

S.No.2

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
22-07-2024 AT 10:30 AM**

CP(IB) No. 133/9/HDB/2023
u/s. 9 of IBC, 2016

IN THE MATTER OF:

M/s. Elite Engineering &
Construction Private Limited

...Operational Creditor

AND

M/s. Trishala Infrastructure Private Limited

...Corporate Debtor

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

ORDER

Orders pronounced. In the result, **this company petition is rejected. No costs.**

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH-1**

CP (IB) No.133/9/HDB/2023

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

M/s. Elite Engineering & Construction (HYD) Private Limited

Having its registered office at 319, Veda's Prime House,
Jayabheri Enclave, Gachibowli, Hyderabad, Telangana-500 032.

...Operational Creditor

Versus

M/s. Trishala Infrastructure Private Limited

Having its Registered Office situated at 5-4-184/2/A,
T-19 Towers, Ranigunj, Secunderabad- 500 003, Telangana.

...Corporate Debtor

Date of Order: 22.07.2024

Coram:

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA
HON'BLE MEMBER (JUDICIAL)**

SHRI CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

Parties/Counsels present:

For Petitioner/Operational Creditor : Mr. V V S N Raju, Advocate along
with Ms. J.V.L.Bharati Advocate

For Respondent/Corporate Debtor : Mr. V.K.Sajith Advocate along with
Mr.V.Ravi Kumar Advocate

PER BENCH

ORDER

1. This is a Petition filed by ‘M/s. Elite Engineering & Constructions (Hyderabad) Pvt. Ltd. (hereinafter referred as ‘Operational Creditor’) under Section 9 of ‘The Insolvency and Bankruptcy Code, 2016’ (hereinafter referred as ‘IBC’) against ‘M/s. Trishala Infrastructure Private Limited’ (hereinafter referred as ‘Corporate Debtor’) seeking initiation of ‘Corporate Insolvency Resolution Process’ (CIRP) of the Corporate Debtor, alleging that the Corporate Debtor defaulted in payment of an amount of Rs.13,01,06,343/- (Rupees Thirteen Crores one lac Six Thousand Three Hundred Forty Three only) as on 31.01.2023.

2. The averments of the application of the operational creditor in brief:

- a. It is averred that the OC/Elite was given a work order dated 28.06.2013 by Corporate Debtor/Trishala for constructing Luxor Apartments for residential purposes on a piece of Land (Copy of the work order is attached on Page No. 1-17) and that the OC started construction as per the T&C of the Contract and also raised bills accordingly.
- b. It is averred that in the review meeting were held at the office of the Corporate Debtor/Trishala on 20.09.2016 all works were reviewed, pending works and bills were discussed and various emails were exchanged between the parties regarding the reconciliation of the accounts.
- c. It is further averred that the operational Creditor after several follow ups ever since between 2016-2022, with the corporate debtor for reconciliation and release of payments, the corporate debtor instead of settling the matter amicably brought non-existing

issues into the picture, and also issued demand notice in terms of Section 8 of the Insolvency and Bankruptcy Code. Pursuant thereto Operational Creditor vide reply dated 19.12.2022 showed his willingness to invoke Arbitration Clause in terms of the contract. However, as the Corporate Debtor has not shown interest to settle the matter, the Operational Creditor issued a demand notice, in form-3 dated 30.01.2023 for which there was no reply from the Corporate Debtor. Hence the present Application has been filed.

3. The Reply of the Corporate Debtor in brief:

- 3.1 The, Corporate Debtor denied the averments made by the operational creditor. as baseless, frivolous, and totally misconceived.
- 3.2 It is averred that the application is liable to be dismissed under Section 65 of the Insolvency and Bankruptcy Code, 2016 for wrongful and malicious initiation of the present proceedings as the fact that the corporate debtor has already moved a petition under Section 9 of IBC, 2016 and the same is pending before this Hon'ble Tribunal as CP.(IB). No. 89/9/HDB/2023 for adjudication.
- 3.3 It is averred that the Applicant has hidden the facts and circumstances that relates to the execution of the contract besides the Applicant had

committed breach of the contract terms and conditions, of the contract. It is averred that corporate debtor is a signature that holds "quality" and "perfection" and is one of the top real estate companies in Hyderabad and is known for its outstanding customer service and timely delivery of the projects they undertake. However, due to the negligent conduct of the applicant the project being stalled midway. It is averred that being an Infrastructure Developer/ Builder and bound by the contractual terms with the Home Buyers, the incompetence, lack of professionalism, and bad workmanship of the applicant has directly caused harm to the goodwill and reputation of the Corporate Debtor. It is stated that due to the breach of the terms and conditions of the work contract by the Applicant, the corporate debtor suffered a loss of Rs.6,49,82,932.00/- (Rupees Six Crores Forty-Nine Lakhs Eighty-Two Thousand and Nine Hundred and Thirty Two Only).

3.4 The Corporate Debtor further submits that the retention money from each RAB (Running Account Bill) shall be released on completion of each block and the release of the said amount is subject to issuance of the Completion Certificate. It is further contended that the Work

contract is very clear that the running account bills will be corporate debtor after due observation of the works done by the operational creditor. But in the present case the corporate debtor has received lots of complaints from the home buyers with respect to the seepage leak and other issues and a complaint was also given by the association to repair the same. When the corporate debtor sought an explanation from the applicant, in this regard the applicant used to avoid the same.

3.5 It is contended that the Corporate Debtor having vexed with the attitude of the applicant in demanding the amounts without completing the works and without giving any proper explanation had issued a Demand Notice under section 8 of the Insolvency and Bankruptcy Code, 2016 in Form-3 demanding payment of the amount mentioned therein, which the same has received by the applicant. However, as the Applicant failed to reply to the said demand notice within the prescribed time mentioned in the notice i.e., 10 days the corporate debtor herein has moved an application under section 9 of I&B Code, 2016, for initiation of Corporate Insolvency Resolution Process vide being CP.(IB). No.

89/9/HDB/2023 and the same is being adjudicated by this Tribunal. Thus, submitting, the respondent contends that the present proceedings are not maintainable under the law and hence the petition is liable to be dismissed.

4. The Operational creditor alone filed **written submissions** reiterating the oral contentions.
5. At the outset we wish to state that this Company Petition under Sec 9 of IBC, 2016, has been filed without mentioning the “date of default” in Part IV of Form 5 (Application operational creditor to initiate bankruptcy under the code). However, in the demand notice issued on 30.01.2022 to respondent/corporate debtor in Form 3 the date of default was shown as 09.02.2021.
 - i). The Registry during the scrutiny of the petition, raised certain objections including the objection as to non-mention of the “Date of default” in the petition. Pursuant thereto Learned Council Ms. JVL Bharati, on 30.03.2023 filed compliance Memo stating as under:

Point 2: **“Date of default 09.02.2021”**

Mr G Mohan, Authorised representative of operational creditor, also sworn in his affidavit at point no 6, that date of default is “09.02. 2021” which is reproduced hereunder.

Point 6: **“Date of default is 09.02.2021 and continuous.”**

ii). On 12.04.2023, the Learned counsel for the operational creditor filed one more memorandum to remove objections raised by Registry, where in it is re-affirmed that date of default as 09.02.2021.

The relevant extract is reproduced as under:

“Reconciliation of accounts was done as per instructions of corporate debtor and the reconciliation statement was submitted on 09.02.2021(Mail sent by the applicant to corporate debtor with reconciliation statement enclosed on **Page no.280 and reply dt. 10.02.2021 to the mail is also attached on the same page. Letter sent to the corporate debtor dt.13.02.2021 by the Applicant enclosed on page No.273**) Since we supplied a copy of the reconciliation of accounts to Corporate debtor on **09.02.2021**, we have considered this as the date of default.

iii). However, on 27.04.2023 the learned counsel filled another memo on the same issue **changing her stand as regards the date of default by mentioning the same as 12.12.2022**. The relevant part of the explanation given by learned counsel is also reproduced as under:

“Applicant Company sent a mail dt. 2.12.2022 and CD sent a reply to this on 3.12.2022 (**page no.276**) and the CD company requested us to see their Managing director for clarifications and balances, mail dt. 10.12.2022 enclosed on **page no. 328. Instead of reconciliation as per mail, CD issued a demand notice dt. 12.12.2022**.

Therefore, the last communication from CD is 12.12.2022 and hence the date of default is 12.12.2022. Kindly the same may be taken as the date of default. Therefore, I request you to kindly look into the matter and allot CP no. at the earliest”.

iv). Yet one more memo dated 04.05.2023, has been filed enclosing the Petition (part) filed under Section 9 IBC, CP No.89/9HDB/2023, by the corporate debtor herein, against the operational creditor and pointed out that in that said Application also the date of default is not mentioned, and *once again prayed that date of demand notice issued by corporate debtor to operational creditor is 12.12.2022 and the same may be taken as the “date of default”*.

v). Having been dissatisfied with the reasons given, the Registry on 09.05.2023 submitted its note to the Bench seeking necessary directions. The Bench took up the matter on 31.05.2023, and directed the Registry to Register the Application if the Company Petition is otherwise in order, however by leaving the objection as to the date of default and application of section 10 A to the present application to be decided later by the Tribunal.

6. Here it is pertinent to note that CP (IB)No.89/9/HDB/2023 which the learned counsel for operational creditor referred in the memorandum dated 04.05.2023 has already been disposed of 12.06.2024, by this Tribunal.

7. Therefore, in the light of the above observation it is imperative to decide at the threshold, what is the *date of default* to be reckoned for the purpose of the present company petition and whether the said date of default, attracts the bar in terms of section 10A of IB Code? And if so, whether the present application is maintainable? Hence the following point is framed for our consideration.

POINT:

Whether 09.02.2021 or 12.12.2022, which of these dates be treated as the “*date of default*” for the purpose of the present petition? and whether the date of default so decided attracts the bar in terms of section 10A of IB Code 2016? If so, whether the present company petition is maintainable?

8. We have heard learned counsel Mr.V.V.S.N.Raju, along with Learned Counsel on record Ms.J.V.L.Bharathi for operational creditor and Learned Counsel Mr. Sajit along with Mr.Ravi kumar for the corporate debtor and perused the record.

POINT:

Whether 09.02.2021 or 12.12.2022, which of these dates be treated as the “date of default” for the purpose of the present petition? and whether the date of default so decided attracts the bar in terms of section 10A of IB Code 2016? If so, whether the present company petition is maintainable?

The Submissions:

9. Mr.V.V.S.N.Raju, Ld Counsel for the operational creditor while reiterating the same factual contentions as raised in the present Company petition, as well as in the counter filed in CP No.89/9/HDB/2023, firmly contended that, in view of the explanation as given vide memo dated 27.04.2023 and 04.05.2023, the date of default is 12.12.2022, and not 09.02.2021, as such the present case does not attract the bar in terms of section 10 A of IBC.
10. Mr. Sajith, Ld. Counsel for the corporate debtor while refuting the submission of the Ld. Counsel for the Petitioner, contended that the date of default mentioned as 09.02.2021 in the demand notice, which is also reiterated vide memos dated 30/03/2023 and 12/04/2023 and also affirmed through the sworn affidavits of the authorized person of the operational creditor, cannot be allowed to be changed as per the *whims and fancies* of the operational creditor. Ld. Counsel further contends that **09.02.2021** being the date of default, the case on hand attracts, the bar in terms of Section 10A, IBC, as such the Company Petition is not maintainable.

Our Analysis & Findings:

11. At the outset we wish to state that, mere omission to mention the date of default in the company petition filed either under section 7 or 9 of I B Code, is not fatal, as the petitioner can be allowed to state the same though acceptable piece of material or the Tribunal itself can ascertain the same from the last invoice or other acceptable material available before the Tribunal. Nevertheless, it is essential to ensure that the correct date of default is properly mentioned both in the demand notice issued under Section 8 of IB Code and also in the application filed under the Section 9 or 7 of the IBC.
12. In so far as the the case on hand is concerned, the petitioner after having stated the date of default in the demand notice as 09.02.2021, besides reiterated the same by way of a memo, and also through a sworn affidavit of the authorised person of the petitioner, strangely by way of yet another Memo sought to contend that the date of default as 12.12.2022 and not 09.02.2021.
13. Before we proceed to decide the point, we feel it proper to refer to Section 3(12) of IBC, 2016, which is reproduced herein:

Section 3(12) of IBC, 2016: “**default**” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1[paid] by the debtor or the corporate debtor, as the case may be;”

On a bare perusal of the above definition of default, it is explicitly clear that the date on which the “whole debt” or “any part” or “any instalment of the amount of debt” has *become due and payable* and is not paid by the corporate debtor, becomes the “date of default”. Therefore, the date of default is a “specific date” on which date the amount which became due and payable is not paid by the debtor.

14. In the case on hand, the operational creditor even though had filed the present company petition without *mentioning the date of default*, during the stage of scrutiny of the petition learned counsel for the operational creditor vide memos dated 30/03/2023 and 12/04/2023, besides through the sworn affidavit of the authorized person of the operational creditor *firmly asserted* the date of default as 09.02.2021. In support of this assertion, Ld.Counsel for the petitioner has stated that, “as the operational creditor submitted “final reconciliation of accounts” to corporate debtor on 09.02.2021 and the corporate debtor failed to clear the said dues even after crystallization of amount of

debt by virtue of the reconciliation statement, supra, 09.02.2021 shall be the date of default”. In fact, the demand notice dated 30.01.2022 (Form 3) issued by operational creditor to respondent / corporate debtor also firmly states the date of default as 09.02.2021.

15. However, perhaps being apprehensive of the fact, that the said date of default, i.e. 09.02.2021 may attract the bar under Section 10A IBC, Ld. Counsel for the operational creditor filed two more memos dated 27.04.2023 and 04.05.2023, contending, inter-alia, that since the corporate debtor gave a notice on 12.12.2022 to the operational creditor, 12.12.2022 shall be the date of default, hence the Tribunal may consider 12.12.2022 as the date of default instead 09.02.2021.
16. We have already observed that, in terms of the definition under Section 3(12) of IBC, 2016 it is explicitly clear that the date on which the “whole debt” or “any part” or “any instalment of the amount of debt” has *become due and payable* and is not paid by the corporate debtor becomes the “date of default” and that the date of default has to be a “specific date” on which date the amount becomes due and payable and is not paid by the debtor. Here, we wish to reiterate to the submission of the Ld.Counsel for the operational creditor, that

“as the operational creditor submitted “final reconciliation of accounts” to corporate debtor on 09.02.2021 and the corporate debtor failed to clear the said dues even after crystallization of amount of debt by virtue of the reconciliation statement, supra, 09.02.2021 shall be the date of default”.

17. So much so, we are unable to comprehend how the *subsequent* plea of the Ld. Counsel for the operational creditor to consider the date of default as 12.12.2022 instead 09.02.2021 is sustainable, when the said plea is premised, the corporate debtor gave a notice on 12.12.2022 to the operational creditor, 12.12.2022 shall be the date of default, hence the Tribunal may consider 12.12.2022 as the date of default instead 09.02.2021.
18. Needless to say, herein that demand notice issued in terms of section 8 of IB Code, is an important piece documents on the premise of which the whole case of the Petitioner in a petition filed under section 9 of IB Code rests. More over as can be seen from *sub section* 1 of Section 9 of IBC, only after expiry of the period of 10 days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not

receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

19. Hon'ble National Company Law Appellate Tribunal ("NCLAT") Delhi Bench in the matter of *Kodeboyina Srinivas Krishna vs PVM Innvensys Pvt. Ltd. & Anr.* [\(2020\) ibclaw.in 92 NCLAT](#) on 25.09.2020 held that "***the Demand Notice in Form 3 also requires the date of default to be explicitly mentioned in the notice so that on the basis of documents the debt amount and the date of default could be ascertained***".
20. Here, the demand notice dated 30.01.2022 categorically states that the date of default as 09.02.2021. So much so it is not proper for the counsel on record to change the date of default by filing memo more especially after it has come to light that date of default mentioned in the demand notice will fall within the period mentioned in Section 10A of IBC.
21. Considering the above facts and keeping in mind that date of default shall be a certain date and cannot be changed as per the choice of the

parties, we hold that the date of default in this case on hand as 09.02.202. Therefore, we reject request of operational creditor to treat the date of default as 12.12.2022 instead 09.02.2021.

22. There is yet another major flaw, if can say so, in mentioning/arriving at the date of default by the operational creditor. The contract agreement dated 26.06.2013, Clause 9 deals with the certification of RA bills and payment of the same is as below:

A. RA Bill Certification/Payment

The contractor is required to submit Fortnightly/Monthly running bills. The payments of bills will be made as under:

1. 75% of the total bill within 7 days from the date of its submission after due deduction of Mobilization Advance retention Money and other advances as agreed.
2. The remaining (25%) shall be paid after complete verification of bill within 15 days from the date of submission of bills.

Please refer Annexure "E1" for the detailed Payment Break up.

B. Advance Payment against RA Bilis.

1. Material Delivery bills to be paid submitted once in 15 Days and the payment shall be made within 5 days from the date of receipt of Bills.
2. Sub/Labour Contractor Bill to be submitted on fortnightly and payment shall be made Within 5 days from the date of receipt of Bills.

23. The Applicant also filed the statement of RA Bills submitted by the corporate debtor for the period commencing from 05.07.2013 till 18.12.2017. Thus, 18.12.2017 being a last RA bill submitted, which is for a sum of Rs.2,25,000/-, is paid within 15 days in terms of

Clause 9 of the contract agreement. It is not the case of the operational creditor that the said sum is paid in terms of Clause 9 of contract agreement has not been certified. So much so the date of default in this case shall fall on 31.12.2017 but strangely in the written submissions filed on behalf of the petitioner, it is contended that, last invoice for sum of Rs.4,92,87,257/- was dated 20.09.2018, and in the light of Clause 9 of the contract agreement the amount became payable within 15 days from 20.09.2018 i.e by 05.10.2018. Thus, in all there are three dates of default merged in this case namely 18.12.2017, 31.12.2017 and 05.10.2018 as per statement of total work done and balance payable amount details up to 31.12.2017.

24. Having thus stated it is to be seen whether the said date of default falls within the period mentioned in Section 10 A of IBC, 2016, which is as follows:

"10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period. Explanation.—For the removal of doubts, it is hereby clarified that the provisions

of this section shall not apply to any default committed under the said sections before 25th March, 2020."

25. We find that this date of default taken on record is falling within the period notified under Section 10A of IBC, 2016. Section 10A of IBC, 2016 clearly states that if any default occurs during the period from 25.03.2020 to 24.03.2021, no application ever shall be filed under Section 7,9 and 10 of IBC, 2016. In view of this shield under Section 10A of IBC, 2016 available to the corporate debtor, the Section 9 Application under IBC,2016 for default occurred on 09.02.2021 which falls within 10A period, the present Petition is not maintainable.
26. The point is accordingly decided.
27. Therefore, in the light of our discussion as above, the present petition stands rejected. However, without costs.

SD
Charan Singh
Member Technical

SD
Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

Pavani