr.Ajesh Kumar Shankar, Advocate
Mr. Adeesh Anto, Advocate
Mr. Sakthivel, Advocate

For Respondent : Ms. Asihwarya. V, Advocate
For R & P Partners

**Coram : Mr. Justice M. Venugopal Member (J)
Mr. Kanthi Narahari Member (T)**

JUDGMENT
(VIRTUAL MODE)

Per: Kanthi Narahari Member (T)

Brief Facts of the Case:

1) The present Appeal is filed against the Order dated 16.04.2021 passed by the 'Adjudicating Authority' (NCLT, Bengaluru Bench, Bengaluru) whereby the 'Adjudicating Authority' admitted the Application filed by the Respondent herein under Section 9 of IBC. Aggrieved by the same, the Appellants preferred the present Appeal.

2) The Learned Counsel appearing for the Appellants submitted that the Appellants owns 96% of the paid-up equity share capital in M/s.Metrik Infra Projects Pvt. Ltd. (Corporate Debtor) and the 2nd Respondent is a Director of the suspended Board of the said Corporate Debtor.

3) The Corporate Debtor purchased a plot of land admeasuring 8 Acres and 13 Guntas in Survey No.88/2 and 1 Acre and 28 Guntas in Survey No.89/2 both situated at Kannamangala Village, Kasabahobli, Devanahalli at Bengaluru for a total sale consideration of Rs.24,06,00,000/- from the Respondent.

4) It is submitted that subsequent to the purchase of the said property, it was revealed that the Respondent had suppressed the following disputes pertaining to the said land viz. pendency of O.S. No.381 of 2015 filed by B.K. Rajashree and Ors. against the Respondent herein seeking declaratory and

injunctory relief as to the said property.

5) Pendency of suit O.S. No.770of 2015 filed by the Civil Aviation and Meteorological Department Employees Co.op. House Building Society Ltd. against the Respondent herein seeking declaratory and injunctory relief against the sale by the Respondent herein to the Corporate Debtor.

6) It is submitted that prior to finalizing purchase of the said land the Corporate Debtor had given some cheques to show its bona fide to the Respondent herein. After the sale took place on 08.06.2015 and the entire sale consideration was paid, the Respondent herein was asked to return the said cheques and in response thereof they have claimed to have lost the said cheques. However, the Appellants accepted the said statement in good faith.

7) In view of breach of the solemn covenants under the Sale Deed, the Corporate Debtor has issued a Notice on 28.09.2016. As a counterblast the Respondent by misusing the five cheques which was to be returned and claimed to be lost, issued show cause notices under Section 138 of the Negotiable Instruments Act on 03.03.2017 and thereafter filed complaints before the Hon'ble Principal JMFC at Chitradurga.

8) It is submitted that the claim of the Respondent to commence proceedings under Section 138 of the NI Act is that a memorandum was allegedly entered into on 08.06.2015 and that the Corporate Debtor purportedly agreed to pay a sum of Rs.6 Crores to the Respondent. Further, the payment of the said sum was towards expenditure incurred for conversion of the said property to

residential purpose, approval of provisional plan from BIAPPA, erection of fence around the wall of the said property. It is submitted that the Corporate Debtor issued twelve undated cheques each Rs.50 Lakhs to the Respondent.

9) It is submitted that the MOU executed on 08.06.2015 and some of the covenants incorporated in the said MOU is that it is executed after the Sale Deed executed on 08.06.2015 and the cheques mentioned therein do not have a date. The Corporate Debtor disputed the very execution of the said MOU and in continuation thereof filed a suit in O.S.No.1445 of 2020 on 21.12.2019. As stated supra, the MOU dated 08.06.2015 has been disputed and the claim of Rs.6 Crores by the Respondent has been disputed at all times by the Corporate Debtor.

10) It is submitted that there is no record of a debt being due as per the financial records of either the Corporate Debtor or Operational Creditor. The Respondent sought a specific performance of a belated claim on a disputed agreement under Section 9 of the I&B Code, 2016.

11) It is submitted that the Learned Adjudicating Authority erred in failing to take note of the fact that there is no document produced by the Respondent other than the disputed Memorandum of Agreement which was executed on 08.06.2015.

12) It is submitted that the Learned Adjudicating Authority failed to take note of the fact that the cheques referred to therein pursuant to the Memorandum of Agreement dated 08.06.2015, do not have a date.

13) It is submitted that the claim made by the Respondent herein under the disputed Memorandum of Agreement and a suit is pending before the City Civil Court in O.S.No.1445 of 2020, therefore, it is a pre-existence of dispute.

14) It is submitted that the amounts claimed by the Respondent to the extent of Rs.6 Crores, the said amount due to the Respondent is disputed under the Memorandum of Agreement, therefore, the disputed claim would not come within the definition of Operational Debt under Section 5(21) of the Code.

15) It is submitted that the disputed agreement cannot be proved to be genuine and did not know of its existence until the Respondent issued a reply on 06.10.2016 in reply to the legal notice dated 28.09.2016. Further the claim is barred by limitation.

16) In view of the aforesaid reasons, the Learned Counsel for the Appellant prayed this Bench to set aside the order passed by the Adjudicating Authority dated 16.04.2021 whereby a CIRP was initiated against the Corporate Debtor i.e. Metrik Infra Projects Pvt. Ltd.

RESPONDENT'S SUBMISSIONS:

17) The Learned Counsel appearing for the Respondent submitted that the Respondent /Operational Creditor is a partnership firm engaged *inter alia* in the business of land development, construction and other incidental activities.

18) It is submitted that the Corporate Debtor purchased the above land from all the partners of the Operational Creditors vide Sale Deed dated 08.06.2015. While so, the Operational Creditor rendered certain services for the

said property sold to the Corporate Debtor i.e. (a) carrying out the development in the said property, (b) expenditure incurred for conversion of the said property to the residential purpose (c) obtaining approval of provisional plan from the BIAPPA, (d) erection of fence around the compound wall of the said property (e) levelling of the said property and expenditure included for liaison of all such works.

19) It is submitted that the work rendered by the Operational Creditor was duly acknowledged by the Corporate Debtor and an amount of Rs.6 Crores towards the service was ascertained and the Corporate Debtor agreed to pay the said amount by way of 12 cheques vide executing Memorandum of Agreement dated 08.06.2015. The Corporate Debtor categorically admitted its liability for the aforesaid payment of Rs.6 Crores hereinafter referred to as “service fee” towards the Operational Creditor’s due and its liability and given an undertaking in favor of the Operational Creditor to proceed against the Corporate Debtor in the event of default of the payment of “service fee”. The Corporate Debtor agreed that its liability under the MOA which is independent of the other Agreements and Bonds executed between the parties.

20) It is submitted that the MOA was executed by Mr. Kishore Kumar, the Managing Director of the Corporate Debtor and all partners of the Operational Creditors have signed on a non-judicial stamp paper of Rs.500/- bought by the Corporate Debtor itself. The Corporate Debtor and all the partners of Operational Creditor executed Sale Deed dated 08.06.2015 separately for effecting the sale of

the said property. Further the Operational Creditor executed Deed of Indemnity dated 08.06.2015 in favor of the Corporate Debtor. Under the Deed of Indemnity, the Corporate Debtor had duly acknowledged the dispute prevailed over the Title of the said property prior to the sale itself. The Operational Creditor provided declarations, representations and agreed to continue to indemnify the Corporate Debtor and defend the Corporate Debtor with regard to claims in the schedule property mentioned therein.

21) It is submitted that on 28.09.2016 the Corporate Debtor issued Legal Notice calling upon the Operational Creditor to settle the pending cases based on the Deed of Indemnity to pursue the disputes between the Operational Creditors and Civil Aviation Society. The Operational Creditor issued reply to the Legal Notice denying all allegations and confirmed that it defending the Corporate Debtor as per the undertaking under the Deed of Indemnity. It is pertinent to mention that there was no whisper about the service fee in the legal notice and the Operational Creditor reserved its rights to recover the service fee from the Corporate Debtor.

22) It is submitted that on presentation of cheques for encashment, all cheques were returned with an endorsement payment stopped by drawer. Despite the delivery of notice under Section 138 of NI Act, 1881, the Corporate Debtor instead of paying the cheque amount replied by denying execution of MOU as such.

23) It is submitted that the Operational Creditor issued demand notice in Form-3 under Section 8 of IBC demanding the service fee due and payable by the Corporate Debtor to the Operational Creditor under the MOA. The Corporate Debtor replied to the demand Notice raising false allegations by denying execution of MOA by it and came up with cooked up story on issuance of 12 cheques, which are purely as an afterthought.

24) It is submitted that the Respondent herein rendered services to the Corporate Debtor and in pursuance of MOA claimed the amount for which the Corporate Debtor failed to pay the same. The Learned Adjudicating Authority rightly admitted the application and the Appellant has not made out any case seeking to set aside the said admission order.

25) Therefore, it is prayed that the Appeal may be dismissed.

ANALYSIS / APPRAISAL

26) Heard the Learned Counsel appeared for the respective parties, perused the pleadings, documents and citations relied upon by them. After analyzing the pleadings, the issue felt for consideration is whether the Respondent is an Operational Creditor and whether the debt is an Operational Debt or not.

27) Now we deal with the issue.

28) The Adjudicating Authority vide order dated 16.04.2021 which is impugned, observed at Para 14 as under:

“The Petitioner issued Legal Notices dated 03.03.2017 under section 138 of NI Act against the 5 dishonoured cheques and calling up the Respondent

to make payment of Rs.6 Cr as per the MOA. To this, the Respondent has denied having entering into MOA and states that he cheques were given prior to the Sale Deed dated 08.06.2015, and were to be returned after receiving entire sale consideration, except 5 cheques. This stand of the Respondent also appears to be unacceptable. We cannot take cognizance of any oral understanding that may have been entered into by the two sides. As per the MOU which is signed and agreed to by both sides, there is a clear liability to pay Rs.6 crores, including the mode of payment, as referred to supra. There was, therefore, no pre-existing dispute, as has been made out by the Respondent and a clear debt existed.”

29) From the impugned order, the Adjudicating Authority observed that there is a liability to pay Rs. 6 Crores and there is no pre-existing dispute. Before proceeding to answer the issues, this Tribunal intend to go through the documents filed by the parties. The issue emanates from the Memorandum of Understanding dated 08.06.2015 entered between the Corporate Debtor and the Respondent and signed both the parties. The basis for entering the MOU is for payment of liability by the Corporate Debtor/appellant for development carried out by the second party that is the Respondent herein in the schedule property and expenditure incurred for conversion of schedule property to residential purpose, approval of provisional plan from the BIAPPA, erection of fence around the compound wall of the schedule property, levelling of the schedule property, etc. and expenditure included for liaison of all such works arrived at Rs.6 Crores. Class D of the MOU, it is stated that the Corporate Debtor having verified and ascertained the amount spent by the Respondent/Operational Creditor for development of the Schedule property has agreed to pay the said amount of Rs.6 Crores and have paid the said

amount in the following manner. In pursuance thereof, the Corporate Debtor issued 12 cheques each amounting to Rs.50 Lakhs drawn on HDFC Bank, Kasturba Road Branch, Bengaluru. It is also stated in the Agreement that the Corporate Debtor admits that the payment of the above said amount to the Respondent is its liability towards the Operational Creditor/Respondent. In clear terms, the MOU entered with a liability to pay to the Respondent and issued 12 cheques thereof. The MOU is entered only for the purpose viz. executing the work as stated therein and in consideration thereof. The Respondent is mainly relying upon the MOU, and filed Section 9 Application on that basis.

30) However, the Appellant submitted that the parties have entered Sale Deed dated 08.06.2015 between the Respondent and the Corporate Debtor whereby the Appellant purchased the property as prescribed in the schedule to the Sale Deed. In the Sale Deed it is mentioned that the total consideration of amount Rs.24,06,00,000/- paid by the purchasers and it is also specifically mentioned that the entire sale consideration of the schedule property there are no amounts due to be paid by the purchaser for the conveyance of the schedule property thereby jointly and severally acquit and discharged the purchaser of all liabilities in respect thereof.

31) In view of the clear terms as stated in the Sale Deed, the Purchaser i.e. the Corporate Debtor had paid full amount to the vendors i.e. the Respondent herein. Further, the parties have entered Deed of Indemnity dated 08.06.2015 with respect to indemnify the Purchasers from all the litigations and pending cases and

to defend the same. There is no whisper with regard to the Memorandum of Understanding and payment of Rs. 6 Crores in the Deed of Indemnity.

32) It is seen that after issuance of cheques by the Corporate Debtor in pursuance of Memorandum of Understanding dated 08.06.2015, the Respondent issued legal notice dated 03.03.2017 through the lawyer to the Corporate Debtor demanding payment of Rs.6 Crores as per MOU dated 08.06.2015 with interest @ 24% per annum.

33) It appears that having failed to receive the money from the Corporate Debtor, the Respondent issued Demand Notice in Form-3 dated 08.03.2019 to the Corporate Debtor demanding a sum of Rs.6 Crores along with 18% interest per annum. In response thereto, the Corporate Debtor vide letter dated 30.03.2019, replied to the demand notice and raised some objections stating that the Respondent had not acted as per the terms/covenants of Sale Deed and Deed of Indemnity both dated 08.06.2015. Further, it is also stated that the claim of Rs.6 Crores is false and relying on a concocted document.

34) It is seen that after presentation of cheques by the Respondent with the Bank, the cheques have been dishonored and the Respondent filed private complaint before the Civil Court under Section 138 of Negotiable and Instruments Act.

35) The moot point for consideration is whether the claim made by the Respondent is an Operational Debt and the Respondent is an Operational Creditor. In this regard, we refer to claim as defined under sub section 6 of section

3 means (a) a right to payment, whether or not, such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured. Further, sub section 11 of Section 3 defined '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. The word "Operational Creditor" defined under sub Section 20 of Section 5 of I&B Code, 2016, "Operational Creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. Sub section 21 of Section 5 defined "operational debt" means a claim in respect of the Provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

36) In the instant case, the covenants as mentioned in the Memorandum of Understanding dated 08.06.2015 clearly mentions and admits that the payment of Rs.6 Crores is a liability on the part of the Corporate Debtor for the services rendered. Therefore, the definition of "Operational Debt" clearly attracts in the instant case, since the Respondent had provided services and in consideration thereof the Corporate Debtor admit its liabilities for the said services. Further, the Respondent also clearly fall under the category of "Operational Creditor" since

an operational debt is owed to the Operational Creditor.

37) The Learned Counsel for the Appellant relied upon the Judgment of the Hon'ble Supreme Court in the matter of K Kishan v Vijay Nirman Company Pvt. Ltd. reported in (2018) 17 SCC 662 at Para 21.

38) The Hon'ble Supreme Court referred to its Judgment in the matter of Mobilox Innovations case at Para 38 of the said Judgment which is reproduced hereat:

“Para 38..... We have also seen that one of the objects of the code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.”

39) Moreover, the above judgment of the Hon'ble Supreme Court is not helpful to the Appellant for the reason that the Appellant has not relied upon the full paragraph of the above Judgment. However, this Tribunal reproducing the full paragraph of the Judgment.

“38. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which “the existence of a dispute” alone is mentioned. Even otherwise, the word “and” occurring in Section 8(2)(a) must be read as “or” keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as “or”. If read as “and”, disputes

would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the Insolvency Process, in which case, though a dispute may exist, there is no time to approach either an Arbitral Tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an Arbitral Tribunal or a court for up to three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.”

40) On the other hand, the Learned Counsel for the Respondent relied upon the Judgment of the Hon’ble Supreme Court in Mobilox Innovations Pvt. Ltd. v Kirusa Software Pvt. Ltd. reported in (2018) 1 SCC 353 at Para 51 held as under.

“51 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 of an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which his mere bluster. However, in doing so, the court does not need to be satisfied that the defense 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.”

CONCLUSION:

41) This Tribunal comes to a resultant conclusion that the Respondent’s claim is an Operational Debt and the Respondent falls under the category of Operational Creditor and there is no pre-existence of dispute. Further, it is not time barred as seen from the Demand Notice issued by the Respondent and reply thereof by the Appellant.

42) For the aforesaid reasons, this Tribunal hold that the order passed by the Adjudicating Authority has no infirmity or illegality. Viewing in that perspective, this Tribunal unequivocally hold that the Appeal is devoid of merits and liable to be dismissed. Accordingly, the same is dismissed. No orders as to cost.

[Kanthi Narahari]
Member (Technical)

[Justice M. Venugopal]
Member (Judicial)

27.01.2022
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