

IN THE NATIONAL COMPANY LAW TRIBUNAL,
SPECIAL BENCH, MUMBAI COURT – III

C.P.(IB)-762(MB)/C-III/2022

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

In the matter of

Aluplex India Private Limited

Having Registered Office at: R-602, TTC MIDC,
Rabale, Navi Mumbai- 400701.

.....Operational Creditor/Petitioner

Vs

Omkar Realtors and Developers Private Limited

Having Registered Office at: Omkar House, off.
Eastern Express Highway, Opp. Sion Chunnabhatti
Signal, Sion (East), Mumbai- 400022.

.....Corporate Debtor/Respondent

Order Pronounced on: 15.05.2024

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SHRI KISHORE VEMULAPALLI
HON'BLE MEMBER (J)**

Appearances:

For the Financial Creditor: Adv. Kajal H. Salankhi

For the Corporate Debtor: Adv. Shakeeb Shaikh

ORDER

1. The Present **Company Petition (IB)-762(MB)/2022** has been filed under section 9 of Insolvency and Bankruptcy Code, 2016 (**“IBC/Code”**) by **Aluplex India Private Limited, (“Operational Creditor/Petitioner”)** for initiating Corporate Insolvency Resolution Process (**“CIRP”**) against **Omkar Realtors and Developers Private Limited (“Corporate Debtor/ Respondent”)** for default in repayment of Rs. 27,46,44,092.56 (Rupees Twenty-Seven Crores Forty-Six Lakhs Forty-Four Thousand and Ninety-Two only).

Brief Facts of the Case as per the Petition:

2. The Corporate Debtor is a company involved in the business of real estate development and had a construction and redevelopment project of an SRA Scheme, namely known as the Omkar Worli Project, wherein the Corporate Debtor vide a formal contract, engaged the services of the Operation Creditor for Façade Labour Works and accordingly a work contract dated 28.10.2015 was executed in conjunction with a letter of intent (LoI) No. ORDPL/1973/FAÇADE/15-16/001.
3. The Scope of Work awarded by the Corporate Debtor to Operational Creditor was to design, engineer, document, test, get government approvals, manufacture, deliver, install, commission and warrant all façade systems including all curtain walls, windows, classing, rain screen facades, windows, doors and other system forming the enclosure to the building.
4. The Relevant clauses of the Contract relied by the Petitioner are as follows:
 - i. As per Section 16, clause 6, all the running bills must be paid within a period of 30 business days of verification and certification of the Running bill and for the Final bills, the same should be paid within 90 business days of the receipt of the final bill duly certified.*

- ii. Section 16, clause 2 states the clause of verification of running bills. As per the proviso, within 10 days of the receipt of the running bill, the corporate debtor shall inspect all the work and in satisfaction, shall certify the payments and in case of any discrepancy, the corporate debtor shall sort out the issue within 30 days of the receipt of the running bill.*
 - iii. Section 16, clause 5 states the clause on the verification of the Final Bills. The clause states that within a period of 60 days of the receipt of the final bill - the corporate debtor shall satisfy itself with all the work completed and documentary evidence. On the same, the payment shall be certified. In case, of any issue or discrepancy, the issues shall be discussed within 90 days of the receipt of the final bill.*
5. The Operational Creditor carried out the work pertaining to the Lobby of Tower 1 and 2, Podium Railing, Powder coating of Tower 1 and 2, Scenic lift as well as Amenities. The Operational Creditor raised the Payment Receipt dated 28.06.2019, for the Work Order completed and requested for the release of the payment for the work. The same was not adhered to, and therefore the Operational Creditor further issued payment receipt dated 13.08.2019, informing the Corporate Debtor of all the work done and requested for the release of the payment due.
6. The Corporate Debtor failed to pay the amount, due towards the Façade work at Worli 1973 of Tower 1 and 2. The Operational Creditor had followed up several times with the Corporate Debtor herein, but to no avail. The Corporate Debtor has only avoided the dues owed. Several communications were exchanged between the Operational creditor and the Corporate Debtor for the release of the payments due. The detail of each contention raised in the email of the Corporate Debtor was answered.
7. On 13.08.2019 and 20.11.2019, the agents of the Corporate Debtor had emailed the agents/representatives of the Operational Creditor for

providing the details pertaining to the construction and work order. Details include: drawings with area demarcation as per the BOQ work item description, is to be attached with the bill amount claimed, certain test certificates etc., was required for processing the bill of the Operational Creditor for the work completed.

8. On 27.11.2019, the Operational Creditor via its agent/ representative emailed in detail of all the documents submitted and all the annexure of the plans and charts. The agent and representative of the operational creditor proved its bonafide by attaching the exhibits and explaining the work completed as per the work order. Further, in the same email, it was pointed out by the operational creditor, that the work order was short certified by 5.88 Cr.
9. Thereafter, the Operational creditor in the month of December, 2019 shared further attachments pertaining to Powder coating support documents, Internal column cladding support documents, and the letters for handover of the flats.
10. Further, the Corporate Debtor addressed an email dated 09.10.2020 to the Operational Creditors requesting them for a Tax Invoice and other SES related documents.
11. Through email dated 02.11.2020, the representative of the Operational Creditor informed about the discrepancy in the amount to be paid to the Operational Creditor by the Corporate Debtor, and recommended the Corporate Debtor for re- issuance of the same or for a joint meeting.
12. Pursuant to the same, on 24.11.2020, the Operational Creditor emailed the discrepancy amount explaining in a tabular format to the Corporate Debtor, and requested to check the same for the meeting to be held by and between the operational creditor and corporate debtor on 26.11.2020.

13. As per the chart prepared, it was the contention of the Operational Creditor that the Corporate Debtor paid Rs. 46,60,93,111.95/- and as per the corporate debtor, the receipt was of Rs. 49,76,04,220.80/-. However, the afore-mentioned scheduled meeting did not take place, on the request of the Corporate Debtor.
14. Further, the meeting was held on 27.11.2020, but the Corporate Debtor still did not have the receipts ready for discussion. Therefore, an email dated 27.11.2020, was sent by Operational Creditor to the Corporate Debtor for a joint meeting to close on the discrepancy. Further reminder email was sent by the Operational Creditor to solve the issue in payments as on 21.12.2020. The Corporate debtor kept on delaying on their part by avoiding the payment required to be made to the Operational Creditor.
15. Various emails addressed by Operational Creditor to Corporate Debtor on 16.12.2020, 21.12.2020 and 23.12.2020, inter alia, requesting Corporate Debtor to clarify and close the account at the earliest. Further, explained that there were no further documents/information pending to be given and Corporate Debtor was requested to expedite the payments.
16. The Operational Creditor addressed an email to Corporate Debtors requesting them to provide, the Stock valuation pursuant to their joint meeting dated 22.12.2020.
17. The Operational Creditor received an email dated 12.02.2021 from "Yes Bank" providing a summary of payments given by Corporate Debtor to Operational Creditor from 16.02.2016 to 15.10.2018 and requesting them to confirm the project towards the received payments. Further, the Operational Creditor replied to Yes Bank on 17.02.2021, inter alia, confirming that an amount of Rs. 12,40,00,692/- was received by them

from Corporate Debtor. Also, various discrepancies were pointed out to Yes Bank in summary statements.

18. The Operational Creditor addressed an email dated 04.01.2021 to Corporate Debtor, recording the difference in account and the same be clarified. Further, email dated 16.01.2021 addressed by Corporate Debtor to Operational Creditor, inter alia requesting for a joint meeting to reconcile the accounts and the payment to be made by corporate debtor to Operational Creditor.
19. Email dated 21.01.2021, addressed by Operational Creditor to Corporate Debtor, inter alia, providing a scanned copy of the invoices as requested by Corporate Debtor for an amount of Rs. 12,89,42,817/- and further requested to release the payment.
20. Email dated 23.01.2021, addressed by Operational Creditor to Corporate Debtor in furtherance to their earlier email, stating that an amount of Rs. 10,39,39,453/- is payable by Corporate Debtor to Operational Creditor. It is further recorded that a joint meeting would be held on 25.01.2021 at 2.00 p.m. to confirm the accounts and for release of payment.
21. Email dated 29.01.2021 addressed by Operational Creditor to Corporate Debtor stating that an amount of Rs. 25,12,887/- was deducted by Corporate Debtor from the payments made to Operational Creditor towards TDS, however, the payments were not made. Further, the total outstanding was 10,64,52,340/-. It was requested that the payment be released.
22. As no payments were made by Corporate Debtor to Operational Creditor, despite of certifying work done by Operational Creditor. The Operational Creditor agreed to settle for a lesser amount on a promise made by Corporate Debtor to pay the dues at the earliest. In view thereof, the

parties executed a Joint Statement dated 25.02.2021, signed by Corporate Debtor and Operational Creditor, inter alia, acknowledging that an amount of Rs. 9,68,78,671/- (Rupees Nine Crores Sixty-Eight Lakhs Seventy-Eight Thousand Six Hundred and Seventy-One) is payable by Corporate Debtor to Operational Creditor.

23. Email dated 09.07.2021 addressed by Operational Creditor to Corporate Debtor stating that invoices worth Rs. 9,68,78,671/- have already been certified by Corporate Debtor, however, the payment towards the same is still due and outstanding.
24. The Operational creditor, having no resort, sent a Demand Notice in Form 3 on 31.08.2021. In response to this, the Corporate Debtor replied to the demand notice denying outright to any such amount of Rs. 15,96,76,798/- being owed to the Operational Creditor. Further mentioned that reply did not deal with the merits therefore, they shall reply in detail to the contentions raised in the said Demand notice.
25. The Operational Creditor after been assured on various occasions orally, did not receive any payment from the Operational Debtor. Therefore, the Operational Creditor, once again issued a Demand Notice dated 22.03.2022; u/s 8 of the Code, called upon the Operational Debtor to make a payment of Rs. 27,46,44,092.56/- (Twenty-Seven Crores Forty-Six Lakhs Forty-Four Thousand and Ninety-Two). Rs. 15,96,76, 798/- (Rupees Fifteen Crores Ninety-Six Lakhs Seventy-Six Thousand Seven Hundred and Ninety-Eight Only) towards principal outstanding along with an interest thereon @ 24% p.a. from 28.06.2019 up to 28.02.2022 i.e., Rs. 11,49,67,294.56/- (Rupees Eleven Crores Forty-Nine Lakhs Sixty- Seven Thousand Two Hundred and Ninety-Four Only).
26. Despite addressing a Demand Notice, the Operational Debtor failed and neglected to make payment and further, vide a letter dated 30.03.2022 denied the contents, without any explanation whatsoever. There has

been no objection raised by the Corporate Debtor on the issue of the work commenced, certified and completed by the Operational Creditor.

Affidavit in reply on behalf of Corporate Debtor:

27. In response to this, the Corporate Debtor has filed a detailed reply and has raised few preliminary objections as follows:

- a. The alleged claim arises out of the Contract dated 28.10.2015 executed between the parties. The said Contract is insufficiently stamped and thus the same is in conflict with the provisions of the Maharashtra Stamp Act read with the Indian Stamp Act. Further submitted that an insufficiently stamped document is no contract at all in the eye of law. Hence, on this ground alone the present Petition is liable to be dismissed.
- b. The said Contract contains a clause of Conciliation and arbitration, which contemplates the resolution of the dispute through mediation at the level of managing director/chief executive officer of the Operational Creditor and the Director Technical of the Corporate Debtor. In the event the above mediation fails, the parties are then required to refer the dispute for arbitration. However, the Operational creditor has approached this Court only to circumvent the clauses pertaining to mediation and conciliation. Therefore, the present Petition ought not be entertained and the same is liable to be rejected.
- c. The Operational Creditor did not complete the entire work as stipulated under the contract issued to the Operational Creditor. As per the terms of the contract the Operational Creditor has failed to do so and did not comply with the site handover procedure. On the contrary the Operational Creditor left the site without informing the Corporate Debtor.

- d. Further submitted that the work done by the Operational Creditor was of sub-standard quality, there were many deficiencies and defects in the work done by the Operational Creditor.
- e. The Petitioner has not submitted the Invoices against the alleged amount claimed in the Petition, which is very much necessary and mandatory for certification of Invoices and work done as per the payment mechanism terms of Contract dated 28.10.2015.
- f. Before the date of the first demand notice dated 31.08.2021, the Corporate Debtor vide its email dated 24.06.2021 had reiterated the existence of dispute, which were overlooked by the Operational Creditor.

Additional Affidavit on behalf of the Operational Creditor:

- 28. In response to aforementioned objections, the Operational Creditor has filed an additional affidavit dated 30.11.2022 and has submitted that it is a settled principal in law that as far as the proceedings before NCLT is concerned, a duly stamped Contract is not the principal criteria for adjudication, as far as there is a clear understanding between the parties in writing with respect to their transactions and their intentions to pay are set out in the Contract.
- 29. Further submitted that there has been no Contractual dispute in the present case and there has been a clear admission of debt and liability of the Corporate Debtor through its joint statement dated 25.02.2021.
- 30. Further, the management and office bearers, engineers of the Corporate Debtor have publicly at various stages of project completion informed the world at large via print and digital media, that the Operational Creditor has completed the project with extreme perfection, dedication and has provided qualitative services towards the project execution and implementation.

31. All the queries related to work certification were addressed and the required details were provided to the Corporate Debtor. It is further stated that on approvals of the certified work done, a joint statement was signed and proforma invoices were issued on 21.01.2021 to the Operational Creditor.

Observations & Findings

32. Heard the Ld. Counsel for the Parties, perused the pleadings and daily orders.

33. Now we propose to deal with the contentions raised by the Corporate Debtor.

34. Further, in relation to the contention that the Contract entered by and between Corporate Debtor and the Operational Creditor is insufficiently stamped, we rely on the judgement **Ashique Poonamparambath vs. Federal Bank -2021 SCC OnLine NCLAT 1769** wherein, the Hon'ble NCLAT has clearly held that even if the agreement is considered to be insufficiently stamped, debt and default can still be proved from other records.

35. In the present case, the parties have executed a Joint Statement dated 25.02.2021, signed by Corporate Debtor and Operational Creditor, inter alia, acknowledging that an amount of Rs. 9,68,78,671/- (Rupees Nine Crores Sixty-Eight Lakhs Seventy-Eight Thousand Six Hundred and Seventy-One) is payable by Corporate Debtor to Operational Creditor. Therefore, the present contention cannot be sustained.

36. Further, in relation to the contention that the said Contract contains a clause of Conciliation and arbitration, which contemplates the resolution of the dispute through mediation/arbitration, this bench is of the considered view that the existence of an arbitration clause is no bar to approach the Adjudicating Authority under the Code for initiation

of insolvency proceedings. Reference shall be made to the observations of Hon'ble NCLAT, Chennai Bench, in **Mr. Shahi Md. Karim vs. M/s Kabamy India LLP & Anr. [Company Appeal (AT) (CH) (Ins.) No. 16 of 2023:**

“9. There is no embargo on the ‘Operational Creditor’, to file a Section 9 Petition, under I & B Code, 2016, even if there is an ‘Arbitration Clause’, in the ‘Agreement’. The scope and objective of the Code is ‘Resolution’, and not a ‘Recovery Mode / Forum’.”

37. Furthermore, regarding other objections raised, such as the Operational Creditor has not completed the entire work as stipulated under the contract and work done was of sub-standard quality, we are of the opinion that such objections were not raised by the Corporate Debtor in response to demand notice. Additionally, all queries related to work certification were addressed before the parties signed a joint statement. Once the parties have settled the matter and the Corporate Debtor has agreed to pay a certain amount, they cannot later raise objections regarding incomplete work or the quality of work. Hence, such contention cannot be entertained.

38. Further, some of the daily orders are worth noting where the parties pleaded settlement, which are reproduced below:

Date	Order
01.05.2023	<i>“Both sides submit that the matter has been settled between the parties and sought time to file consent terms for withdrawing the above company petition. List the matter on 04.05.2023 high on board for reporting settlement.”</i>
04.05.2023	<i>“... request time on the ground that settlement talks are going between the parties.”</i>

	<i>Request is considered. List this matter on 15.06.2023 high on board for reporting settlement.”</i>
13.06.2023	<i>“Both sides present and submits that a settlement has been worked out between them in pursuance of which the Corporate Debtor has already paid some amount and requested time to complete the process of settlement and for filing appropriate withdrawal application along with Consent Terms. List this matter on 14.07.2023 for reporting settlement.”</i>
14.07.2023	<i>“By consent requested for an adjournment for completing the settlement on the ground that the Corporate Debtor has already paid an amount of Rs. 1 crore as initial amount and the remaining amount is agreed to be paid on or before 14.08.2023. List this matter on 16.08.2023 for reporting settlement and for filing appropriate application withdrawing the company petition.”</i>
16.08.2023	<i>“Both parties requested to list the matter on day after tomorrow for filing an appropriate withdrawal application along with consent terms since the matter has been settled between the parties. List this matter on 18.08.2023.”</i>

39. Thereafter, on 21.08.2023, the Corporate Debtor filed an additional affidavit and stated that-

“13. Both the parties have reworked the settlement with the incoming Developers as per their conference call between Mr. Nishant Agrawal the representative of the Corporate Debtor and Mr. Anand Gandhi, Mr. Jinesh Kothari, representatives of incoming developer, Sugee Realtors Pvt. Ltd. and Ms. Rujita of PRPL Enterprises Pvt. Ltd. (formerly known as Piramal Realty Pvt. Ltd.), the Lender with Mr. Keswani, the owner of Aluplex India Pvt.

Ltd., the Operational Creditor and upon such resettlement the Corporate Debtor has made further payment of Rs. 2 Crores to the Operational Creditor as follows:

<i>Sr. No.</i>	<i>Date</i>	<i>Mode of Payment</i>	<i>Amount Paid</i>
<i>1.</i>	<i>17th August, 2023</i>	<i>RTGS</i>	<i>Rs. 1,00,00,000/-</i>
<i>2.</i>	<i>18th August, 2023</i>	<i>RTGS</i>	<i>Rs. 1,00,00,000/-</i>

The Operational Creditor has accepted the said amount under the said resettlement.

14. The balance amount of Rs. 8 Crores under the resettlement will be paid by the Corporate Debtor to the Operational Creditor on or before 23rd November, 2023 as under:

- a. Rs. 2 Crores by 23rd September, 2023*
- b. Rs. 2 Crores by 23rd September, 2023*
- c. Balance Rs. 4 Crore by 23rd November, 2023”*

40. From the aforementioned daily orders, it is evident that there were a number of adjournments on the ground of settlement between the parties. Moreover, it was mentioned that the Corporate Debtor has made the part payment of Rs. 1 crore as initial amount and the remaining amount is agreed to be paid on or before 14.08.2023.

41. Moreover, the Corporate Debtor has filed an additional affidavit dated 21.08.2023 and submitted that Rs. 2 Crores was paid as part payment and the rest amount of Rs. 8 Crores shall be paid on or before 23.11.2023. Therefore, part payment amounts to an acknowledgement of debt in view of Judgement of the Hon’ble Apex Court in the case of Dena Bank Vs. C. Shivakumar Reddy and Anr. In Civil Appeal No. 1650 of 2020. Further, the Corporate Debtor has failed to pay the rest amount as per the settlement terms, even on the date matter was reserved for

orders i.e. 13.03.2024. Therefore, it's again a default on the part of Corporate Debtor.

42. In view of the fact that existence of debt and default has been established, default amount is more than threshold limit of Rs. 1 crore. The Petition has been filed on 18.05.2022 and date of default mentioned in part IV of Form 5 is 28.06.2019, therefore, the Petition is well within limitation. Accordingly, we hereby admit this company petition and appoint **Mr. Harish Kant Kaushik** as an IRP, with a direction to the Financial Creditor to pay remuneration to the IRP and his expenses until the constitution of CoC.

43. Accordingly, this Company Petition is **admitted** with the following directions:

- a. **The above Company Petition (IB) 762(MB)/2022 is allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s. Omkar Realtors & Developers Private Limited.**
- b. This Bench appoints **Mr. Harish Kant Kaushik**, having Registration No: **IBBI/IPA-001/IP-P01469/2018-2019/12340**, email: harishkant2007@gmail.com; **Ph. No. 9819799455**; as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Operational Creditor shall deposit an amount of Rs. 5 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby directs operation of moratorium under section 14 of Insolvency and Bankruptcy Code, 2016 and prohibits the following:
 - a. 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;

- b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c. 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;
- d. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

44. Registry shall send a copy of this order to the concerned Registrar of Companies for updating the Master Data of the Corporate Debtor.

45. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately. The Registry is further directed to send a copy of this order to the Insolvency and bankruptcy Board of India for their record. The Petitioner is also directed to forthwith communicate this order to the IRP.

Sd/-

CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)

Sd/-

SHRI KISHORE VEMULAPALLI
(MEMBER JUDICIAL)

Arpan, LRA