

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU**
*(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)*

**C.P(IB)No.21/BB/2021&
I.A.No.309 of 2021 and I.A. No.211 of 2023**
Under Sec.9 of Insolvency and Bankruptcy Code, 2016
R/w. Rule 6 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016

IN THE MATTER OF:

M/s. KAP India Projects & Constructions Pvt. Ltd.

No. 33/817, NishatKuriachira,
P.O. Thrissur – 680006 -

...Petitioner/Operational Creditor

Versus

M/s. AishwaryaHeights Infra Private Limited

No.27, K.G. Road,
Bangalore – 560009-

....Respondent/Corporate Debtor

Order delivered on: 28th June, 2024

Coram: 1. Hon'ble Shri K.Biswal, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : ShriRicab Chand
For the Respondent : Shri DhyanChinnappa, Sr. Counsel with
Shri Shrikar A.J

ORDER

Per: K. Biswal (Member Judicial)

1. This Company Petition has been filed on 15.01.2021 by M/s. KAP (India) Projects & Constructions Pvt. Ltd., i.e., the Petitioner/Operational Creditor (hereinafter referred to as “Petitioner or OC”) 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 by *inter alia* seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of M/s.Aishwarya Heights Infra Private Limited (hereinafter referred to as “Respondent or CD”) for defaulting an amount of Rs.2,98,48,694/- along with interest as per the Interest Act, 1968 after 21 days from the date of submission of the Invoice till realisation, on account of work done under Labour Contract Agreement dated 10.11.2014.

2. The brief averments made in the Petition, which are relevant to adjudicate the issue in question, are as follows:
 - (1) The Corporate Debtor i.e., AishwaryaHeights Infra Private Limited, is a Private Limited Company was incorporated on 25.01.2008 under the provisions of the Companies Act, 1956 with CIN U45200KA2008PTC045054 and having its registered office at No.27, K.G. Road, Bengaluru.Its Authorised Share Capital is Rs.256,000,000 and Paid-up Share Capital is Rs.200,000,000. The Corporate Debtor is in the business of real estate construction.

 - (2) The Operational Creditor and Corporate Debtor entered into Labour Contract Agreement dated 10.11.2014 whereby the Petitioners were employed as the contractor for execution of proposed construction of Commercial Complex-cum-Multiplex (Civil Work) at No.27, K G Road, Gandhi Nagar Bangalore. The

Contract value of the work amounted to Rs.14,13,65,393/- subject to variation caused due to change in scope, change in Plan etc. The project was sought to be completed on or before 15 months after commencement is reckoned.

- (3) As per the Payment Terms of the Labour Contract Agreement in Clause 10, the running account bill was to be raised once in a month whereby 75% of RA Bill Value shall be released within 7 days from the date of submission and balance 25% shall be released within 21 days from the date of submission after certification from technical team and confirmed by GM project (AHIPL i.e. the CD).

- (4) The Petitioner performed the work as specified under the work order for which running bills were raised by the Operational Creditor. As per the Petitioner, the Corporate Debtor has cleared the running bill No.20 after which the petitioner communicated to the Corporate Debtor about fulfilment of work vide email dated 20.02.2018. The Operational Creditor, thereafter raised running bills No.21 to 24, the last running bill/final bill being RA Bill No.24 which was raised vide email dated 12.10.2018.

- (5) The Petitioner has sent various reminders to the Corporate Debtor to fulfil their monetary obligation of payment for the work done for which the petitioner has adduced the latest email of reminder dated 21.02.2020. The wilful default of the Corporate Debtor led to the petitioners issuing Demand Notice dated 09.03.2020 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 inter alia demanding to pay amount of Rs.2,98,48,694/- along with interest after 21 days from the date of submission of the invoice till realisation, on account of work done under dt.10.11.2014. The demand notice was received by the Corporate Debtor on 14.02.2022 as per the postal receipt.

However, the Operational Creditor neither received any payment nor any reply/notice raising any dispute due to which the amounting default amount fell due as against the Operational Creditor.

(6) The due date, as per clause 10 of the Agreement for payment of RA Bill No.24 dated 12.10.2018 is 21(75% of the amount) and (balance 25% of the amount) 28 days from the date of submission thereof. The RA bills raised are cumulative balance which is carried forward from the previous bills to the next bill. Therefore, there is operational debt of Rs.2,98,48,694/- along with interest as per the Interest Act, 1978 after 21 days from the date of submission of the work order till realisation, on account of work done under work order dt.10.11.2014. However, the Respondent has neither paid due amount nor raised any dispute leading to file the instant Petition.

3. The Respondent/Corporate Debtor has filed Objections to the petition on 22.03.2022 vide diary no.1183,*interalia*,contending as follows:

(1) They have filed I.A. No. 309/2021 under Section 8 of Arbitration Act, 1996 before this Tribunal, as per Clause 11 of the Labour Contract Agreement. The Corporate Debtor contends that since the bills in question arises out of the said Labour Contract, which contains an arbitration clause, this Tribunal does not have the jurisdiction to adjudicate the present dispute and thus the matter should be dismissed at the threshold.

(2) Further, the bills that are raised by the petitioner are unverified and uncertified bills and not the final invoices and raised much after the Petitioner had abandoned the work site, the bills are fictitious and false. The Corporate Dector avers that in Clause 10 of the Labour Contract, any bill submitted by the Labour Contract

aka Petitioner would have to be certified by the Employer/Respondent.

(3) That when the R.A. Bill no.20 was raised by the petitioner on 30.05.2017, the same was submitted along with measurement sheets. The Corporate Debtor completed the initial verification of the document and made ad-hoc payment of Rs.28,71,430/- on 13.07.2017. After initial verification, the representatives of the Corporate Debtor and the petitioner visited the building site for verification of the works for which the Corporate Debtor submitted the abstract of the RA Bill no.20 dt.14.09.2017 containing details of payment made until then. Upon receipt and verification of the abstract, the G.M. (Projects) of the Respondent recommended final payments of the running bill for which the Corporate Debtor made payment of Rs.4,06,921/- on 20.09.2017. After joint verification of the works and invoices by the Petitioner and the Respondent, there were many corrections and changes made to the measurement sheets. At this stage the Petitioners submits a revised and updated abstract as an outcome of the discussions held and after such endorsement the balance bill amount was paid to the Petitioner.

(4) RA Bill No.21 was submitted on 5.09.2017 and after preliminary verification a sum of Rs.25,00,000/- on 14.10.2017 and Rs.15,00,00/- on 7.11.2017 and Rs.15,00,000/- on 4.01.2018. A total of Rs.55,00,000/- was paid as ad-hoc payment in relation to RA Bill No.21. The bill was raised through email without any supporting documents and without certifying the bill, the contractor paid 75% of the invoice and was waiting for additional reports to be certified. Since the verification was not done, no further payment was released. Moreover, the final RA Bill No.21 and RA 21 to 22 were raised much after the contract period through email which did not contain the measurement sheets or

any supporting documents to show that they have completed the work they were assigned to do. Until date, the hard copies of the bills along with the additional reports required to certify the bills are not submitted. Further, on 02.03.2022 the Senior Manager of the Operational Creditor sent an email to the Respondent stating that Corporate Debtor has submitted the uncertified RA Bill No.21, 22, 23, 24th and final bill on 24.02.2022 much after the Petitioner initiated these proceedings before the Hon'ble NCLT. Moreover, as alleged by the Corporate Debtor, the representative of the petitioner has admitted to the non-verification of the said bills vide email dt.02.03.2022.

(5) The Corporate Debtor alleges that the Petitioner failed to complete the works agreed in the time frame and in fact abandoned the Project midway (on or about June 17) leaving the Respondent to fend for itself. Subsequently, the Corporate Debtor appointed another labour contractor to continue its project. The Corporate Debtor submitted that it is the owner of the land and the project in the Platinum Mall with a current worth of the land being more than Rs.500 crores and the current debt claimed is approximately Rs.1crore. Thus, the Corporate Debtor avers that it is a solvent company and should not undergo CIRP.

(6) After receiving the alleged invoices, the Corporate Debtor contends that the Petitioner did not make any contact with the Corporate Debtor for two years and suddenly without any contact in the interim, sent a letter by way of email requesting for payment of outstanding dues. The Corporate Debtor denies the existence of any visits or correspondences on the part of the Operational Creditor. The Corporate Debtor also denies receipt of the statutory notice sent in Form 3 IBC as it was sent to the project site and not to the corporate office of the Respondent. As per the Corporate Debtor, the Labour Contract Agreement included work which was

not done by the Petitioner for which the Corporate Debtor engaged a different contractor at a higher cost to complete these works.

- (7) As per the terms of the Labour Contract Agreement, a total payment of Rs.8,04,14,136/- was made to the Operational Creditor in relation to the partial work done.
- (8) The Corporate Debtor raised dispute in relation to the claim made by the Petitioner whereby the Corporate Debtor has alleged that the scope of work under the Labour Contract Agreement included solid concrete block masonry, size stone masonry, internal and external plastering, construction of basement 2 and storm water drainage system which has not been done by the petitioner. As per the terms of the Agreement, the Operational Creditor was supposed to complete the construction work of the proposed commercial building in the property bearing No.27, K.G. Road, Bangalore within 15 months from the date of commencement of work i.e., 10.02.2016. However, the Operational Creditor did not complete his obligations in time. It can be seen that the purported invoices are also dated in the year 2018, more than 2 years after the work was supposed to be finished.
- (9) The office address given during the time of signing the Agreement was "RAMANASREE ARCANE", 2nd Floor, No.18, M.G. Road, Bangalore. However, the Corporate Debtor was never able to reach the given address as the office was closed. Moreover, even on the telephone the Operational Creditor used to reply that because of the internal issues there is a delay in the execution of the project and was assuring that it will complete and conclude the project and the Operational Creditor was taking further extension of time. That the Corporate Debtor submits that the representations were false and the Operational Creditor had abandoned the project

violating the terms of the Labour Contract. During the same time when Corporate Debtor tried to get in touch with the Petitioner, they started bringing up the issue of bills not being cleared which as per the Corporate Debtor is a false and baseless statement. The Corporate Debtor contends that when all their efforts to get in touch with the Operational Creditor went in vain, a legal notice was issued by the Corporate Debtor on 15.02.2021 demanding Rs.70 lakhs to be paid by the Operational Creditor being the penalty amount as per Clause 13 of the Labour Contract Agreement. As a reply to the legal notice, the Corporate Debtor received a reply from the Operational Creditor on 25.02.2021 stating that they had initiated CIRP proceedings against the Corporate Debtor along with the copy of the proceedings through email as well as under the cover letter dt.16.01.2021.

(10) The Petition is also barred by limitation as the bills were raised by the Operational Creditor dated 05.09.2017, 16.12.2017, 30.01.2018 and 12.10.2018. The present Petition filed on 15.01.2021. Even if the claims are considered to be valid, it is submitted that the claims in relation to RA 21 and RA 22 have been filed after the expiry of more than 3 years from the date on which the claim could have been raised. Therefore, the Petition should be dismissed.

4. The Operational Creditor filed Written Submissions vide diary no.1917 on 06.04.2023 by *inter alia*, contending that the Corporate Debtor has admittedly received the RA Bills but have not paid the amounts as 75% contemplated under Clause 10 within 7 days and thus, the Petition is liable to be admitted on this ground alone. The Operational Creditor has relied on the decision of Hon'ble Supreme Court in *Innoventive Industries Ltd. b. ICICI Bank (2018) 1 SCC 407* wherein it was held that as per Section 3(12) of the Code, a default means "non-payment of a debt once it becomes due and payable which includes non-payment of even part thereof or an instalment amount." It is also contended that

the Corporate Debtor has not disputed that they are in receipt of the RA bills and till now no payment has been made. Additionally, as per the decision of the Hon'ble Supreme Court in *Mobilox Innovations (P) Ltd. v. Kirusa Software (P)Ltd., 2018 (1) SCC 353* that the presence of pre-existing dispute must exist before the receipt of demand notice or invoice. The Operational Creditor also relied on judgement of the Hon'ble Supreme Court in the matter of *Suo moto Writ Petition (C) No.3 of 2020* dt.10.01.2020 reported in *2022(3) SCC 117* in support of limitation.

5. The Corporate Debtor has filed the Written Submissions vide Diary No.3254 on 21.06.2023 and vide Diary No.1750 on 18.03.2024 in which it is contend that there is a legal dispute in relation to the said amount and moreover the Operational Creditor has failed to provide any documentation in support of its claim as the fundamental documents which are the invoices for the said claim are absent and the ones produced are fictitious and false. Therefore, as per the Corporate Debtor the bills raised were not verified and certified due to which the question of payment does not rise. The Operational Creditor has only attached abstracts of the RA bills and no other additional documents which are required to be submitted in support of the bill. Additionally, no bank statements have been attached by the petitioners in the present petition. The Corporate Debtor avers that as per the NCLAT judgement in *Neeraj Jain v. Cloudwalker Streaming and others in Appeal (AT) (Ins.) No.1354 of 2019* wherein it was held that “*keeping in mind the summary nature of the proceeding, the Bank Statement is a crucial document to help establish which amounts have been received and lack thereof merits rejection of Section 9 Application.*” The bank statements have not been attached because if bank statements were attached, it would show that a payment of Rs.8,04,14,136/- to the Operational Creditor in relation to the Labour Contract Agreement for the partial work done by the Operational Creditor has already been made (which is already far in excess of the contract amount). The Corporate Debtor

relies on the decision of NeerajJain(supra) wherein the Hon'ble NCLAT noted that no invoices as required by the IBC Code were produced by the Petitioner/Operational Creditor and on that ground the set aside Hon'ble NCLT's order admitting the Petition. Additionally, the Hon'ble NCLAT also noticed the initiation of arbitration proceeding while the insolvency proceedings were still pending.

Regarding the pre-existing dispute, the Corporate Debtor contends that the Operational Creditor has also initiated Arbitration before Hon'ble Justice Mr. A.V.Chandrashekar and filed the claim in relation to purported non-payment of RA No.21-24 which itself is an admission by the Operational Creditor of the existence of a pre-existing legal dispute between the parties. The Petition is also barred by limitation.

6. Subsequent to the filing of the instant Petition, the Corporate Debtor has filed I.A.No.309 of 2021 in Petition, U/s.8 of the Arbitration and Conciliation Act, 1996 R/w.Rule 11 of the NCLT Rules, 2016 by seeking to refer the matter to the Arbitration Tribunal and dismiss the main Company Petition. And also filed another I.A.No.211/2023, under Rule 11 of NCLT Rules, 2016 by *inter alia* seeking the permission of the Tribunal to place on record the correspondence between the Applicant/Corporate Debtor and the Respondent/Operational Creditor dated 26.05.2022. 04.07.2022 and 13.07.2022. It is *inter alia* contended in this Application that during the pendency of I.A.No.309/2021, the Operational Creditor issued notice dated 26.05.2022, U/s.11 of the Arbitration and Conciliation Act, 1996 in relation to the same subject matter and cause of action, while referring to the insolvency proceedings. It is further mentioned that due to non-payment by the Corporate Debtor, a legal dispute has arisen. The Applicant/Corporate Debtor has given a reply to the arbitration notice dated 04.07.2022 stating that there is a legal dispute and that the Operational Creditor is agreeable to Justice Mr. A.V.Chandrashekar (Retired High Court Judge of Karnataka High Court) as one of the three suggested names to

conduct arbitration proceedings. The Respondent in the I.A. No.211/2023 has also issued a response dated 14.07.2022 to the notice dt.4.07.2022 seeking Applicant/CD's response to know if they would like to continue without prejudice to settlement discussions or if a letter could be written to Justice Mr. A.V Chandrashekar to enter reference at the earliest to adjudicate the claim. Therefore, they have contended that the arbitration commenced when the applicant received the Respondent's notice dated 26.05.2022 to initiate arbitration.

7. Heard Shri Ricab Chand, learned Counsel for the Petitioner and ShriDhyanChinnappa, learned Sr. Counsel for the Respondent and have carefully perused the all the pleadings placed on record and the settled position of law on the issue.
8. The Learned Counsels have once again reiterated their respective pleadings and stick to their stands.
9. In first instance, we would like to point out the cardinal requirement to be filed by the Parties for filing an Application/ Petition U/s 9 of Code, before the Adjudicating Authority. U/s 8 of Code, on occurrence of default, an Operational Creditor is required to issue a demand notice in prescribed form of unpaid operational debt by demanding the Corporate Debtor to make good the default. On receipt of such demand notice, the Corporate Debtor has to respond to it raising his defence(s) like existence of dispute, Arbitration Proceedings pending, etc. If the Corporate Debtor fails to respond suitable as per law, the Operational Creditor can invoke section 9 of the Code in a prescribed form and procedure. Therefore, whether due procedure has been followed and any dispute or arbitration is there or not to be examined basing on the facts and circumstances of the instant case.
10. So far as the issue of pre-existing dispute is concerned it is seen that the instant Petition was filed on 15.01.2021, whereas, the I.A.No.309/2021 filed U/s.11 of the Arbitration and Conciliation Act,

1996 on 25.05.2022 which is subsequent to the filing of instant Petition. Further, the Corporate Debtor has not raised the issue of the pre-existing dispute before the issuance of Demand Notice under the IBC. The Hon'ble Supreme Court in Mobilox (supra) has held that the issue of pre-existing dispute cannot be raised belatedly after the issuance of Demand Notice by the Operational Creditor but has to be raised prior to the issuance of the Demand Notice. Further, Hon'ble NCLAT in Ahluwalia Contracts (India) Limited Vs. Raheja Developers Limited has held that "in the present case, it is not in dispute that the arbitration proceeding was initiated by the Respondent vide notice dated 24.05.2018 i.e., after about one month from the date of issuance of demand notice under Section 8(1) which was issued on 24.08.2018. Therefore, the 'Corporate Debtor' cannot rely on arbitration proceeding to suggest a pre-existing dispute." In view of the above, it is to be held that there is no pre-existing dispute.

11. During the course of the proceedings, the Learned Senior Counsel for the Corporate Debtor, Mr. Dhyan Chinappa has also raised the objection that the unpaid bills i.e. R.A Bills No.21 to 24 are uncertified and unverified invoices and not submitted with the requisite enclosures and hence they are not valid invoices. In this regard the learned Senior Counsel has also made distinction between the RA Bills No.1 to 20 which are duly paid by the CD and RA Bills No.21 to 24 which are not accompanied by the description of the work done, measurement sheets, verification, certification and subsequent finalisation of the payments by the Corporate Debtor as an attachment. In the written submissions of the Corporate Debtor the following points were raised:

“33 RA Bill 20 was raised by the Petitioner dt.30.05.2017 along with measurement sheets for which the CD completed the initial verification of the documents. The Respondent made ad-hoc payment of Rs.28,71,430/-

on 13.07.2017. After initial verification, the representatives (Quality Suveryors and engineers) of the Respondent and the Petitioner visited the building site for verification of the works. After verification, the Respondent submitted the abstract of the RA Bill No.20 dt.14.09.2017 containing the details of payments made until then. Upon receipt and verification of the abstract, the G.M. (Projects) of the Respondent recommended final payments of the running bills. The Respondent made a final payment of Rs.4,06,921/- on 20.09.2017. After the joint verification of the works and invoices by the Petitioner and the Respondent, there were many corrections and changes made to the measurement sheets as can be seen from the document.”

“**34** RA Bill No.21 was submitted on 05.09.2017 and after preliminary verification, a sum of Rs.25,00,000/- on 14.10.2017 and Rs.15,00,000/- on 7.11.2017 and Rs.15,00,000/- on 04.01.2018 i.e., a total of Rs.55,00,000/- was paid as ad-hoc payment in relation to RA Bill No.21. This bill was raised through email as stated in the Application without any supporting documents. Without even certifying the same, as per the terms of the contract, the Contractor paid 75% of the invoice and was waiting for the additional reports to be certified. However, the same was not done. Accordingly, no further payment was released.”

12. The Learned Senior Counsel has also placed reliance on Clause 10 of the Labour Contract Agreement which states that “...and the balance 25% shall be released within 21 days from the date of submission after certification from technical team and confirmed by GM project (AHIPL).” In this regard, the Learned Senior Counsel has argued that that as per the terms of the contract the bills which were certified by the CD were paid whereas the Bills starting from 21 onwards were not certified as the same were not adduced with the measurement and description sheets and hence the same were not finalised by the CD to effectuate payment.

13. On the perusal of the documents which were flagged by the learned counsel for the Respondent, this Tribunal notes that the RA Bills No.21 to 24 were raised without relevant enclosures and thus cannot be deemed to be final invoices whereas the earlier invoices i.e. RA Bills No.1 to 20 even though abstract bills were accompanied by the relevant enclosures which were duly verified and certified. Therefore, this Tribunal is of the considered view that the RA Bills No.21 to 24 are not valid and regular. Accordingly, they cannot be considered as valid Invoices as envisaged under Section 8 and 9 of the IBC. This Tribunal additionally places reliance on the decision of the *Hon'ble NCLAT in SLB Welfare Association vs. M/s PSA IMPEX Pvt. Ltd.[Company Appeal (AT) (Insolvency) Nos.905 and 642 of 2022]* wherein the appellate authority observed that the invoices filed in support of Section 9 Application were proforma invoices and therefore dismissed Section 9 on the ground that the petition was filed on the basis of "proforma invoices" claimed to be prepared on one day. Similar decision was taken by this Bench in *CP (IB) No. 144/2022 in M/s Bhandari Construction and Developers Pvt. Ltd. v. M/s Furein Constructions Engineering Pvt. Ltd. vide order dt.07.12.2023.*
14. So far as the issue of limitation is concerned, it is relevant to mention the bills in question were raised by the Petitioner vide bills dated 05.09.2017, 16.12.2017,30.01.2018 and 12.10.2018.However, the present Petition was filed in 2021. Therefore, cause of action arise in the instant case is for more than three years and they are barred under Law even to recover them under Civil Law. Moreover, the Petitioner has not enclosed supporting bank statement to show how much payments they have received. It is also relevant to refer date of default, as recorded in Record of Default as per Form-D of the NeSL, wherein date of default stood as 08.01.2018. The instant Petition is not filed within period as prescribed under the provisions of Code after the issue of Demand Notice in question. Therefore, the instant Petition is hopelessly barred by laches and limitation and it is filed only with an attempt to

recover time barred alleged bills. The Corporate Debtor is admittedly solvent Company as rightly contended by the Corporate Debtor.

15. We have carefully read the judgements relied upon by the Petitioner in support of its case and found that the ratio laid down there would not be applicable to the facts and circumstances of the instant case.
16. For the aforesaid facts and circumstances of the case, and the taking of the settled position of law into consideration, on the issue, we are of the considered view that the Operational Creditor failed to make out any case to invoke Section 9 of the Code to initiate CIRP against Corporate Debtor. By invoking powers conferred on this Adjudicating Authority, under proviso to clause (ii) of Sub-section 5 of Section 9 of the Code, we hereby **dismiss C.P (IB) No.21/BB/2021. I.A.No.309 of 2021 and I.A. No.211 of 2023** also stand **disposed of** in terms of this order. No order as to costs.

-Sd/-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

-Sd/-

**(K.BISWAL)
MEMBER (JUDICIAL)**