

**In the National Company Law Tribunal
Division Bench, Chennai**

CP/622/ (IB)/CB/2017

Under Section 9 rule 6 of the IBC, 2016

In the matter of

M/S. PENNAR ENGINEERED BUILDING SYSTEM LIMITED

V/s

M/S. INDIA JAPAN LIGHTING PRIVATE LIMITED

Order delivered on: 04.11.2017

**Coram: K. ANANTHA PADMANABHA SWAMY, MEMBER (JUDICIAL)
S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)**

For the Petitioner/OC : Shri. P. Subba Reddy, Advocate

Shri. P. Aparna Devi, Advocate


For the Respondent/CD: Shri. A.K. Mysamy, Advocate

Shri. A.G. Sathyanarayana, Advocate

ORDER

Per: K. ANANTHA PADMANABHA SWAMY, MEMBER (J)

Under consideration is a Company petition filed by M/s. Pennar Engineered Building System Limited (in short Petitioner/Operational Creditor) against M/s. India Japan Lighting Private Limited (in short Respondent/Corporate Debtor) under section 9 of the Insolvency and Bankruptcy Code, 2016 (in short IB Code 2016) r/w rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, IB Rules 2016)



2. Before proceeding with this matter, it would be appropriate to make a note of background facts for the purpose of determination of this petition.
3. The petitioner/OC is public Company having its registered office at Floor No. 9, West Wing, DHFL VC Silicon Towers, Kondapur, Hyderabad and the Corporate Debtor is a private Company incorporated in the year 1996 having its registered office at 82, Radhakrishnan Salai, Chennai – 600 004.
4. The learned Counsel for the Applicant submitted that the respondent had come with tender for supply of steel material and erection of Phase 1 and Phase 2 building and ware house. The Applicant took part in the tender process and the respondent awarded the tender to the Applicant. The Applicant has completed the work and bills were also raised from time to time. However, the Respondent has defaulted in making payment for nearly 9 invoices and the total amount to be paid to the Applicant is Rs. 62,59,981/- (Rupees Sixty Two Lakh Fifty Nine Thousand Nine Hundred and Eighty One Only) and the same is to be paid along with interest of 21% annum. The learned Counsel for the Applicant/OC submitted that originally the work was commenced in the year 2014 and the entire work of both the phases was completed on 06.07.2015. The Applicant/OC issued internal notice during the month of February to the respondent seeking for the amounts payable, but in spite of receipt of the said notice the respondent company did not come forward to make payments. The Applicant has also filed a petition to wind up the Company before the High Court, Madras under section 434 of the Companies Act, 1956 and subsequently

it was transferred to this Tribunal on its constitution. The Applicant approached this Adjudicating Authority under the provision of I & B Code, 2016 claiming the payment of Rs. 62,59,981/- including 21% interest per annum against the corporate debtor in the capacity of a Operational Creditor. The learned Counsel submitted that the Corporate Debtor has become commercially insolvent due to its inability to pay its debts and thus prayed to initiate Corporate Insolvency Resolution Process against the Respondent/CD.

5. The learned Counsel for the Respondent vehemently opposed the contentions raised by Counsel for the applicant and submitted that the Applicant has failed and purposely withheld the email correspondences emanated between the parties. The Respondent clearly set out that in respect of the structural work carried out by the Applicant is defective in respect of Phase I and Phase II, apart from that there is a delay in completing the work of Phase I and Phase II. Counsel for the Applicant has issued notice dated 20.06.2016 under section 434 of the Companies Act, 1956 and an interim reply dated 21.07.2016 and a detailed reply dated 19.11.2016 were issued by the Respondent in which a counter claim for Rs. 52,50,470/- was also made. In view of the dispute raised by the Respondent in the reply notice dated 19.11.2016 under section 434 of the Companies Act before the demand notice issued by the Applicant under Section 8 of I & B Code, 2016, the petition has to be dismissed in limine as the invoices submitted by the Applicant are disputed by the Respondent. Therefore, there is no reason for invocation of the IB Code by the Applicant. The learned Counsel

for the Respondent relied upon the following judgment in support of his submissions:

- *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited – 2017 Online SC 1154 – to show 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 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.*

6. The learned Counsel for the Applicant submitted for the above contentions of the Respondent that the Applicant issued the statutory notice under section 434 of the Companies Act, 1956 on 20.06.2016 and the Respondent Company replied to the notice on 21.07.2016 in which they had sought some more time to reply in detail. When the numbering process of the file before Hon'ble High Court was pending the Respondent replied to the notice on 19.11.2016 and raised the dispute after a period of one and half year during which they occupied the building constructed by the Applicant. This period alone would show that there were not disputes pending between the



Applicant and Respondent and the averments made by the Respondent lacks bonafide. The learned Counsel further submitted that a further notice dated 05.04.2017 was issued by email demanding the payment of Rs. 62,59,981/- along with 21% interest per annum from the date of invoice and the Respondent failed to reply the notice within 10 days. Therefore, the reply notice dated 23.04.2017 cannot be constituted as reply under section 9(2) of the I & B Code, 2016. The learned Counsel also submitted that the building is in occupation and enjoyment of the respondent Company and it is utilizing the building without any obstacles for the purpose for which it was erected. The learned Counsel for the Applicant based on the above submissions prayed to admit the petition.

7. Heard. Perused the pleadings and documents submitted by both the parties.

8. After taking into consideration all the above, it is on record that the Applicant had issued a notice under section 434 of the Companies Act, 1956 even before the petition filed under section 433 of the Companies Act, 1956 was numbered by the Hon'ble High Court. In the detailed reply, the respondent raised certain disputes in respect of work done by the Applicant.

9. The email correspondences between the parties in relation to the disputes in brief are as follows:

- (i) 03.02.2015 to 12.02.2015 – With regard to rescheduling the time for completion and delay. (Respondent Type set Page 31 to 37)

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- (ii) 04.04.2015 – With regard to default and defects (Respondent Type set Page 39)
- (iii) 16.04.2015 – With regard to the Architect Certification ((Respondent Type set Page 43)
- (iv) 13.05.2015 - With regard to defect in painting (Respondent Type set Page 49)
- (v) 27.05.2015 to 29.05.2015 – With regard to defects in construction. (Respondent Type set Page 52)
- (vi) 27.05.2015 to 29.05.2015 – With regard to sending photos of defects identified by the Respondent. (Respondent Type set Page 65)

10. Therefore, the above referred defects were communicated in detail to the Applicant long before filing of the petition. Hence, there were pre-existing disputes in relation to the claim made by the applicant.

11. In relation to the submission of the Applicant that there was no reply to the notice under section 8 of the I & B Code, within 10 days, the Respondent contended that he sent a reply by email on 23.04.2017 after 10 days referring the earlier reply given on 19.11.12016. (Respondent Type set Page 138). Therefore considering these submissions, it is evident that there were serious disputes in existence between the parties in relation to the execution of work and transactions. The case law submitted by the Respondent is also squarely applies to the facts of the present case. In view of the above observations, this Adjudicating Authority is not inclined to admit the Application, accordingly the same is rejected. No order as to costs.



S. Vijayaraghavan
Member (Technical)
TJS


K. Anantha Padmanabha Swamy
Member (Judicial)