

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

(IB)-1238(ND)2019

IN THE MATTER OF:

M/s Arcee Trading Corporation
2860, Behind G.B. Road,
Delhi- 110006

...Operational Creditor

VERSUS

M/s Dev Landcon Pvt. Ltd.
185/15-A, Krishna Gali No. 4
Maujpur, Delhi- 110053

... Corporate Debtor

Section: 9 of IBC, 2016

Judgement Delivered on: 23.01.2020

CORAM:

SMT. INA MALHOTRA, HON'BLE MEMBER (J)

SHRI. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Petitioner : Mr. Basant Kr. Gautam, Advocate
For the Respondent : Mr. Sabhay Choudhary, Advocate



JUDGEMENT

PER SHRI L. N. GUPTA, MEMBER (T)

The present Petition is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by M/s. Arcee Trading Corporation, through its Partner Sh. Tanmay Rastogi, (for brevity 'Operational Creditor'), with a prayer to initiate the Corporate Insolvency Resolution Process against M/s Dev Landcon Private Limited (for brevity 'Corporate Debtor').

2. The Corporate Debtor namely, M/s. Dev Landcon Private Limited is a Company incorporated on 10.07.2007 under the provisions of Companies Act, 1956 with CIN No. U45400DL2007PTC165656, having its registered Office at 185/15A Krishna Gali No.4, Mauzpur, Delhi-110053.

3. The Authorized Share Capital of the Respondent Company is Rs.10,00,000 Paid-up Share Capital of the Company is Rs.1,00,000 as per the Master Data of the Company annexed.

4. It is submitted by the Operational Creditor that the Corporate Debtor has assigned the work of Civil Structure vide Work Order dated 13.11.2017 which was required to be carried at Hitaishi Heights, Ghaziabad, U.P.



5. It is added by the Operational Creditor that it had started the aforesaid work at the said site without wasting any time. It has added that with a good intention to get the work completed, it had further sub-contracted the work to M/s. Adstec Construction Company as per its Work Order dated 08.04.2018.

6. It is stated by the Operational Creditor that it had completed the first billable work on 26.07.2018, against which it had raised a bill/invoice No. UP/2018-19/001 dated 24.08.2018 to the Corporate Debtor. It is further stated that the Corporate Debtor had taken measurements at the site, which have been duly acknowledged and signed by the General Manager of the Corporate Debtor.

7. It is further submitted by the Operational Creditor that the Corporate Debtor refused to receive the said bill. Therefore, the Operational Creditor was constrained to send the aforesaid bill to the Corporate Debtor through Speed Post on 31.10.2018.

8. It is added by the Operational Creditor that it had also done an unbilled work of Rs.12,00,000 (excluding GST), the measurement sheets of which were duly signed/acknowledged by the General Manager of the Corporate Debtor. It is added by the Operational Creditor that it continued the work without any kind of discrepancies.



9. The Operational Creditor has submitted that the total liability of the Corporate Debtor comes to Rs.1,07,55,942 plus interest, for which it had sent a Demand Notice under Section 8 of IBC 2016 on 14.01.2019 via Speed Post at the Registered Office of the Corporate Debtor, which was duly delivered on 17.01.2019 as per the tracking report.

10. It is further submitted by the Operational Creditor that the Corporate Debtor has not replied to the Demand Notice. The same has been averred in its Affidavit filed under Section 9(3)(b) of IBC, 2016. The Operational Creditor has further filed a statement issued by Dena Bank for the period 01.04.2017 to 15.05.2018 in compliance of the Section 9(3)(c) of IBC 2016.

11. That the Corporate Debtor has filed its reply on 20.08.2019 and submitted that the work was delayed by more than six months. Further, the Corporate Debtor has raised a dispute regarding delay in completion of work vide its Letter dated 20.12.2018, the translated contents of which as annexed by the Corporate Debtor are reproduced overleaf :



True-Type copy
JS
Annexure R5

Jitendra Singh

Mob.No-09810755953

Advocate

Res.1/55 Chiranjeev Vihar

Office Address: Ch.No.414.Distt.

Ghaziabad

Court, Raj Nagar, Ghaziabad

Reply of notice from M/s Dev Landcon Pvt. Ltd.185/15-A Krishna Gali No. 4
Maujpur Delhi

Also AT :- 32, 1ST Floor Navyug Market Ghaziabad Through adv. Jitender Singh
Chamber No. 414 Civil Court Compound Raj Nagar Ghaziabad.

V

1. Adv. Basant Kr Gautam Chamber no. 533, 5th floor Lawyers Chamber
Block District Court Rohini Delhi 110085
2. M/s ARCEE TRADING CORPORATION 2860 behind GB Road Delhi
110006

Sir,

On behalf of above stated M/s Dev Landcon Pvt Ltd. and under their
instructions, I am replying of your notice dated 08/12/2018 as under :-

1. As per notice, content of para no. 1 is acceptable.
2. As per Notice para No. 2 is not acceptable as the date of work order of
Hitaishi Heights Ghaziabad for Construction is 11/11/2017 instead of
13/11/2017.
3. As per Notice para no. 3 is wrong as above stated work was allotted on
11/11/2017, but after that no construction of work was started by your
client at the site, instead without the consent of my client the work was
sub let to Shoaib builder and building material supplier and work was
to be done by shoaib builder and building material supplier. After that
none of the construction was carried at the site. After 6 months your
client allotted the work to M/s Adstee construction company due to

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- which the project was unnecessarily delayed, and due to no construction activity at site the bookings were stopped .due to which my client suffered a loss of approximately Rs 2 cr.
4. As per the registration certificate, UP RERA has instructed my client to complete the project by March 2020. As your client has not done the construction work in time, because of that it is impossible to complete the project by March 2020 as per UP RERA. As per UP RERA If the Project is not completed in the stipulated time we are liable for Monetary fine. Therefore whatever fine will be imposed by UP RERA will be the responsibility and recovered from your client.
 5. That my client has provided to your client the construction material steel bar , cement , grit , badarpur etc of Rs 4575000/- and Rs 1065480/- were paid through cheque to M/s A. K Concrete under your clients instructions. Rs 360000/-were paid in cash which is accepted by your clients Projects manager Ashwani Dhiman and we have a receipt of the same signed by your project manager. The bill issued by you is not acceptable and can't be paid because the amount already paid is not deducted from the bill.
 6. The work which was allotted to your clients firm was under measurement and the particulars provide in the invoice are not acceptable.
 7. The things described in para no. 7 are not acceptable instead the verbal communication on phone between your client saying inability to perform the work is recorded by my client and we have a recording of the same.
 8. As your clients firm has verbal communication on phone of inability to abide by the terms and conditions of the work order. Because of not completing the work my client has suffered huge loses.



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9. The invoice raised by your client is completely wrong and my client has provided to your client the building material ,steel bar , cement , grit , badarpur etc of Rs 4575000/- which is accepted by your project Manager Ashwani Dhiman, Rs 1065480/- paid through cheque to M/s A.K Concrete as per your instructions, Rs 360000/- cash as per your instructions to A.K Concrete. Therefore total amount of Rs 6000480/- were paid by my client to your client and which is not disclosed anywhere in your invoice.
10. That because of your client my client has suffered a loss of approx. Rs 2 cr. And my client is free to suit a case under criminal / civil law against your client in order to recover the losses.

I thus, hereby call upon you to instruct and inform M/s Arcee trading corporation that if any legal proceedings is initiated in any court of law then my client will be forced to take legal action against your client. Instruct your client to pay losses suffered by my client of Rs 2 Cr. With in 30 days from the date of receipt of this reply of the notice. Other wise after that period my client will be free to take legal action in any court of law, and the expenditure done will be paid by your client.

Replied the Notice

Jitender Singh

Advocate



12. It is further submitted by the Corporate Debtor that the date of Work Order of Hitaishi Heights Ghaziabad Construction was 11.11.2017 instead of 13.11.2017.

13. That the Corporate Debtor has also submitted that Sh. Basant Kr. Gautam, who is proposed as an IRP by the Operational Creditor, is not an Insolvency Professional registered with IBBI.

14. During the course of the hearing on 22.08.2019, it was submitted by the Corporate Debtor that no work was conducted by the Operational Creditor. It was further submitted that the work was further assigned by the Corporate Debtor to the third party and was not as per the guidelines of RERA.

15. That on 20.09.2019, the Directors of the Corporate Debtor along with Sh. Mukesh Sharma, who had filed the measurement of the running bills were asked to present before this Bench on 25.09.2019 to verify as whether Sh. Mukesh Sharma has signed the measurement sheets or not. However, it was not disputed by the Ld. Counsel for the Corporate Debtor that the Operational Creditor had undertaken and carried out the construction work.

16. That on 25.09.2019, Sh. Mukesh Sharma, Ex-employee of the Corporate Debtor appeared before this Bench and identified the signatures on the measurement sheets at Annexure D from Page 23 to 26 as his signatures. The same were noted by this Bench. The



Measurement Sheets as signed and identified by Sh. Mukesh Sharma are reproduced below :

Measurement Sheet

S. No	Description	No.	Length (L) (meter)	Width (B) (meter)	Height or Depth (H) (meter)	Unit	Quantity
1:	Brickwork for Ramp	(a) 2	8.000	0.230	$\frac{0+0.770}{2} = 0.385$	m ³	1.417
		(b) 1	5.800	0.230	0.770	m ³	1.027
	Total	-	-	-	-	m ³	2.444 ✓
2:	Back filling for ramp (Soil)	1	7.770	5.340	$\frac{0+0.77}{2} = 0.385$	m ³	15.974 ✓
3:	P.C.C. for ramp	1	8.037	5.800	0.150 0.130	m ³	6.992 6.0 ✓
4:	Slab. Basement 2	1	$\frac{55.97+43.37}{2} = 52.350$	23.130	-	m ²	1210.856
	Deduction for Cut outs	1	3.340	1.580	-	m ²	(-) 5.280
		1	4.500	1.430	-	m ²	(-) 6.435
	Total for slab Area				Deduction for Lift Pit. 2 x 1.9 x 1.9 = 7.22	m ²	1199.140 1191.92 ✓
5:	Steel Reinforcement for BS ₁	1	128.58 128.58 ✓	2 ✓	OK <i>pkh</i>	m	128.58 128.58 ✓ OK <i>pkh</i>
6:	Concrete for Retaining wall for BS ₁	1	23.950	0.250	2.400	m ³	14.370 ✓
		1	10.100	0.250	2.400	m ³	6.060 ✓
		1	13.100	0.250	2.400	m ³	7.860 ✓
		3	0.450	0.500	2.400	m ³	1.620 ✓
		Total Concrete for Retaining wall (BS ₁)	-	-	-	-	m ³

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Description	Nos	Length (L) (meter)	Width (B) (meter)	Height or Depth (H) (meter)	Unit	Quantity	
Plastering	1	23.950	—	3.500	m ²	53.400 83.825 ✓	
	1	9.050	—	3.500	m ²	31.725 31.675 ✓	
	1	12.800	—	2.300	m ²	29.440 ✓	
	1	3.300	—	3.100	m ²	10.230 ✓	
	1	5.900	—	1.750	m ²	10.330 ✓	
	1	23.950	—	2.200	m ²	52.690 ✓	
	1	5.100	—	2.200	m ²	11.220 ✓	
	1	4.500	—	1.600	m ²	7.200 ✓	
	1	3.100	—	4.500	m ²	13.950 ✓	
	1	8.600	—	1.800	m ²	15.480 ✓	
	1	5.100	—	1.500	m ²	7.650 ✓	
	1	12.600	—	1.900	m ²	23.940 ✓	
Total outside Plastering	—	—	—	—	m ²	297.63 ✓	
Painting wall. putting for BS, Internal	1	23.370	—	2.400	m ²	56.088 ✓	
	1	10.100	—	2.400	m ²	24.240 ✓	
	1	13.100	—	2.400	m ²	31.440 ✓	
	1	0.500	—	2.400	m ²	7.200 ✓	
	External	1	23.870	—	2.400	m ²	57.288 ✓
		1	10.350	—	2.400	m ²	24.840 ✓
		1	13.350	—	2.400	m ²	32.040 ✓
Total for Painting for BS	—	—	—	—	m ²	233.136 ✓	

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(Signature)

B
(Signature)
 25/9/19

(Signature)
 for (ARCEE)

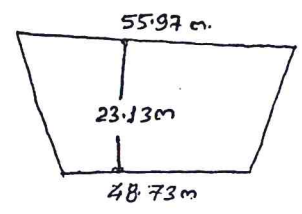
Measurement Sheet:

Slab Area

$$A_1 = \left(\frac{55.97 + 48.73}{2} \right) \times 23.13$$

$$= 52.35 \times 23.13$$

$$= 1210.86 \text{ Sq. mtr}$$

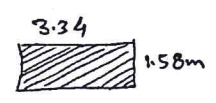


(B) Deduction for mechanical cut out:

(i)

$$A_2 = 3.34 \times 1.58$$

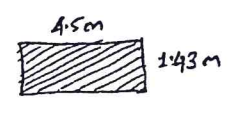
$$= 5.28 \text{ Sq. mtr}$$



(ii)

$$A_3 = 4.5 \times 1.43$$

$$= 6.435 \text{ Sq. mtr}$$



Total slab area $A = A_1 - (A_2 + A_3)$

$$A = 1210.86 - (5.28 + 6.435) = 1199.145 \text{ Sq. mtr}$$

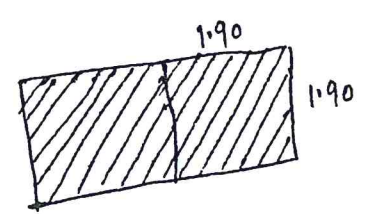
$$\approx 1199.145 \times 10.764$$

$$A = 12,907.6 \text{ ft}^2$$

Total Slab Amount = 12907.6 x 700

$$= \text{Rs } 90,35,320/-$$

$$2 \times 1.9 \times 1.9 =$$

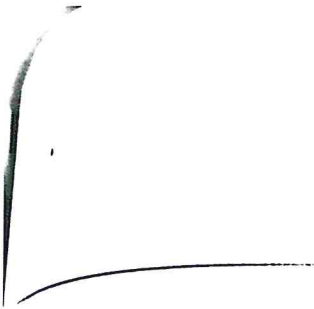


Lift Pit.

Handwritten signature and date: 25/9/19

Handwritten signature and name: M. ARCEE

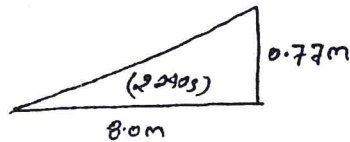
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2:

Brick work: (Ramp)
Wall thickness = 0.230 m

$$Q_1 = 2 \times \left(\frac{1}{2} \times 0.77 \times 8 \right) \times 0.23$$
$$Q_1 = 1.4168 \approx 1.42 \text{ m}^3$$



$$Q_2 = 0.77 \times 5.8 \times 0.23 = 1.027 \text{ m}^3$$
$$\approx 1.03 \text{ m}^3$$



Total Brick work

$$Q = Q_1 + Q_2$$
$$= 1.42 + 1.03 = 2.45 \text{ m}^3$$

Total Amount = 2.45 x

= Rs

soil Back filling:

$$Q = \frac{1}{2} \times 0.77 \times 8 \times 5.8$$
$$= 17.864 \text{ m}^3$$
$$\approx 17.864 \times 35.28$$
$$Q = 630.24 \text{ #3}$$

From Notably
~~Blue~~

Total Amount = 630.24 x

= Rs

PCC:

$$Q = 8.38 \times 5.80 \times 0.15 = 7.29 \text{ m}^3$$

Total Amount = 7.29 x



K. Manoj
19/19

~~(ARCEE)~~

Q

17. On 25.09.2019, Parties also expressed an interest in settling the matter. On the next date i.e., 01.10.2019, it was observed that the Corporate Debtor was only resorting to tactics and seeking adjournment on the grounds of settlement.

18. After hearing submissions of both the parties, this Bench is of the view that the plea taken by the Corporate Debtor regarding non-execution of the work does not merit any consideration as the then employee of the Corporate Debtor has himself identified his signatures on the Measurement Sheets before this Bench. Further, the Ld. Counsel for the Corporate Debtor did not dispute that the Petitioner firm had undertaken and carried out the construction work. In addition to this, the Corporate Debtor has failed to bring anything on record which could corroborate the allegations made in its letter dated 20.12.018. Further, the defense taken by the Corporate Debtor that it has suffered a loss and has a claim of Rs.2 Crore because of the Operational Creditor cannot be treated as the pre-existing dispute by the parties as held by the Hon'ble NCLAT in case of **Ahluwalia Contracts (India) Pvt. Ltd. VS Raheja Developers Limited, Company Appeal No.703 of 2018 :**

“20. From the aforesaid findings, it is clear that ‘claim’ means a right to payment even if it is disputed. Therefore, merely the ‘Corporate Debtor’ has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute, in absence of any evidence to suggest that dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.”



19. In the given facts and circumstances, the present Petition being complete and establishing the default in payment of the Operational Debt beyond doubt, the Operational Creditor is entitled to claim its dues. The amount of default being above Rs.1,00,000 for the unpaid invoice, the Petition is admitted in terms of Section 9(5) of the IBC and accordingly, moratorium is declared in terms of Section 14 of the Code. As a necessary consequence of the moratorium in terms of Section 14(1) (a), (b), (c) & (d), the following prohibitions are imposed, which must be followed by all and sundry :

- “(a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.”

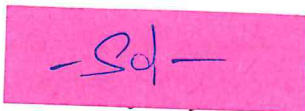
20. The Operational Creditor has proposed the name of Sh. Basant Kr. Gautam as IRP but has not provided his IBBI Registration Number. The Operational Creditor has also not annexed the Form-II i.e., the consent of the proposed IRP. The Corporate Debtor has also pointed out that Sh. Basant Kr. Gautam, who is proposed as an IRP



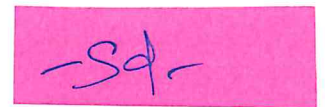
by the Operational Creditor is not an Insolvency Professional registered with IBBI. In this background, this Bench based on the list furnished by IBBI, appoints Sh. Vinay Kumar Jairath, as an IRP, having Registration No. IBBI/IPA-002/IP-N00169/2017-18/10439 (Email vinayjairath916@gmail.com, Mobile No. 9810433008) subject to the condition that no disciplinary proceedings are pending against the IRP named and disclosures as required under IBBI Regulations, 2016 are made within a period of one week from this Order. The IRP is directed to take the steps as mandated under this Code specifically under Section 17, 18, 20 and 21 of IBC, 2016.

21. The Operational Creditor is directed to deposit Rs.2,00,000 (Two Lakh) only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by the Interim Resolution Professional and shall be paid back to the Operational Creditor.

22. A copy of this Order shall be communicated to the Operational Creditor, the Corporate Debtor and the IRP mentioned above, by the Registry of this Tribunal. In addition, a copy of the Order shall also be forwarded by the Registry to IBBI for their records.



(L. N. Gupta)
Member (T)



(Ina Malhotra)
Member (J)