SL No.3

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Special Bench (PHYSICAL HEARING)

CORAM: DR.VENKATA RAMAKRISHNA BADARINATH NANDULA – HON'BLE MEMBER (J)
CORAM: SHRI SATYA RANJAN PRASAD- HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 13.03.2023 AT 04:00 PM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	**Company Petition IB/268/2021**
NAME OF THE COMPANY	**SRK Constructions and Projects Pvt Ltd**
NAME OF THE PETITIONER(S)	**APS Hydro Pvt Ltd**
NAME OF THE RESPONDENT(S)	**SRK Constructions and Projects Pvt Ltd**
UNDER SECTION	**9 of IBC**

ORDER

Order in **CP(IB) 268/9/2021** pronounced, recorded vide separate sheets. In the result, this application under Section 9 of IBC is hereby rejected.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

Syamala

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II

CP(IB) No. 268/9/HDB/2021

[U/s. 9 of I&B Code, 2016 r/w Rule 6 of I & B (AAA) Rules, 2016]

In the matter of:

M/s. APS Hydro Private Limited
House No.58, 1st Floor, Block-10,
Opp. Old Police Station
Kirti Nagar Ind. Area, New Delhi
West Delhi DL 110 015 IN

.... Operational Creditor

Vs.

M/s. SRK Constructions and Projects Private Limited
Flat No.501, H.No.6-3-665, Lumbini Enclave
Opp: NIMS, Punjagutta
Hyderabad – 500 082, Telangana

... Corporate Debtor

Date of Order: 13.03.2023

Coram:

Hon'ble Dr. Venkata Rama Krishna Badarinath Nandula, Member (Judicial)
Hon'ble Shri Satya Ranjan Prasad, Member (Technical)

Parties / Counsels Present:

For the Petitioner	:	Mr.Vinay Kumar Jain Advocate & Solicitor
For the Respondent	:	Mr. S. Chidambaram, PCS

[PER: BENCH]

ORDER

I. This is a Petition filed by the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016, r/w Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the application, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and relevant Rules against the Corporate Debtor, alleging that the Corporate Debtor had failed in discharging the debt amount of Rs.114,66,18,008/- (Rupees One Hundred Fourteen Crores Sixty Six Lakhs Eighteen Thousand Eight only) which includes principal amount of Rs.97,27,91,633/- along with compound interest on the principal amount of Rs.17,38,26,376/- @ 10.90% (Base Rate – 8.90% + 2%) as on 31.07.2021 as per the provisions of the Contract Agreement between the parties and thereafter payable from the due dates till the date of realisation of the pending amount.

II. The gist of the Petitioner's brief is -

i. M/s. APS Hydro Private Limited, for short 'Applicant/Petitioner/Operational Creditor' is a registered MSME, engaged in the business of providing construction services and has been rendering contractual work to various organizations and companies.

ii. M/s. SRK Constructions and Projects Private Limited, for short 'Respondent/Corporate Debtor' is engaged in the business of Construction of Highway Projects.

iii. During the course of the business, the Corporate Debtor sub-contracted the work by issuing the following Work Orders in the form of five Sub-Contract Agreements to the Operational Creditor for rehabilitation and upgradation of five different sites and all the services were successfully discharged by the Operational Creditor according to the specifications and descriptions provided by the Corporate Debtor and raised invoices amounting to Rs.228,94,80,577/-. Out of which, an amount of Rs.97,27,91,633/- is due and payable by the Corporate Debtor.

Sl.No.	Work Order No. / Date
1.	SRKCPPL/CWRP/MISC/2018-321, Dt. 30.08.2018
2.	SRKCPPL/MPPS/MISC/HO/2018-10, Dt. 30.08.2018
3.	SRKCPPL/RARP/MISC/HO/2018-13, Dt. 12.10.2018.
4.	SRKCPPL/KABG/MISC/HO/2018-397, Dt.05.11.2018
5.	SRKCPPL/MTRP/MISC/HO/2018-007 Dt. 08.11.2018

iv. The Work Orders sub-contracted to the Operational Creditor were issued after the execution of Principal Agreement between the Corporate Debtor and the Ministry of Road Transport and Highways ("MORTH"), for short 'Principal Employer'. Copies of Work Orders alongwith the extract of Principal Agreements are filed as Annexure-4 at page nos.57 to 182 of the application.

v. The Corporate Debtor has illegally and arbitrarily terminated the Work Orders, but regardless of all unwarranted actions done by the Corporate Debtor, the Operational Creditor in all good faith relinquished all the sites without any justification and are only claiming the amount that were already due to them.

vi. It is averred that TDS was deducted by the Corporate Debtor and that they had deposited only Rs.3,08,20,527/- as TDS. This amount is already included in the claim, as the balance of the TDS is also adjusted in the claim.

vii. An Escrow Agreement was signed between the parties for the Work Orders, for the release of payments by the Corporate Debtor of the Escrow Amount (Funds received by the Principal Employer) to Income Tax Department and the Operational Creditor, which is filed as Annexure-6 at page nos. 230 to 268 of the application.

viii. The Work Order sub-contracted to the Operational Creditor was a project done in favour of the Principal Employer and despite the payment already made by the Principal Employer, the Corporate Debtor has till date not made any payments for the outstanding principal amount. In addition, the GST IPC bills that are also raised in favour of the Corporate Debtor is included in the claim amount and included in the invoices already annexed as Annexure-5 of the application.

ix. When the Corporate Debtor failed and neglected to make the outstanding dues after several follow-ups, the Operational Creditor got issued a Demand Notice dated 04.08.2021 in Form-3, demanding the Corporate Debtor to pay an amount of Rs.114,66,18,008/-. In response, the Corporate Debtor filed a reply dated 17.08.2021, which is filed as Annexure-10 at page nos. 306 to 310 of the application.

x. The Operational Creditor has also filed RTI letters dated 28.08.2021 to the Central Public Information Officer, Office of the Deputy General Manager (HR/Admn.), National Highways Authority of India regarding (a) work done by the principal contractor on the project; (b) details of payment discharged by the Principal Employer to the Corporate Debtor; (c) For any liquidation charges that might have been imposed on the Corporate Debtor; and (d) for details of the extension of time provided to the Corporate Debtor.

xi. Despite acknowledging the debt the Corporate Debtor has deliberately in order to harass the Operational Creditor neglected to make the payment of the outstanding dues.

III. The gist of the Respondent's brief is –

i. The Corporate Debtor filed a reply dated 15.12.2021 stating that the Operational Creditor filed a copy of the demand notice dated 04.08.2021, but did not disclose the legal notice dated 06.10.2020 issued by the Corporate Debtor, which is filed as Annexure-I of the application, wherein it was pointed out that the Petitioner has stopped the project work without completing the work given and serious disputes pointed out in para 6 of the Legal Notice dated 06.10.2020.

> *"6. Our client represents that you have not adhered to the terms and conditions of the agreements and breached the contracts and not paid the hire charges in spite of our client raised invoices from time to time. You have also not completed the project as per schedule and delayed the project and left the project abruptly without any prior notice, due to which our client could not allocate the plat, machinery and other equipment for other projects and thereby incurred additional costs and also the loss, which you are liable to be compensate. On account of (a) un-utilisation of plants and machinery; (b) restoration of damages to the plant & machinery of approximate amount of Rs.8.5 crores; (c) additional finance costs incurred for Bank Guarantees; (d) Liquidated damages levied by the Authority as on date and to be levied further due to non-compliance of the projects as per schedule; and (e) Loss of Brand name in industry due to delayed projects are to be worked out. Our client approximately estimates the loss and amounts recoverable at Rs.95,08,27,127/- which you are liable to pay to our client and the other losses".*

ii. In para 7 of the legal notice dated 06.10.2020, it was pointed out that rather than this Respondent due to the Applicant, it is the Applicant who is due to this Respondent an amount of Rs.95.08 crores. In response, there is no rebuttal or denial given by APS Projects. It is an admitted position that instead of the demand, it is actually APS Projects defaulted to this Respondent. It was also pointed out that all the work orders have been terminated for non-performance of the work way back in 2019. By not disclosing the legal Notice dated 06.10.2020, which issued prior to the demand notice establishes the pre-existing dispute between the parties.

iii. In reply to the Demand Notice dated 04.08.2021, issued by the Applicant, the Respondent replied on 17.08.2021 which contains a claim to be discharged by applicant of Rs.95.08 crores towards hire charges of Plant and Machinery to be paid by the Applicant to this Respondent.

iv. Another common condition for each work order is every contract should be completed within one year from the date of issue of the Work Order. Ex-facie, this is not adhered by the Applicant there is an enormous delay by the Applicant and it was shocking to know that due to

the reason of not completing the project within time, this respondent terminated the work orders. This is admitted by the Applicant himself at page 5 of 12(g) of the Application. A copy of the Termination of Work Orders is enclosed as Annexure-3 (Colly.) at page nos.24 to 92 of the counter.

v. It is averred that it could be seen in all the work orders the Applicant miserably failed to complete the work within the time schedule. Since all the work orders have been terminated there is no question of any debt due to the Applicant. On this ground alone the application deserves to be dismissed in limine.

vi. With respect to Work Order dated 05.11.2018 – Gooty Section, the Work Order was issued by an entity called DOTT-SRK JOINT VENTURE. It is a fact that, this entity was not made a part to the Application. On this ground alone the Application deserves to be dismissed in limine. Moreover, this work was also abandoned by the Applicant, which was not disclosed in the Application. A copy of the letter dated 05.07.2019 is filed as Annexure-4 at page no.93 of the counter. There is no response from the Applicant for this letter. If the work orders are terminated which is not disputed by the Applicant

naturally no further payments shall be due to the Applicant. On this ground alone the Application deserves to be dismissed.

vii. All the Work Orders contain that APS is duty bound to pay Hire Charges on all plants and equipment mobilized by this Respondent. In this regard, a consolidated statement for the claim of Rs.122.67 crores to be paid by the Applicant to the Respondent on the same set of work orders which is filed as Annexure-5 at page nos.94 to 171 of the application.

viii. The Applicant has not explained how the total claim of Rs.114.66 crores was derived and no supporting invoices for this claim. This figure is arrived as per presumptions and assumptions of the applicant.

ix. The communication exchanged between both the parties regarding time over run, quality of work, extra work billing etc. are filed as Annexure-8 at page nos.175 to 277 of the counter.

x. To summarize:

a. All the Five Work Orders have been terminated even before the Demand Notice;

b. There is existing disputes on all the work orders.

c. There is no debt due to the Applicant rather Applicant is due to this Respondent a sum of Rs.96.48 crores on the same work orders.

d. This respondent is also entitled to claim damages.

e. The Application did not comply with provisions of I&B Code, 2016 and defective.

f. Claim is not supported with invoices.

xi. The Application needs to be dismissed with the exemplary cost awarded and prosecute the Applicant under Section 65 of the Code for making a fraudulent claim and not disclosing material documents. There is no debt due to the Applicant and the application is a fraudulent one.

IV. The gist of the Applicant's brief in Rejoinder is –

i. The petitioner denies each and every averment as stated in the reply. The contentions and objections raised by the Respondent in its reply are totally frivolous and misconceived in nature.

ii. The notice letter by the Respondent dated 06.10.2020 and the reply of Demand Notice by the Respondent dated 17.08.2021 are mentioned at page 24, para 18 and Page

27, para 25 respectively and copies of the same are filed at Annexure-8 & 10 respectively.

iii. The respondent had been claiming a fictional amount from the petitioner.

iv. The hire charges as mentioned in the Work Orders were mutually agreed upon and it was never agreed between the Petitioner and the Respondent that the Petitioner is liable to pay for the same.

v. The claim of the Petitioner is supported by all the documents and is a valid claim under the IBC, 2016. All the objections raised by the Respondent is lacking the consolidation by any valid documents and a concocted effort for misleading the Bench including the Claim Summary submitted in their Reply, which lacks any supporting document to support their claim.

vi. A copy of the RTI Responses / information received by R&B, NH Division stating that Total work done for all the sites from July 2020 to August, 2021 is Rs.142,83,02,743/- and total payment discharged to SRK (without any LD during or after APS work period) is Rs.527,91,07,093/-, along with bills, Letters for

extension of time and memorandum of payment are filed as Annexure-A at page nos. 10-57 of the rejoinder.

vii. The Petitioner had duly submitted the rightful claims, for the services accepted by the Respondent and for which the Respondent already received the payments.

V. The Learned Counsel for the Corporate Debtor has filed the written submissions.

VI. In the light of the contest, as afore stated, the points that emerge for consideration of this Adjudicating Authority are –

1. **Whether there is a pre-existing dispute between the parties or the record of the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?**

2. **Whether an Operational Debt of a sum of over Rupees one crore is due and payable by the Corporate Debtor exists in favour of the Operational Creditor? If so, whether the Corporate Debtor defaulted in repayment of the same?**

VII. We have heard the Learned Counsels for both sides, perused the record and Case Law.

VIII. Before we proceed to decide the matter further, we would like to refer to the ruling of Hon'ble Supreme Court of India, in ***Mobilox Innovations Private Limited vs. Kirusa,*** wherein it has been held that;

> *"Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*
>
> *(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)*
> *(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?*
> *and*
> *(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?"*
> ***If any one of the aforesaid conditions is lacking, the application would have to be rejected."*** *(Emphasis is ours).*

IX. Since the principal *defence* of the corporate debtor is that there is a *pre-existing dispute* between the parties, and the said plea since denied by the operational creditor, we wish to first discuss the issue, *namely;*

Whether there is a pre-existing dispute between the parties before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

X. At the outset, it may be stated that the present Application being one under Section 9 of the Insolvency & Bankruptcy Code, 2016, it is imperative for the Operational Creditor to show that an Operational Debt of a sum over Rs.1,00,00,000/- is *due and payable* by the Corporate Debtor and that the Corporate Debtor has *defaulted* in repayment of the same. However, if the Corporate Debtor is able to establish that there is a *pre-existing dispute* between the parties or the record of the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute, the Tribunal shall reject the application.

XI. This legal position can be traced from the ruling of the Hon'ble Supreme Court of India, in re., ***Mobilox Innovations Private Limited vs. Kirusa,*** *has held that;*

> *"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"

XII. Therefore, in the above legal frame coupled with a factual matrix of the subject dispute, we proceed to decide the point.

XIII. According to the Applicant, the Corporate Debtor sub-contracted the work of rehabilitation and upgradation of five different sites, by issuing the following five Work Orders in favour of the Operational Creditor.

Sl.No.	Work Order No. / Date
1.	SRKCPPL/CWRP/MISC/2018-321, Dt. 30.08.2018
2.	SRKCPPL/MPPS/MISC/HO/2018-10, Dt. 30.08.2018
3.	SRKCPPL/RARP/MISC/HO/2018-13, Dt. 12.10.2018.
4.	SRKCPPL/KABG/MISC/HO/2018-397, Dt.05.11.2018
5.	SRKCPPL/MTRP/MISC/HO/2018-007 Dt. 08.11.2018

XIV. The Applicant contends that it had successfully discharged the contractual obligations under the above work orders and raised invoices for an amount of Rs.228,94,80,577/. According to the Applicant, as against the said amount, an

amount of Rs.97,27,91,633/- is now due and payable but had been defaulted by the Corporate Debtor.

XV. The Applicant further contends that the Corporate Debtor had illegally and arbitrarily terminated the Work Order. As the balance amount of Rs.97,27,91,633/- for the work undertaken by the Operational Creditor has not been paid, a Demand Notice in Form-3 demanding the payment of an amount of Rs.114,66,18,008/- has been issued on 04.08.2021 for which the Corporate Debtor sent a Reply dated 17.08.2021 with untenable and unsustainable allegations and did not comply the demands. Hence, the present application is filed.

XVI. However, Learned Counsel for the Respondent would contend that the Applicant filed the present application suppressing the Legal Notice dated 06.10.2020 issued by the Corporate Debtor prior to the receipt of demand notice dated 04.08.2021 whereunder the Corporate Debtor has raised a dispute regarding the work carried out by the Applicant and also claimed damages caused to the plant & machinery to the tune of Rs.8.5 crores. As such, on the ground of willful suppression of material facts alone the application is liable to be dismissed.

XVII. It is further claimed that the Applicant is due of *Rs.95,08,27,127/-* to the Corporate Debtor and no amount is due and payable by the Corporate Debtor.

XVIII. A bare perusal of the record discloses that the Corporate Debtor on 06.10.2020 had issued a legal notice to the Applicant whereunder it had specifically contended that the Operational Creditor had not complied the terms and conditions of the Work Orders besides failed in payment of hire charges pursuant to the invoices raised by the Corporate Debtor from time to time. Para '6' of the said Legal Notice extracted hereunder:

> *"6. Our client represents that you have not adhered to the terms and conditions of the agreements and breached the contracts and not paid the hire charges inspite of our client raised invoices from time to time. You have also not completed the project as per schedule and delayed the project and left the project abruptly without any prior notice, due to which our client could not allocate the plat, machinery and other equipment for other projects and thereby incurred additional costs and also the loss, which you are liable to be compensate. On account of (a) un-utilisation of plants and machinery; (b) restoration of damages to the plant & machinery of approximate amount of Rs.8.5 crores; (c) additional finance costs incurred for Bank Guarantees; (d) Liquidated damages levied by the Authority as on date and to be levied further due to non-compliance of the projects as per schedule; and (e) Loss of Brand name in industry due to delayed projects are to be worked out. Our client approximately estimates the loss and amounts recoverable at Rs.95,08,27,127/- which you are liable to pay to our client and the other losses".*

XIX. Therefore, all that we need to see at this stage is, *whether there is a plausible contention which requires further investigation and that the above 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*, as held by Hon'ble Supreme court of India, in Mobilox, *supra.*

XX. Admittedly, the subject contract is a works contract. The terms of payment as well as work execution is governed by the terms and conditions mentioned in the respective work orders. The corporate debtor in its Legal Notice dated 04.08.2021, contended that the Operational Creditor had breached the terms of the works contract, more particularly the clauses relating to payment of hire charges, besides contended that the Operational Creditor failed in completing the project as per the schedule and left the project abruptly in violation of the terms and conditions of the work order. The Corporate Debtor also claimed

damages to the tune of Rs.8.5 crores contending that the plant and machinery was damaged and finally claimed that it is sustained a loss to the tune of Rs.95,08,27,127/- and demanded the Applicant to pay the same. Subsequently, the Work Contract also have been terminated.

XXI. Strangely, the above allegations of breach of terms and conditions of contract despite serious in nature, no record is forth coming from the side of the Applicant, disputing these contentions. The termination order which followed the legal notice appears to have not been challenged. That apart, as already observed there is no whisper about the above Legal Notice in the demand Notice.

XXII. Therefore, having given our serious thought to the above submissions, we are satisfied that the plea that the operational creditor breached the terms and conditions of the above contracts is plausible, which require further investigation and that the "dispute" is not a patently feeble legal argument and is not spurious, hypothetical or illusory.

XXIII. That apart, as already stated, the Operational Creditor had suppressed the Legal Notice dated 04.08.2021 in the Demand Notice dated 04.08.2021 and also in the pleadings despite receipt of the same.

XXIV. ***The Hon'ble Supreme Court of India, in re, Ramjas Foundation & Ors. Vs. Union of India & Ors,***

'The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution ***but also to the cases instituted in others courts and judicial forums****" (Emphasis is ours)*

Therefore, on this ground alone the application is not entitled for the relief as prayed.

XXV. **Point 2:**

Whether an Operational Debt of a sum of over Rupees one crore is due and payable by the Corporate Debtor exists in favour of the Operational Creditor? if so, whether the Corporate Debtor defaulted in repayment of the same?

In the light of our findings on point 1 above, it cannot be said that an operational debt as claimed by the applicant exists. The Point is answered accordingly.

XXVI. Therefore, in the light of our discussion as afore mentioned, this application is liable to be rejected. Accordingly, we hereby reject this application, however without costs.

Sd/-
SATYA RANJAN PRASAD
MEMBER (TECHNICAL)

Sd/-
Dr.N.V.RAMAKRISHNA BADARINATH
MEMBER (JUDICIAL)

Syamala