

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 489/MB/2018

[Under Section 9 of the 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. SYNERGY PROPERTY DEVELOPMENT SERVICES PRIVATE
LIMITED**

[CIN: U74140MH2003PTC340546]

Registered Office: 1st Floor, Pine Valley
Embassy Golf Links Business Park
Off Intermediate Ring Road
Domlur, Bengaluru- 560071, Karnataka.

...Operational Creditor

V/s

PATEL ENGINEERING LIMITED

[CIN: L99999MH1949PLC007039]

Registered Office: 2nd Floor, Patel Estate
S.V. Road, Jogeshwari (West)
Mumbai -400102, Maharashtra.

...Corporate Debtor

Pronounced: 07 .02.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Operational Creditor: Adv. Pranav Shah a/w Akshay Petkar i/b Ameya Malkan & Co

Corporate Debtor: Adv. Rohit Gupta a/w Adv. Kunal Mehta i/b Crawford Bayley & Co

ORDER**[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]****1. Background**

1.1. This Company Petition bearing C.P. (IB) No. 489/MB//2018 (Application) was filed on 22.03.2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (Rules) by M/s. Synergy Property Development Private Limited, the Operational Creditor (OC), through Mr. C.M. Ramkumar, Head of Quality Control of the OC, authorised *vide* Board Resolution dated 05.01.2018, for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Patel Engineering Limited, the Corporate Debtor (CD).

1.2. The total amount of operational debt claimed by the OC is Rs. 1,15,77,256/- including the principal amount in default of Rs. 68,70,178/- and interest at the rate of 18% per annum, which is based on the unpaid invoices issued by the OC to the CD during the period 2013-2014 for the services rendered to it by the OC.

1.3. No specific date of default is mentioned in Part IV of the Application.

2. Contentions of OC

2.1. The OC submits that it is a private company and is engaged in the business of Project Management and Consultancy Services and the CD is carrying on the business of infrastructure and construction services. The OC provided its services as Project Management and Construction Consultant (Consultant) to the CD for the latter's project called "Construction of Patel Corporate Office-Mumbai" (Project).

2.2. The OC submits that, on 01.02.2011, the OC and the CD entered into an agreement wherein the OC was appointed as the Consultant. It is further submitted that the Project was to be completed within 32 months from the date of signing of the agreement but due to CD's conduct over delay in handing over amenity space, etc., the Project could not be completed within the stipulated time.

2.3. The OC submits that the agreement clearly stipulated the terms of payment to be made by the CD to the OC which was required to be done within 15 days from the date of receiving the invoices and the OC raised invoices upon execution of the work in a timely manner. However, the CD breached the contractual terms by failing to make payment against certain invoices raised beyond February 2013 as shown below:

SL No	INVOICE NO	INVOICE DATE	INVOICE VALUE
1.	PRI-26	01.03.2013	Rs. 7,76,632/-
2.	PRI-27	31.03.2013	Rs. 7,76,632/-
3.	PRI-28	05.03.2013	Rs. 35,82,600/-
4.	PRI-29	28.07.2013	Rs. 11,25,960/-
5.	PRI-30	01.09.2013	Rs. 2,25,192/-

2.4. The OC further submits that the Project could not be completed within the stipulated time on account of reasons attributable to the CD such as delay in handing over amenity space, delay in providing drawings and finalisation of design, non-payment to vendors, etc.

2.5. The OC also submits that it had sent several emails annexed to the Application as reminders to the CD for making payments towards the raised invoices but the CD did not make payments.

2.6. In view of the above, the OC issued a demand notice under Section 8 of the IBC on 17.01.2017 to the CD. The CD sent its reply dated 08.02.2017 to the demand notice, wherein the CD cited pre-existing dispute over non-performance of the conditions of the agreement. The OC further submits that pursuant to the demand notice dated 17.01.2017, both the parties tried to resolve the dispute through mediation but the same has been a non-starter due to lack of co-operation from the CD.

2.7. The Ld. Counsel for the OC submits that a certificate dated 03.03.2018 from Axis Bank has been produced showing confirmation of receipts from the CD in the OC's account, which shows that the last date of payment made by the CD was 08.01.2013.

2.8. The OC further submits that it has filed Affidavit dated 08.03.2018 under Section 9(3)(b) of the IBC to the effect that the OC has not received any notice or letter regarding any dispute of unpaid operational debt or dispute over any invoices from the CD.

3. Contentions of CD

3.1. The CD, in its reply dated 18.12.2018, submits that the OC's Board Resolution for authorising Mr. C.M. Ramkumar for filing this Application is defective since Resolution was passed on 09.03.2018 while the OC's Petition was verified on 08.03.2018.

3.2. The CD submits that the OC's claims are barred by limitation and are not legally enforceable as the purported invoices were raised between March 2013 to

September 2013, while this Application is filed on 22.03. 2018, which is beyond the limitation period of three years.

3.3. The CD further submits that the OC had suppressed material facts of the matter such as winding up notice sent by the OC dated 19.12.2016 and further, it had invoked Clause 44 of the agreement which refers to arbitration. In its reply dated 19.01.2017 to the OC's winding up notice, the CD refers to pre-existing dispute over poor quality of work and raising of invoices without supporting documents to justify the work undertaken.

3.4. The CD further submits that the dispute between the parties was supposed to be resolved through Mediation and Arbitration as per Clause 43 of the agreement but the OC deliberately filed the present Application to extort money from the CD despite the fact that the CD, in good faith, had already made part payment of Rs. 35,00,000/- (Thirty-Five Lakhs Rupees) through Cheques bearing Nos. 376542 and 168330 for amount of Rs. 10,00,000/- and Rs. 25,00,000/- dated 05.07.2013 and 06.12.2013 respectively to the OC. In fact, the OC admitted to existence of dispute, according to the CD.

4. Rejoinder of OC

4.1. In its rejoinder dated 16.04.2019, the OC submitted that the authorisation in favour of Mr. C.M. Ramkumar is not defective and relied upon the OC's Board Resolution dated 05.01.2018 for the same.

4.2. The OC further submits that recovery of outstanding debts based on unpaid invoices was not barred by limitation since the OC had issued a winding up notice dated 19.12.2016, for the purpose of invoking arbitration under Clause 44 of the agreement which arrested the limitation under Section 21 of the Arbitration and

Conciliation Act, 1996. Also, at the time of issuing the notice, the recovery of such debt was not time barred. Since the OC's right to file a suit or arbitration proceedings was not barred by the limitation, the present Application is maintainable as held by the Hon'ble Apex Court in *B.K. Educational Services Pvt. Ltd. V/s. Parag Gupta & Associates*, [2018 SCC Online SC 1921]. The OC further submits that at the time of issuing notice dated 19.12.2016 for initiating arbitration, there was no pending dispute or arbitration. Moreover, the OC submits that insolvency proceedings fall outside the purview of arbitration as held by the Hon'ble Supreme Court in *Booz Allen and Hamilton INC v SBI Home Finance Ltd. & Ors.*, [AIR 2011 SC 2507]. In fact, the CD failed to give consent for arbitration or mediation to settle dispute between the parties. Hence there are no disputes within the meaning of Section 5(6) of the IBC.

4.3. The Ld. Counsel for the OC argued that the CD raised moonshine defence over poor quality of work and non-completion of the aforesaid project because the CD raised issues over the invoices for the first time in the CD's reply dated 08.02.2017 to OC's demand notice. In fact, issuing notice, for initiation of arbitration cannot be construed as a dispute.

5. Analysis and Findings

5.1. We have perused all the documents and heard both the Ld. Counsel for the OC and CD in detail. The Application filed by the OC does not explicitly specify the date of default. It is neither pleaded in any of the documents attached with the Application and rejoinder nor is it ascertainable from the reply filed by the CD. The agreement between the OC and CD for the Project is dated 01.02.2011. The invoices which form the basis of the claim of the OC are all dated from 01.03.2013 to 01.09.2014, while

the Application was filed on 22.03.2018. The last payment is seen to have been made by the CD to the OC on 20.12.2013 as per the summary of invoices produced by the OC along with the demand notice dated 17.01.2017. Moreover, the statement produced by the OC from Axis Bank shows that the last payment of Rs. 25,00,000/- was made by the CD on 20.12.2013. There is no other material to indicate any acknowledgment of debt by the CD thereafter. Hence, we hold that the Application is barred by limitation.

5.2. Having found that the Application is filed beyond the limitation period of three years from the date of default, and is not maintainable for adjudication by us under Section 238A read with Article 137 of the Limitation Act, 1963, we do not propose to delve into any other contentions or rival contention of the parties. Hence, the judgments relied upon by the OC also have no relevance in the present Application.

ORDER

This Application bearing C.P. (IB) No. 489/MB/2018 under Section 9 of the IBC, filed by M/s. Synergy Property Development Private Limited, the OC, for initiating CIRP in respect Patel Engineering Limited, the CD is **Rejected**.

We make it clear that any observations made in this Order shall not be construed as expressing opinion on merits. The OC's rights available as per law before any judicial/quasi-judicial forum shall not be prejudiced on the grounds of rejection of the present Application. No orders as to costs. Ordered accordingly.

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)**

//Tanmay Jain//