

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER
SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 319/9/JPR/2019

(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)

IN THE MATTER OF:

D.B. CORP LIMITED

...Operational Creditor/Applicant

Versus

V.N. BUILDTECH PRIVATE LIMITED

...Corporate Debtor/Respondent

MEMO OF PARTIES

D.B. CORP LIMITED

CIN: L22210GJ1995PLC047208

R/o 280, Sarkhej Gandhinagar Highway,

Near YMCA Club Markarba,

Ahmedabad, Gujrat- 380051

...Applicant

VERSUS

V.N. BUILDTECH PRIVATE LIMITED

CIN: U70101RJ2013PTC042109

R/o Office No. 20, 21, 22, 2nd Floor Silver Square,

C-18 Bhagwan Das Road, C-Scheme,

Jaipur, Rajasthan- 302001

...Respondent

**SECRETARY, MINISTRY OF CORPORATE AFFAIRS
UNION OF INDIA, NEW DELHI**

E-mail: secy.mca@nic.in

Contact No.: 011-23382324

...Respondent

For the Applicant : Sandeep Jain, PCS
For the Respondent : Rakesh Kakkar, Adv.

Order Pronounced On: 05.12.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present application has been filed by M/s D. B. Corp Limited through its authorised signatory Mr. Anil Kumar Pareek ('Operational Creditor'/ 'Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against V. N. Buildtech Private Limited ('Corporate Debtor'/ 'Respondent') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Applicant, M/s D. B. Corp Limited, is a public limited company engaged in publishing various newspapers, periodicals, and other literary and print publications. The registered office is at 280, Sarkhej Gandhinagar Highway, Near YMCA Club Markarba, Ahemdabad, Gujarat. The alleged default by the Corporate Debtor for the non-payment of operational dues amounts to Rs. 82,25,878/- (Rupees Eighty-Two Lakhs Twenty-Five

Thousand Eight Hundred and Seventy-Eight Only) along with interest payable @ 18% per annum.

3. The Corporate Debtor, M/s V. N. Buildtech Private Limited, is a private company incorporated under the Companies Act, 1956, on 15.04.2013, having CIN: U70101RJ2013PTC042109. The Respondent has its registered office at – Office No. 20-22, II Floor, Sliver Square, C – 18, Bhagwan Das Road, C–Scheme, Jaipur – 302001; and has an Authorised Share Capital of Rs. 1,00,00,000/- (Rupees One Crore Only) and Paid-Up Share Capital of Rs. 50,00,000/- (Rupees Fifty Lakhs Only).
4. The details of the transactions leading to the filing of this application averred by the Applicant *vide* Diary No. 2862/2019 dated 05.12.2019 are as follows:
 - a. The Applicant and Respondent entered into an Agreement ('Agreement') dated 25.10.2013, wherein the Corporate Debtor selected Operational Creditor for advertising its Project: Exclusive – 444, Khasra No. 703/2, 705/1, 705/2, 706, Shri Krishanpura Village, Sector – 37, Jagatpura, Jaipur, Rajasthan – 302037 ('units') in DBCL Media along with the right of participation as a presenter sponsor in the Abhiviyakti Garba programme, during the same year. It is stated in the Agreement that time is of the essence in the performance of the parties' respective obligations. A copy of the Agreement is attached as Annexure – 2 of the Application.

- b. As per the Agreement, the Corporate Debtor decided to place advertisements of its units with the Operational Creditor for a consideration valuing at Rs. 1,01,83,090/- (Rupees One Crore One Lakh Eighty-Three Thousand and Ninety Only). This consideration from the side of the Respondent was divided into two parts comprising a cash payment of Rs. Rs. 19,91,240/- (Rupees Nineteen Lakhs Ninety-One Thousand Two Hundred and Forty Only) and barter payment of Rs. 81,91,850/- (Rupees Eighty-One Lakh Ninety-One Thousand Eight Hundred and Fifty Only).
- c. This barter payment was to be discharged by handing over possession of two flats ('flats') in the said units; the particulars of the flats are in Schedule 5 of the Agreement. In addition, it was agreed between the parties that the Respondent would make a cash payment within sixty days of publication of the relative advertisement. The Corporate Debtor duly discharged this by issuing four cheques. The details of the same are as follows:

S. No.	Date	Amount (in INR)
1.	26.09.2013	Rs. 4,90,000/-
2.	22.01.2014	Rs. 5,05,620/-
3.	15.03.2014	Rs. 5,05,620/-
4.	20.04.2014	Rs. 4,90,000/-

Total	Rs. 19,91,240/-
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- d. The Corporate Debtor accepted to give possession of the flats within thirty-six months from the date of execution of the Agreement, excluding a grace period of a further three months (*i.e.*, 31.12.2016). Additionally, the Respondent undertook to register the charge in favour of the Applicant over the property after raising the first bill. Thus, the Applicant has a charge/ lien over the units to the extent of its dues till satisfaction.
- e. It raised a total of 11 invoices ('Invoices') under the barter payment aggregating to Rs. 82,25,878/- (Rupees Eighty-Two Lakhs Twenty-Five Thousand Eight Hundred and Seventy- Eight Only) inclusive of Tax Deducted at Source ('TDS') from 06.10.2013 to 30.03.2014 remained unpaid. A copy of the Invoices is annexed as Annexure – 4B of the Application.
- f. As per the terms of the Invoice, it was agreed that payment is to be made within the stipulated time from the date of the invoice issued to the Respondent failing which an interest @18% per annum would be charged. Thus, the Applicant is claiming interest on the Invoices amounting to Rs. 39,47,069/- (Rupees Thirty-Nine Lakhs Forty-Seven Thousand and Sixty-Nine Only). A copy of the Calculation Sheet is attached as Annexure – 4C of the application.

- g. Clause 6.6 of the Agreement states dispute resolution between the parties through the process of Arbitration. It is mentioned in the aforementioned Clause that the parties to the Agreement shall endeavour to resolve the dispute amicably. Upon the failure of the same, the aggrieved party can invoke the clause by giving the other party seven days' notice in writing. *It is seen that the Applicant has referred the matter to Arbitration. The arbitrator passed an ex-parte award in favour of the Applicant ('Arbitral Award').* Copy of the Arbitral Award dated 25.05.2019 is annexed as Annexure – 3 of the Application.
- h. The aforementioned details, as reflected in Part IV of the Application, are as follows:

Part IV

Particulars of Operational Debt

1.	Total Amount of Debt, Details of Transactions on account of which debt fell due, and the Date from which such debt fell due.	Total amount of debt: Rs. 1,22,02,947/- (Rupees One Crore Twenty-Two Lakhs Two Thousand Nine Hundred and Forty-Seven Only)
2.	Amount claimed to be in default and the date on which the default occurred	Amount Claimed to be in default: Rs. 1,22,02,947/-# Total Principal Amount: Rs. 82,25,878/- Total Interest Due: Rs. 39,47,069/-* Cost of Arbitration: Rs. 30,000/- Date from which Debt fell Due:

		31.12.2016
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* *Calculated the Interest Amount @18% p.a. from the period of 31.12.2016 to 31.08.2019.*

Computation of Amount to be claimed from Corporate Debtor is annexed at Annexure – 4C of the application.

5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 257/2020 dated 04.02.2020, stating as follows:

- a. The Respondent contended that the Applicant/Operational Creditor has not approached with clean hands and suppressed various material facts. There exists a pre-existence of the dispute between the parties as the Applicant failed to fulfil their part of duties, including failure to provide promotional advertisements and notice under Section 8 of the Code. Thus, the present application is liable to be dismissed.
- b. The barter part of the Agreement is not legally valid and cannot be considered evidence. The Agreement is neither a registered agreement nor any stamp duty has been paid. Further, the Corporate Debtor got the registration of the units on 30.07.2018. Therefore, Rajasthan Real Estate Regulatory Authority ('RERA') or Consumer Dispute Redressal Forum has jurisdiction to entertain and decide the present matter. A copy of the Registration Certificate dated 30.07.2018 is annexed as Annexure – B of the Reply.

- c. Moreover, the Operational Creditor has already exercised its right(s) under the dispute resolution clause of the Agreement and has already been decided by the Arbitrator. Therefore, any further adjudication of the same controversy between the parties is hit by the principles of *Res Judicata*. Additionally, it has challenged the *ex-parte* Arbitral Award on the grounds of unilateral appointment of the sole arbitrator.
6. The Applicant filed its rejoinder *vide* Diary No. 564/2020 dated 11.06.2020 and has submitted that:
- a. The Agreement is validly executed between the parties with requisite stamp duty. As per the provisions of the Rajasthan Stamp Act 1998, there was no requirement to register an agreement relating to the advertisement for the promotion of a product, programme, or event. A copy of the Registration & Stamps Department Circular, Government of Rajasthan, is annexure as Annexure – 1 of the Rejoinder.
 - b. The Respondent's confirmation and acknowledgement of the debt and transaction dated 08.04.2014 and 14.04.2017 shows that there were operational dues under Section 5 (21) of the Code. Consequently, the Applicant falls under the definition of Section 5 (20) of the Code. The copy of the Letters dated 08.04.2014 and 14.04.2017 is annexed as Annexure – 2 of the Rejoinder.
 - c. The appointment of the sole arbitrator and notices in this regard was duly served *via* speed post *vide* Notice dated 25.08.2018 ('Arbitration

Notice’). A copy of the Arbitration Notice is annexed as Annexure – 3 of the Rejoinder. Further, the sole arbitrator has also caused a public announcement (‘Public Notice’) of his appointment through Financial Express dated 10.02.2019, and Dainik Bhaskar dated 16.02.2019. A copy of the Public Notice is annexed as Annexure – 4 of the Rejoinder.

d. It has also attached an Email dated 15.10.2019 from Mr. Anshuk Agarwal, Accountant of the Respondent, as proof of duly receiving the Demand Notice. A copy of the email dated 15.10.2019 is annexed as Annexure – 5 of the Rejoinder.

7. The Respondent has further filed additional documents on record (‘Additional Affidavit’) *vide* Diary No. 1600/2022 dated 25.05.2022 stating the following:

a. The Arbitral Award was challenged under Section 34 of the Arbitration and Conciliation Act, 1996, before the Commercial Court – III, Jaipur, on 23.09.2019 (‘Arbitral Application’). A copy of the Arbitral Application seeking setting aside of the Arbitral Award is annexed as Annexure A – 2 of the Additional Affidavit.

b. The Commercial Court – III, Jaipur *vide* Order dated 04.05.2022 (‘Arbitral Order’) has set aside the Arbitral Award on the ground that the appointment of the Arbitrator by the Applicant has an adverse impact on the decision of the dispute as such appointment carries the

presumption of interest/ advantage in favour of the Applicant. A copy of the Arbitral Order is annexed as Annexure A – 3 of the Additional Affidavit.

- c. Subsequently, it has also filed a Caveat Petition before the Hon'ble High Court of Rajasthan, Jaipur Bench praying that no order should be passed where any appeal arises out of the Arbitral Order under Section 37 of the Arbitration and Conciliation Act, 1996 without giving any opportunity of hearing. A copy of the Caveat Petition and Postal Receipts is annexed as Annexure A – 5 of the Additional Affidavit.
 - d. Furthermore, the RERA revised the timeline as envisaged in the Agreement. Hence, the application is filed prematurely. *It is seen that the Corporate Debtor registered its units with the RERA on 30.07.2018 and received approval for an extension for its units on 03.09.2020. This project/ unit was further revised on 21.04.2022 giving further extension till 30.09.2023.* A copy of the Certificate for extension of Registration of the project/ unit is annexed as Annexure A – 6 of the Additional Affidavit.
8. The Operational Creditor filed its Reply to Additional Affidavit *vide* Diary No. 2943/2022 dated 06.10.2022 asserting that the Arbitral Order was challenged based on the Arbitral Award passed the arbitrator and does not dispute the debt owed to the Applicant. In addition, the Arbitral

Application was filed on 23.09.2019, and the Applicant filed its reply to the Arbitral Application on 19.11.2019, during which he was unaware of the pending proceedings before the Commercial Court – III, Jaipur.

9. We have heard the Learned Counsels for the parties and perused the averments made in the application, reply, rejoinder, written submissions and the documents enclosed with the application.
10. The Hon'ble Supreme Court, in the case of K. Kishan v. Vijay Nirman Company Private Limited, Civil Appeal No. 21824 of 2017, has stated that *'the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.'* The Hon'ble Apex Court further states that *'Section 238 of the Code would apply in case there is an inconsistency between the Code and the Arbitration Act ... the Award passed under the Arbitration Act together with the steps taken for its challenge would only make it clear that the operational debt, in the present case, happens to be a disputed one.'* This judgment has been further relied on by the Hon'ble Supreme Court of India in the case of M/s Jai Balaji Industries v. D. K. Mohanty & Anr., Civil Appeal No. 5899 of 2021.
11. In the instant case, the Applicant sent a Demand Notice *via* registered post and e-mail on 03.10.2019 and 04.10.2019, respectively, to the Respondent

in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, wherein the aggregate amount of Rs. 1,22,02,947/- has been claimed. However, the Arbitral Application was filed on 23.09.2019, challenging the *ex-parte* Arbitral Award.

12. We have closely gone through the facts of the case. As per Section 8(2)(a) of the Code, '*existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices in relation to such dispute*' can interdict Section 9 proceedings under the Code. The admission of arbitration application under Section 34 of the Arbitration and Conciliation Act, 1996, before the Commercial Court – III, Jaipur, challenging the adjudication of the same amount, which is the pivot for the present application, is an indicator of prior contentious issues. *It is seen that the Corporate Debtor has placed heavy reliance on the Arbitral Award, which was set aside by the Commercial Court – III in an application under Section 34 of Arbitration and Conciliation Act, 1996 preferred by the Respondent/ Corporate Debtor. Consequently, the same cannot be considered an indicator of the operational debt being due and defaulted in the current set of circumstances of the case.*
13. The action of the Operational Creditor reflects recovery as the motive for filing the instant application as a dual chance to recover dues. The pendency of an application under Section 34 of the Arbitration and Conciliation Act 1996 falls under Section 5 (6) of the Code. The pre-

existence of a pending dispute is an undeniable fact, whatever may be the outcome of the *lis* between parties. Therefore, there is a pre-existing dispute whose merits need not be examined by this Adjudicating Authority, and the claim of the Operational Debt cannot be raised before this Adjudicating Authority for CIRP of the Respondent Company.

14. Further, '*Ignorantia Juris Non Excusat*' – a person unaware of the law may not escape liability/ consequences for violating that law merely by being unaware of its content. The Operational Creditor has acknowledged being ignorant of the Arbitral Application's pendency while issuing the Demand Notice under Section 8 of the Code. An application under Section 9 is only maintainable when the contention of the defendant is rejected in its entirety in the civil matter and goes past the appellate stage; it can be presumed that there is no cause of dispute between the parties.
15. Furthermore, the Hon'ble Supreme Court of India, in the matter of '*Mobilox Innovative Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353*', held as follows:

“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the

“existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties.

Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster.

However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

16. In view of the foregoing, *inter-alia* including pending civil dispute and irregular demand notice, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC.
17. Hence, the Application is Dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016 and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority. Any pending Interim Applications with this Application are disposed off accordingly.

18. Let the copy of the Order be served to the parties and IBBI.

**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**