

SL. No.5

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

PHYSICAL HEARING

**CORAM: SHRI. RAJEEV BHARDWAJ – HON’BLE MEMBER (J)
CORAM: SHRI. SANJAY PURI - HON’BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 14.12.2023, At 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) No.46/9/HDB/2020
NAME OF THE COMPANY	Seven Hills Digital Park Pvt Ltd
NAME OF THE PETITIONER(S)	Polygon Steel Building System
NAME OF THE RESPONDENT(S)	Seven Hills Digital Park Pvt Ltd
UNDER SECTION	9 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, application is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH – II

CP(IB) No.46/9/HDB/2020

*[Section 9 of the Insolvency & Bankruptcy Code, 2016 and
Rule 6 of Insolvency & Bankruptcy (Application
to Adjudicating Authority Rules, 2016)]*

Between :

M/s.Polygon Steel Building System,

Regd.Off: D.No.46-21-8/1,

Mandavaripeta, Dondaparthu,

Visakhapatnam - 530 016.

....Petitioner/Operational Creditor

A n d

M/s.Seven Hills Digital Park Private Limited,

Regd Off: Villa No.325,

Indu Fortune Fields,

Phase 13, Near Hitech City Railway Station,

Kukatpally,

Hyderabad - 500 085.

....Respondent/Corporate Debtor

Date of Order: 14.12.2023

Coram:

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)

Sri Sanjay Puri, Hon'ble Member (Technical)

Counsel/Parties present:

For the Applicant : Ms.Sandhya Rani, Advocate

For the Respondent : Mr.M.V.Pratap Kumar, Advocate

Heard on : 08.12.2023

Per: Rajeev Bhardwaj, Member (Judicial)

ORDER

1. The instant application has been filed by M/s.Polygon Steel Building System (hereinafter referred as Operational Creditor/OC) to initiate Corporate Insolvency Resolution Process (**CIRP**) in respect of M/s.Seven Hills Digital Park Private Limited (hereinafter referred as **Corporate Debtor/CD**) under Section 9 of the Insolvency & Bankruptcy Code, 2016 and Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority Rules, 2016]
2. By filing the application, the applicant has averred:
 - a) Both the parties have entered into a work agreement dated 08.08.2018 (**Annexure A - page nos.13-18 of the application**) for the supply of structural steel components along with construction of civil work by the OC to CD.
 - b) As per terms & conditions of the work agreement, 30 days' credit was granted to the CD, but on account of the long standing relationship between the parties, such dispensation was extended upto 45 days.
 - c) The OC raised invoices on the CD from time to time (**Annexure B - page nos.19 - 29 of the application**).
 - d) However, the CD failed to pay Rs.65,62,266/- as principal amount and Rs.3,93,734/- as interest @24% per annum from 23.05.2019 to 23.08.2109. The ledger account maintained by the OC is at **Annexure E - page no.38 of the application**. When the CD failed to make the payment, demand notice (**Annexure D - page nos.33-37 of the application**) was served on the CD.

3. The CD by filing the counter has contended and contested the averments made in the application and submitted that:
- i) Against the contracted price of Rs.3,24,80,265/-, an amount of Rs.3,09,80,265/- has already been paid and balance of Rs.15,40,265/- has been retained as caution deposit for leak test in accordance with the terms & conditions of the work agreement.
 - ii) The CD also brought to the notice of the OC the complaint made by M/s.Sunny Optical about the leakages. However, the OC failed to respond to him and has not rectified the defects.
 - iii) It is claimed that there is pre-existing dispute between both the parties and it is reflected from various e-mails and further from the reply dated 04.09.2019 to the demand notice dated 23.08.2019, which has not been put on record by the OC.
 - iv) The OC has not disclosed that an amount of Rs.39,60,000/- was paid by the CD through 4 Demand Drafts bearing Nos.328477, 328478, 328479 and 328476 dated 18.08.2018 in favour of Ms.Addanki Parvathi Himabindu, Mr.Addanki Suresh Kumar, Mr.Radhakrishna Obulsetty and Ms.Ummadi Rajamani. Another payment of Rs.10 lakhs was also made by the CD in the month of May, 2019.
 - v) The CD has also taken preliminary objections that the OC has not approached this Authority with clean hands and has not only failed to give proper details of the payments made by the CD, but also did not put up on record the reply dated 04.09.2019 to the demand notice dated 23.09.2019.
4. In the rejoinder, OC has reaffirmed and reiterated the contentions put up in the application:

a) It is averred that the CD has intentionally concealed all the e-mails addressed by the OC to the CD. Reference has been made to the e-mails dated 23.07.2019, 24.07.2019, 25.07.2019, 12.08.2019 and 19.08.2019.

b) In the e-mail dated 12.08.2019, the OC has pointed out about the leakages and efforts taken to rectify the same.

c) About the payment of Rs.39,60,000/- through demand drafts, it is denied that any such payment was made in connection with the work agreement dated 08.08.2018. It is claimed that the said payment was made in connection with different transactions.

d) On the question of work agreement for Rs.3,24,80,265/-, it is explained that due to changes made in the drawing by the CD, the cost has escalated by another Rs.9 lakhs and this amount was referred in the e-mail dated 11.12.2018 sent by the OC to the CD. (Annexure IV - page no.12 of the rejoinder). Therefore, the OC raised invoices for a total amount of Rs.3,35,42,266/- and out of this, the CD has paid Rs.2,69,80,000/- leaving balance of Rs.61,62,266/-.

5. We have heard learned counsels for both the parties and have also gone through the entire record.
6. Section 9 r/w Section 8 of the IBC lays down the procedure and formalities for initiation of CIRP by an Operational Creditor. These provisions require a strict proof of debt and default. Hon'ble Apex Court in *Mobilox Innovations Private Limited versus Kirusa Software Private Limited 2018(1) SCC 353* explained as what the Adjudicating Authority has to examine in an application under Section 9:-

34. 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.

7. Learned counsel for the applicant has vehemently argued that all the requirements as discussed above have been met by the applicant and he has taken us through the work agreement (**Annexure A of the application**), invoices (**Annexure B of the application**), demand notice (**Annexure D of the application**), copy of the ledger (**Annexure E of the application**), statement of bank accounts (**Annexure H of the application**) etc and submitted that against the work order of Rs.3,35,42,266/-, the respondent has paid only RS.2,69,80,000/- as on the date when the demand notice (**Annexure D of the application**) was served on the respondent and therefore Rs.65,62,266/- as principal amount and interest of Rs.3,93,734/- is still pending from the respondent.

8. In answer to the issue raised by the respondent in the counter that the dispute existed on the date of issuing the demand notice (**Annexure D of the application**), learned counsel for the applicant has referred to emails dated 23.07.2019, 24.07.2019, 25.07.2019, 12.08.2019 and 19.08.2019. (**Annexures 1 to Annexure 4 of the application**) and

contended that whatever defects that were pointed out by the respondent was corrected and accordingly withholding of the payment of 5% of the work order is wrong and unjustified.

9. Per contra, Learned Counsel Mr. M.V.Pratap Kumar appearing for the respondent submitted that against the contracted price of Rs..3,24,80,265/-, the respondent has already paid Rs.3,09,80,265/- and an amount of Rs.15,40,265/- has been retained as caution deposit for leak test in accordance with the terms and conditions of the work agreement.
10. Learned Counsel for the respondent has also argued that before issuance of the demand notice, there was dispute between both the parties regarding quality of work and as per work agreement (**Annexure A – page nos.13-18 of the application**), 5% of the amount has been retained as caution deposit for leak test.
11. The work agreement (**Annexure A – page nos.13-18 of the application**) dated 08.08.2018 involved construction of three sheds by the applicant and the contract price was Rs.3,24,80,265/- inclusive of GST @ 18% and transportation of PEB material to the site. Regarding the payment due, it has been specifically provided in the agreement as to how the payment will be made:

Payment terms:

- a) *20% advance at the time of agreement*
- b) *PEB Raw materials to be purchased from the market on cash purchase. Hence, the money has to be paid before despatch of the material and before despatch of every truck money will be paid by FIRST PART on submission of Proforma Invoice by SECOND PART.*
- c) *Balance amount on running bill once in 20 days on check measurement.*
- d) *5% amount will be retained as a caution deposit for leak test.*

12. Therefore, the respondent was required to pay money to the applicant before despatch of every truck and on submission of proforma invoices by the applicant.
13. Both the parties have given details about the contract price in the ledger account. The applicant has detailed the material used to the tune of Rs.3,35,42,266/- in the ledger account (**Annexure E – page No.38 of the application**) and the total amount received from the respondent as Rs.2,69,80,000/-. On the other hand, the respondent in his ledger account has described that against the total contract amount of Rs.3,24,80,265/-, entire amount excluding 8Rs.15,40, 265/- which has been kept as caution deposit for leak test, has been paid.
14. When the applicant has gone beyond the contract amount, i.e., Rs.3,35,42,266/- instead of Rs.3,24,80,265/-, it is for the applicant to prove that the contract amount was enhanced. In this regard, the applicant has relied upon the e-mail dated 11.12.2018 (**Annexure IV – page no.12 of the rejoinder**) vide which additional price of Rs.9 lakhs was demanded. Merely sending e-mail without acceptance of the increase by the respondent would not mean that both the parties agreed for the increase in price due to escalation of costs, as there is no such provision in the work agreement (**Annexure A – page nos.13-18 of the application**).
15. Apart from the so called increase in the cost of the project, the applicant has also not accounted for the demand draft (**at pages 28-32 of the counter**), amounting to Rs.39,60,000/- which were admittedly received by the applicant. Receipt of this payment was not referred by the applicant in the application, but in para 6 of the rejoinder, it is admitted

that this payment was made by the respondent, but in connection with a different transaction. However, there is no other business transactions between both the parties and therefore the respondent has correctly shown this amount in its ledger account.

16. The applicant has not shown either the payment of Rs.39,60,000/- nor the enhancement of contract amount from Rs.3,24,80,265/- to Rs.3,35,42,266/- in the demand notice.
17. The pre-condition for filing application under section 9 of the IBC, 2016 is that dispute between both the parties must be genuine and is not spurious, hypothetical or illusory. The dispute has been defined in section 5(6) of the IBC which says that:

“Dispute” includes a suit or arbitration proceedings relating to :
(a) the existence of the amount of debt;
(b) the quality of goods or service; or
(c) the breach of a representation or warranty.”

18. On many occasions, the respondent has brought the defects of leakages to the notice of the applicant by e-mail. In this regard emails dated 22.07.2019, 23.07.2018, 19.08.2019, 24.08.2019 and 03.09.2018 have already been annexed by the applicant as well as the respondent. The applicant has tried to show that the problems have been corrected by referring to e-mails dated 26.07.2019, 12.08.2019 and 19.08.2019. The leakages in the shed is material and there are allegations and counter allegations about the leakages. However, the fact remains that there was bonafide dispute between both the parties regarding the quality of the work done by the applicant prior to the issuance of demand notice.

This defect is still in existence even upto the last e-mail dated 03.09.2019. As such, there was bonafide dispute between both the parties prior to issuance of demand notice.

19. In view of the above discussions, we come to this conclusion that there is a real dispute between the parties as to the debt owed did not exist. The IBC is not intended to be a substitute to recovery forum and whenever there was existence of a real dispute, the IBC provisions cannot be invoked and accordingly conclude that there is no merit in the application filed by the applicant.
20. Keeping in view the facts of the case, the Company Petition bearing No. **CP(IB) No.46/9/HDB/2020** is dismissed with costs.

Sd/-
SANJAY PURI
MEMBER (TECHNICAL)

Sd/-
RAJEEV BHARDWAJ
MEMBER (JUDICIAL)

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