

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-III
NEW DELHI**

C.P.No.IB-394/(ND)/2017

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

**M/s KLA Const. Technologies Pvt. Ltd.,
2 Shambhu Dayal Bagh,
Main Kalkaji Road,
Opposite Modi Floor Mill
On outer Ring Road,
New Delhi-110 020**

... Operational Creditor/ APPLICANT

**CKG Realty Private Limited,
4/24 A, AB House,
Asaf Ali Road,
Delhi-110 002**

....Corporate Debtor/RESPONDENT



Coram:

**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**Counsel for the Petitioners : Dr.Amit George,Mr. Swaroop George
Advocates**

**Counsel for the Respondents : Mr. Sumant Batra, Mr. Honey Satpal,
Mr. Srishti Kapoor, Advocates**

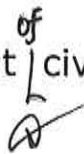
Order delivered On: 02.02.2018

ORDER

1) The above Petition has been filed by M/s KLA Construction Technologies Pvt. Ltd. in the capacity of Operational Creditor against M/s CKG Realty Pvt. Ltd. claiming to be its Corporate Debtor under the provisions of Section 9 of Insolvency and



Bankruptcy Code, 2016 (IBC,2016). The Transaction giving rise to the claim and the particulars of Operational Debt has been stated in Part. IV of the application filed in the relevant form, as provided under Insolvency and Bankruptcy Board of India(Application to Adjudicating Authority) Rules, 2016 for brevity 'AAA' rules. Perusal of the same discloses that the principal amount in default is claimed to be in a sum of Rs.11.00 lakhs arising due to non-payment of an advance which was required to be paid by the Corporate Debtor in relation to the contract entered into between the parties for the construction of CKG Xpresswalk at Rudrapur - Structural Works for a contract value of Rs.7,41,35,813.32. It is claimed by the Operational Creditor that as per the said agreement entered into between the parties, a sum of Rs.11.00 lakhs was required to be paid as mobilization advance prior to the commencement of actual work in order to enable the Operational Creditor to mobilize machinery and equipments at the construction site as the nature of work is that ^{of} civil construction contract. The Operational Creditor also



claims that on 13.7.2017 based on the minutes of the meeting held between the Operational Creditor and the Corporate Debtor, a sum of Rs.21.00 lakhs was demanded to be paid as an advance inclusive of Rs.11.00 lakhs, as detailed above by the Operational Creditor and the Corporate Debtor also acceded to the said request. However, despite the same as no payment was forthcoming from and on the part of the Corporate Debtor, Operational Creditor issued a demand notice as required under Section 8 of IBC,2016 dated 12.9.2017 and it is also represented that the same was duly served upon the Corporate Debtor but no notice of dispute or payment was forthcoming from the Corporate Debtor and in relation to the non-receipt of notice of dispute to the said effect has also been filed alongwith the application and in the circumstances the Operational Creditor has intended to invoke the provisions of IBC,2016 seeking for unleashing the Corporate Insolvency Resolution Process as against the Corporate Debtor.



2) Perusal of the record shows that an advance copy of the application was duly served upon the Corporate Debtor by the applicant. Subsequently, the Corporate Debtor has entered its appearance and has also filed its reply as well as an additional reply in order to bring forth all the facts before this Tribunal. Perusal of the said reply as well as additional reply filed by the Corporate Debtor contends out that in terms of the contract entered into by both the parties the Corporate Debtor was obliged to pay the mobilization advance, but however subject to completion of mobilization process by the Operational Creditor. Since the same was not completed despite several reminders and requests for mobilization from the Corporate Debtor, the advance was not paid. It is also pointed out in the reply that the Operational Creditor had infact started de-mobilization by initiating the de-mobilization procedure and hence the claim in relation to mobilization advance has been made only to invoke undue pressure by the Respondents/Corporate Debtor to exhort monies from it. It is also further contended in the reply that the



non-commencement of works at the project site by the Operational Creditor has resulted in huge losses which has provided the scope to Corporate Debtor to file claim for the recovery of cost and damages from the Operational Creditor in terms of the contract entered into between the parties.

3) In the additional affidavit filed on behalf of Respondent/Corporate Debtor wherein it is contended by the Corporate Debtor that a sum of Rs.11.00 lakhs as token advance being the claim herein was required to be paid only to start the work after the formal agreement is signed between the parties and the site is set up and ready for concreting and that the Corporate Debtor was entitled to recover the advance from the working bill and since the site was not ready for concreting, it is claimed by the Corporate Debtor that onus of paying mobilization advance does not arise as the site was for sometime flooded with water and hence required de-watering.

4) The Petitioner was given an opportunity to file rejoinder both in relation to reply as well as for additional reply as filed by

the Corporate Debtor and which opportunity has also been availed by the Petitioner by filing rejoinder and additional rejoinder wherein several emails alleged to have been exchanged between the parties with a view to establish that the site was ready for concreting and that mobilization of equipments and materials had taken place and that costs have also been incurred in relation to the same and certain bills have also been raised by the third parties against the Operational Creditor for transporting equipments have been annexed in order to sustain the claim that mobilization had commenced but advance was not forthcoming.

5) After due completion of pleadings on the part of the parties, the matter was heard by this Tribunal finally on 16.01.2018. Ld. Counsel for the Petitioner reiterated the submissions made in the Petition as well as rejoinder and pointed out certain emails exchanged between the parties and more particularly the minutes of the meeting dated 13.7.2017 as duly signed by both the parties concerned, as well as to the details of work done, as



annexed with the statement of expenditure as Annexure A-1 as well as Annexure A-2 filed on 11.10.2017 vide Diary No. 2262. It is pointed out by the Ld. Counsel for the Operational Creditor that despite repeated emails the Corporate Debtor has sought from the Operational Creditor not to demobilize but on the other hand despite the request to pay the mobilization advance has failed to pay the said amount as already agreed.

6) On the other hand Ld. Counsel for the Corporate Debtor submits that in the absence of any goods supplied or services rendered by the Operational Creditor and for non-payment of mobilization advance, even assuming that the same is payable cannot give rise to a claim under the provisions of IBC,2016 as the claim is not a 'debt' and more particularly cannot be classified as an 'Operational Debt' and the Petitioner cannot be classified as an 'Operational Creditor' in terms of the provisions of IBC,2016 which goes to the root of the claim and relying on the decision of Hon'ble Supreme Court in Mobilox Innovations Private Ltd. vs. Kirusa Software Private Ltd. in Civil Appeal



No.9405 of 2017, Learned Counsel for the Petitioner has also chosen to rely on the said judgement of the Hon'ble Supreme Court and draws the attention of this Tribunal to paragraph Nos. 24 and 40 and points out that there is no pre-existing dispute raised by the Corporate Debtor but on the other hand the Corporate Debtor is raising issues only subsequent to the filing of application as no notice of dispute has been given by the Corporate Debtor. It is submitted by Ld. Counsel for the Corporate Debtor that even though the statement of expenditure for work done has been filed vide Diary No. 2262 dated 11.10.2017, and as detailed under Annexure A-1 wherein a bill in a sum of Rs.2880837.30 has been raised and again vide Annexure A-2 claiming compensation in a sum of Rs.16308661.35 in relation to loss of opportunity and the resultant damages claimed to have arisen there under due to the alleged non-adherence on the part of the Corporate Debtor or honoring its commitment and this according to the Ld. Counsel for the Corporate Debtor points out that there is if at all a breach on the



part of the Corporate Debtor as agreed to and entered into between the parties and in the circumstances this is not the proper forum to agitate the said claims and the parties should instead be relegated to the Civil Court in order to thrash out their dispute as this forum it is contended primarily being a forum of summary jurisdiction.

7. Both sides were heard in detail. It is seen from the record as filed by the parties and considering the pleadings and records filed that the parties have entered into an agreement which is primarily in relation to civil construction works wherein the Operational Creditor was to do plain concrete work at site. The contract it is seen was entered into on 10.06.2017 and further an addendum has also been agreed to between the parties both of which have been filed as Annexure A-2 to the application. The total value of contract in consideration of the construction, execution, completion and maintenance of the works has been fixed approx. at Rs.7,41,35,813.32 excluding service tax, WCT



and labour cess. The addendum annexed with the agreement dated 10.6.2017 by virtue of clause 6 reads as follows:

KLA will be paid an amount of Rs.11.00 lac as token advance to start the work after the formal agreement is signed-off & site set-up is ready for concreting. The advance would be recovered from the following working bill of KLA. There will not be any other advance payable.

8) Perusal of the above clause in the addendum discloses that a sum of Rs.11.00 lakhs as token advance shall become payable after the formal agreement is signed and the site is set up and is ready for concreting. Perusal of the documents filed by both parties shows that no formal agreement has been filed since both the parties laid particular emphasis on the minutes of the meeting dated 13.7.2017 in order to sustain their respective pleas, an examination of the said document as annexed as Annexure-3 discloses that the Corporate Debtor had engaged de-watering agency and that the external water is being tackled and

resolved separately by KLA i.e. Operational Creditor. The Operational Creditor was also required to provide by virtue of the said addendum dated 13.7.2017 a schedule of work by 16.7.2017. The Operational Creditor was required to mobilize by 26.07.2017 and start laying cement concrete (PCC). It is the contention of the Corporate Debtor that the site itself was not ready for carrying out PCC work and that there was water logging which was not fully tackled and further the mobilization having not taken place to commence the work envisaged under the agreement, the advance was not paid.

9) In the exercise of summary jurisdiction it is required to be seen whether this Tribunal can go into the question that whether the site was properly set up and as to whether the full mobilization of equipments as envisaged for carrying out the work has been done by the Operational Creditor as this will require, being in the nature of works contract, an independent commissioner to be appointed to ascertain the veracity of claim of the respective parties in relation to the status of the project site.



It is seen from the record that there is no independent report or certificate having been enclosed by the Operational Creditor to sustain the plea of full mobilization of equipments or that the construction site was ready to carry out the civil construction work, as envisaged in the agreement read with the addendum. It is also required to be seen as rightly contended by the Ld. Counsel for the Corporate Debtor as to whether non-payment of mobilization advance will give rise to a claim and thereby fall within the definition of Section 5(21) of IBC,2016 and whether the Petitioner can be treated as such a Operational Creditor. From the facts averred by the parties it is seen that construction work is a composite contract involving supply of material as well as rendering works at the site. Neither of the two has commenced on the part of the Operational Creditor to sustain the claim of advance payment based on the non-payment of which the Operational Creditor has issued notice as envisaged under Section 8 of IBC,2016. From Annexure A-1 and Annexure A-2 filed vide Diary No. 2262 dated 11.10.2017, it is seen that the claim in a

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sum of Rs.2880837.30 by way of first and final bill dated 4.9.2017 has been raised as against the Corporate Debtor where as Section 8 notice under the provisions of IBC,2016 has been issued subsequent to that date (i.e) on 12.9.2017 in which the amount as above in a sum of Rs.2880837.30 has not been claimed against the Corporate Debtor and it is for the Petitioner to explain the same. There is a paradox in the contention and claim of the Operational Creditor/Petitioner. Non-payment of advance which according to the Corporate Debtor is unsustainable in view of no goods provided or services having been rendered by the Operational Creditor and in the circumstances the petition is not maintainable. There is credence in the arguments of the Ld. Counsel for the Corporate Debtor as non-payment of advance cannot give rise to a claim under Section 5(21) of IBC,2016 as an Operational Debt will arise only when the Petitioner/Operational Creditor is able to establish that there is a debt due and payable arising out of provision of goods or by rendering of services which is not the case here as the

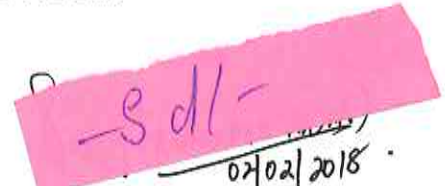


said stage has not according to the Corporate Debtor arisen at all. At best, non-payment of mobilization advance even if there has been full mobilization on the part of the Operational Creditor can give rise to breach of the contract and the amount payable under the said contract as well as the damages can be quantified in a Civil Court and not by this Tribunal. This is particularly so in relation to the work contract.

10) As rightly stated by Ld. Counsel for the Corporate Debtor that there is a plausible dispute between the parties which can be agitated as well, by the parties before the Civil Court and not before this Tribunal as the provisions of IBC,2016 contemplate the insolvency of the Corporate Debtor and the consequences arising there under are for the benefit of the entire body of creditors and that no creditor is going to be benefited and on the other hand the claim of advance and non-payment of the same cannot be considered as an 'Operational Debt', this Tribunal is not satisfied with the claim as put forth by the Operational Creditor as beyond the pale of plausible dispute. In the circumstances this



application is dismissed but without cost. However, the order of dismissal will not preclude the parties from approaching other forums as may be available to them, if so advised.


-Sdl-
02/02/2018
(R.VARADHARAJAN)
MEMBER(JUDICIAL)

U.D.Mehta
02/02/2018