

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

C.P. No. 432/I&BP/2018

Under section 9 of the IBC, 2016

In the matter of

Jayraj Engineering Contractors,
TharayilKizhachathil, Puthiya Vila P.O.
Kayamkulam, Alleppey, Dist. Kerala
(State), Pin-690531

....Petitioner

v/s.

Neo Structo Construction Private Limited
Level 2, Raheja Centre Point, 294 CST Road,
Near Mumbai University, Off BandraKurla
Complex, Santacruz (E), Mumbai-400098.

....Respondent

Order delivered on: 09.10.2018

Coram: Hon'ble BhaskaraPantula Mohan, Member (Judicial)

Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner :Mr. Dhiren R Dave, PCS

For the Respondent: Mr. Shyam Kapadia, Advocate

Mrs. NupurJalan, Advocate,

Mr. KanishkKejriwal, Advocate i/b M/s.Khaitan Legal

Associates

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. This Company Petition is filed by Jayraj Engineering Contractors through its proprietor T. K. Rajan (hereinafter called "JEC") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Neo Structo Construction Pvt. Ltd. (hereinafter called "Neo Structo") alleging that Corporate Debtor committed default in making payment to the extent of Rs. 96,22,363/- by invoking the provisions of Sections 8 and 9 of I & B Code (hereinafter called "Code") read with Rule 5 and 6 of Insolvency & Bankruptcy (AAA) Rules, 2016.
2. JEC is engaged in the business of construction and Neo Structo has given a sub-contract to JEC to execute the work at the site of Neo Structo's client at Kochi and the terms and conditions were agreed between them in terms of

Service Order dated 01.12.2014. Neo Structo was awarded with various contracts by Air Product India Pvt. Ltd. (API), and API's Project Manager, Technip KT India Ltd., who in turn subcontracted certain works to JEC. The Petition reveals that JEC executed works to the extent of Rs. 1,13,77,069/-, received a payment of Rs. 10 lacs and after adjustment of debit note to the extent of Rs. 7,54,707/-, the balance receivable is Rs, 96,22,363/-, for which a Demand notice was issued on 19.01.2018 to Neo Structo. Neo Structo sent an interim reply through its advocate on 29.01.2018 emphatically denying all the allegations and contentions as completely false and misconceived, further, JEC was required to furnish all the copies of the documents referred to in the demand notice and it was stated that response to the demand notice will be given only after receipt of the complete letter with all annexures and documents relied on by JEC, which were missing in the Demand Notice.

3. Subsequently on 20.02.2018 Neo Structo sent another reply, contending as below:

- a. *Nothing claimed under the Demand Notice is payable by Neo Structo to JEC as the work which was awarded by Neo Structo to JEC under the work order bearing Nos. 4800000470 / 1000098, 4800000591 / 1000098 of even dates and their respective amendments ("Work Orders"), was not completed as per the time schedule, which was agreed under the Work Orders and the same was delayed by JEC. Moreover, the portion of the work which was not completed by JEC, has been completed by the API at the cost of Neo Structo.*
- b. *Neo Structo was awarded the contract by Prodair Air Product India Private Limited to carry out mechanical work for project situated at Kochi, Kerala and for piping pre-fabrication of mechanical work at BPE Coimbatore Shop under the supervision of Technip India Limited ("Project Consultant") duly appointed by API.*
- c. *Since, the scope of work awarded by API was substantial and the time was an essence of the contract, Neo Structo vide Work Orders, engaged JEC to complete the work as mentioned in the Work Orders. Accordingly, JEC was appointed as sub-contractor for the work to be executed at the site of API for the value and on the terms and conditions as stated in the Work Orders. It is pertinent to note that since the time was essence to complete the work under the main contract, similar condition was incorporated under the Work Orders and agreed between JEC and Neo Structo.*

- d. *Neo Structo has time and again intimated JEC to complete the work as per the time schedule agreed under the Work Orders, however, JEC have failed to complete the work in a timely manner. Due to such delay, the client viz. API who had awarded the work to Neo Structo, is intending to impose liquidated damages upon Neo Structo due to the delay caused in the works, which is completely attributable to JEC as per the Work Orders issued to JEC.*
- e. *Moreover, despite several intimations to complete the pending work, JEC failed to complete the same. Accordingly, API, has withheld the amount payable to Neo Structo due to non-completion of the work. Under the Work Orders, it was JEC's sole responsibility to complete the entire work which was awarded to JEC, however, JEC not completed the same. JEC is therefore, solely responsible for the amount which API has withheld for the pending work. Consequently, due to JEC's above unprofessional conduct, Neo Structo has suffered not only monetary loss but also loss to its reputation which Neo Structo reserve its right to claim from JEC.*
- f. *It is also noticed that several times JEC not paid its due to the sub-contractors for the work to be carried out despite the said amount had been paid by Neo Structo to JEC. Due to such non-payment to the sub-contractors, they stopped the work, which also caused delay in execution of the works. Neo Structo has several occasions intimated to JEC that the delay due to the same will cause damage to Neo Structo, however, JEC failed to consider the same and adopted lackluster attitude towards the works given under the Work Orders.*
- g. *Moreover, Neo Structo has vide email dated 3 April 2017 called upon JEC to furnish several documents such as (i) No Due's from Neo Structo stores and TP-API's Stores; (ii) Release of liens and no claims to Neo Structo; (iii) no dues to the Agencies/ Sub vendors engaged by you against the Work Orders; (iv) Site gate passes; (v) All workmen's wages paid documents till their last working day; (vi) All statutory documents for the Service Tax paid; (vii) Acknowledgement on debit notes which were issued and not returned for finance reconciliation; and (viii) Site clearance from Neo Structo, many of which JEC have till date not submitted to Neo Structo.*
- h. *Thus, the amounts claimed by JEC in the Demand Notice are not due and payable by Neo Structo. Neo Structo reserves its right to claim*

further compensation from JEC for the damage caused to their reputation solely because of JEC.

- i. Neo structo states that despite being aware that the time is of essence of the contract and despite repeated reminders, JEC failed to complete the works as per the time schedule agreed under the Work Orders. Due to the aforesaid reasons, API was constrained to complete the incomplete work by appointing another contractor. Accordingly, API has not only intending to claim liquidated damages from Neo Structo for delay in completion of work, but is also withholding the payment towards work done by Neo Structo. Due to the aforesaid reasons, Neo Structo suffered a substantial loss.*
- j. Without prejudice to the aforesaid, Neo structo states that the debt as claimed by JEC under the Demand Notice is not payable by Neo Structo. In fact, it is a matter of record that Neo Structo has raised bonafide disputes in respect of your alleged claim and denies that any amount is due and payable by Neo Structo to JEC.*

4. Even though Neo Structo replied to the Demand Notice, initially on 29.01.2018 as interim reply and then on 20.02.2018 raising many issues, JEC while filing the Petition on 20.03.2018, which is much after 20.02.2018 filed an Affidavit u/s. 9(3)(b) stating that no notice relating to any dispute was received from Neo Structo, even though disputes were raised by JEC as stated supra.

5. While awarding the contract to JEC, a Service Order was signed on 01.12.2014 by JEC and Neo Structo wherein at para no 6.3 it was agreed as below:

"6.3. Work Schedule:

- a) In case your performance is not found satisfactory, we shall get the job executed by other agency at your risk and cost.*
- b) You shall discuss with our Site In-Charge / Planning personnel time to time about the work front and carryout the same accordingly.*
- c) You shall ensure that the job is completed within the time schedule instructed by our Site-in-Charge / Planning Engineer.*
- d) If, at any time actual progress is too slow to complete the works within the time for completion, and /or progress has fallen or will fall behind the current program, you have to submit the measures that you propose to adopt in order to expedite progress and complete the works within the time for completion.*

- e) *You shall promptly adopt the proposed measures, which may include working overtime, shift work, and/or employing additional labour and/or supervision, at the risk and cost of yours.*
- f) *You have to engage sufficient number of personnel as may be required for co-ordination, supervision and execution of job as per the requirement and good engineering practice."*

6. Neo Structoon 05.08.2016 addressed an E-mail to JEC which is reproduced below:

"Dear Rajan,

Further to the discussion we had yesterday meeting. Still we are slipping the target dated committed according to enclosed schedule by you. Here we take a glance on missing dates and wants from your end to expedite for completion this activity with in committed schedule.

- 1. Reformer 1 sheeting completion-30.07.2016.*
- 2. Structural erection Reformer 1 and 2-30.07.2016*
- 3. FD/ID fan completion including aux piping-30.07.2016.*
- 4. Reformer 2 pressure part completion-30.07.2016.*

Reformer-1 Piping also not upto the mark as per committed schedule.

We already discussed with you the client wants to deploy other agency to complete some modification work on reformer. Such modification required additional manpower and presently you concentrate on your scope of work completion only. We are going to confirm same to client for his further line of action.

Again we requesting to you complete the Reformer on committed schedule."

7. Neo on 19.04.2017 sent an E-mail to JEC and the same is as below:

"MrRajan,

We would like to recall our meeting MOM held at Kochi on 6th April morning and your commitments on completion.

- ITE Expressed to JEC outstanding of INR 13.05 L is due to them.*
- JEC expressed to ITE available cash in account is only INR 1.2L.*
- JEC Requested BNS to release payment.*
- BNS agreed to release adhoc payment to JEC on the basis of Scaffolding work progress.*
- BNS agreed to release the first adhoc payment of INR 5 L and HONOURED (Released on 7th April).*
- JEC & ITE agreed to resume work from 10th April- started.*

- *ITE agreed with JEC all materials will be handover to BNS store by their people, since the scope falls under JEC scope, further JEC accepted to pay ITE for that.*
- *JEC agreed to complete the work and documentation work as per BNS mail dated 3rd April.*

Actual Scenario

In spite of our numerous mail JEC is not responded/ nor completed the works as committed.

We came to know JEC has paid to ITE only a small amount (3L) against the recent received amount of 5L hence ITE has stopped working on 13th April (3 days only worked) itself due to this issue.

We request JEC to adhere to MOM and release the balance amount to ITE and resume the work immediately to release further payments.

In order to help JEC BNS is proposing an alternate solution to make direct payment to ITE from the balance payable amount to JEC, please do confirm in writing.

Demanding more payment without completing the work is NOT acceptable.

Our ultimate client is also pressuring us for this removal of scaffolding work. In case of your failure/ delay AP/ TPI shall remove the material and store under their custody/ scarp it out which is being accounted on JEC under non-returning of Store Materials."

8. The email dated 18.04.2017 sent by Technip (who awarded the contract to Neo Structo) to Neo Structo is reproduced below:

"Dear Mr. Sangam

Regarding your trailing mail, we have reviewed in detail with our site and our response is as follows:

- *Please note that M/s JEC has been withdrawn from site without completing balance work including checklist activities. Hence balance activities are being executed through another agency as required.*
- *Even today we are not clear when M/s Constructo will complete balance activities (scaffolding removal) in Reformer 2 area.*

....."

9. The above E-mails clearly show that there is delay on the part of the Petitioner in the execution of the contract awarded to him. An analysis of the e-mails clearly shows that the Petitioner has not completed the work in time as stipulated in the Service Order. Hence, the disputes raised by the Corporate Debtor in their reply dated 20.02.2018 cannot be termed as spurious or as if they were raised for the mere sake of raising disputes to stall the CIRP process.
10. Neo Structo submitted that there was a joint meeting between API and Neo Structo on 20.03.2018 wherein it was agreed between them that due to the delayed completion of work, penalty to the tune of Rs. 3,29,94,168/- being 10% of the value of DOA number 0818-000-DOA-MECH-1-010 dated 31.07.2014 was to be imposed on Neo Structo. Even though, JEC contends that the imposition of penalty cannot be attributable to them, in view of the fact there were delays on part of JEC, and JEC has withdrawn from the site without completing the balance work, their submission cannot be accepted.
11. The Petitioner heavily relies on the balance confirmation letter sent by the Corporate Debtor to the Petitioner on 18.05.2017 which is reproduced below:

"Dear Sir or Madam:

Our auditor's S R B C & Co. are auditing our financial statements and wish to obtain direct confirmation of amounts payable to you as of March 31, 2017. Compare the information below with your records on that date and confirm that this information agrees with your records or note the details of any discrepancies in the space provided below. Then please sign this request and return it in the enclosed reply envelope directly to our auditors. Our records on March 31, 2017 showed an INR. 77,55,323 as payable to you. Please note that this invoice may not represent the entire balance payable to you as of that date. This is not a request for payment and remittances should not be sent to S R B C & Co.

The breakup of same is given below.

<i>Balance as on 31.03.17</i>	
<i>Description</i>	<i>Amount (INR)</i>
<i>Payable (Receivable)</i>	<i>19,37,679.00</i>
<i>Retention</i>	<i>58,17,644.00</i>
<i>Net Payable (Receivable)</i>	<i>77,55,323.00</i>

Your prompt attention to this request will be appreciated."

11. The above letter seeking confirmation from the Petitioner clearly states that the amount payable by the Corporate Debtor is Rs. 19,37,679/- and the retention money is Rs. 58,17,644/-. Since genuine dispute regarding the final completion of work has already been raised by the Corporate Debtor, the amount shown as retention money cannot be said to be an undisputed debt and no reliance can be taken on the acknowledgement letter as long as the acknowledgement is under the nomenclature of retention money. Hence this Bench is unable to rely on the confirmation of balance to the extent of Rs. 58,17,644/- which has been shown as retention money.
12. The Hon'ble Supreme Court in the case of Innoventive Industries Ltd. v/s. ICICI Bank and Another, AIR 2017 SC 4084 observed as below:-
" 29. The scheme of section 7 stands a contrast with the scheme under section 8 where an operational creditor is, on the occurrence of a default, to deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in section 8(1) of the Code. Under Section 8(2), the Corporate Debtor can, within a period of 10 days of receipt of the demand notice or copy of invoice mentioned in sub-section 1 bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing i.e. before such notice or invoice was received by the Corporate Debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code".
13. The above stated findings it is evident that the existence of dispute or record of pendency of suit or arbitration proceedings should be pre-existing i.e. prior to the receipt of demand notice by the Corporate Debtor. The moment there is existence of dispute the operational creditor comes out of the clutches of the IB Code. Here, in this case the disputes were raised by the Corporate Debtor much prior to the issue of demand notice by the Operational creditor.
14. In the case on hand, the email communications discussed above clearly shows there is existence of dispute on various aspects and hence those disputes squarely fall under section 5(6) of the Code which reads as below:

"dispute includes a suit or arbitration proceedings relating to-
(a) The existence of the amount of debt;

- (b) *The quality of goods or services; or*
(c) *The breach of a representation or warranty;”*

15. The Professional appearing for JEC relied on the Judgement of NCLT in “M. Y. Agro Private Limited v/s Amira Pure Foods Private Limited (Manu/NC/0815/2017)” to saythat when there is absolutely no document or particulars to support the claim of existence of dispute, the mere claim of dispute in the reply and in the pleadings in defense can be termed as vague and motivated to avoid the liability.However, in the case on hand there are emails and other documents in support of the existence of claim and hence the case law quoted by the professional is of no help to him.
16. Further the Ld. Professional also relied on the Judgement of NCLAT in“*Jord Engineers India Limited v/s Valia& Co (Manu/NL/0413/2018)*” wherein the Corporate Debtor has not even taken the plea that there is an existence of dispute, hence a reliance on the cited case law is of no use to JEC.
17. Further, the learned professional relied on the judgment of the Honourable Supreme Court in *Mobilox Innovations Pvt. Ltd. V/s. Kirusa Software Pvt. Ltd.(Manu/SC/1196/2017)* to say that when the dispute raised by the Corporate Debtor is spurious, hypothetical or illusionary, such kind of defence should be rejected. However, the disputes raised by Neo Structo are not spurious but supported by the evidence of so many emails for the existence of dispute between the parties. Hence relying on the same judgment, so long as dispute truly exists the petition deserves to be rejected.
18. In view of the above discussions the petition is dismissed but without cost.
19. The Registry is directed to communicate this order to both the parties.

Sd/-

V. Nallasenapathy
Member (Technical)

Sd/-

BhaskaraPantula Mohan
Member (Judicial)