IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI

COURT – IV

IB/323/ND/2022

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:
BIOSAFE LAB INDIA PRIVATE LIMITED
REGISTERED OFFICE:-
201-204, 2nd Floor, Best Business Park
Plot No. P-2, Netaji Subhash Place
Pitampura, New Delhi-110034
CIN U74140DL2013PTC256112

...OPERATIONAL CREDITOR

VERSUS

NBCC INDIA LIMITED
REGISTERED OFFICE:
NBCC Bhawan, Lodhi Road
New Delhi-110003, India
CIN: L74899DL1960GOI003335

...RESPONDENT

Judgment Delivered on: 27.05.2022

CORAM:

SH. DHARMINDER SINGH, MEMBER (J)
MS. SUMITA PURKAYASTHA, MEMBER (T)

ORDER

PER- SHRI DHARMINDER SINGH, MEMBER (JUDICIAL)

The instant application under Section 9 of the IBC has been filed on behalf of the Applicant Biosafe Lab India Private Limited

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against the NBCC India Limited for initiation of CIRP proceedings for a default of an amount of Rs. 7,10,07,021/-.

2. Brief facts of the case are that the Operational Creditor is a company incorporated as per the provisions of the Companies Act, 2013 having expertise of highly specialised biosafety laboratories dealing infectious micro organisms. Accordingly, vide its letter dated 24.04.2012 awarded a work contract to M/s. ERA Infra Engineering Ltd. for the construction and upgradation of NCDC for an amount of Rs. 199.02 crores and the Corporate Debtor vide letter dated 07.08.2014 appointed the Operational Creditor as a sub-contractor for carrying out work. Therefore, several purchase order amounting to Rs. 49.08 Crores were issued to the Operational Creditor by M/s. ERA Infra Engineering Ltd. pertaining to the construction/upgradation of NCDC New Delhi. Accordingly, invoices were raised upon the M/s. ERA Infra Engineering Ltd. by the Operational Creditor for the work carried out in construction/upgradation of NCDC Shamnath Marg, New Delhi.

3. Further, it is also submitted that M/s. ERA Infra Engineering Ltd. was unable to make timely payment to the Operational Creditor which was hampering the timely progress of the work

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and the same was duly acknowledged by the Respondent. Accordingly, M/s. ERA Infra Engineering Ltd. requested the Respondent to make direct payment to the Operational Creditor and the same was agreed upon by the Respondent vide its letter dated 01.08.2015. The Operational Creditor completed the work entrusted upon it but complete payment was not made by M/s. ERA Infra Engineering Ltd. to the Operational Creditor. Hence the Operational Creditor vide its letter dated 31.10.2017 requested M/s. ERA Infra Engineering Ltd. to get a letter of surety issued from the Respondent to undertake to make payments directly to the Operational Creditor in case of failure of ERA Infra Engineering Ltd. to make payment to the Operational Creditor. The Corporate Debtor vide its letter dated 03.11.2017 agreed to the same and thus stood as surety on behalf of the M/s. ERA Infra Engineering Limited to the Operational Creditor. Thereafter, the Operational Creditor submitted its claim of Rs. 7.87 Crores in Form B dated 25.05.2018 to the Resolution Professional of the M/s. ERA Infra Engineering Ltd. as an Operational Creditor of ERA Infra Engineering Ltd.

4. It is also submitted that the Resolution Professional of ERA Infra Engineering only verified the claim of the Operational Creditor to

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the extent of Rs. **51.79** lakhs and was unable to verify the remaining amount. Thereafter, the Operational Creditor filed a Writ Petition bearing No. 12427/2021 under Article 226 of the Constitution of India seeking various reliefs against the Respondent. Which inter-alia includes an amount of Rs. 7.87 crores, termination of contract awarded to the Operational Creditor by the Corporate Debtor, to release the performance bank guarantee of Rs. 1.80 crores and to pay the remaining amount to the Operational Creditor under a separate claim. The said writ petition was listed on 08.11.2021 and the said writ petition is still pending.

5. Further, it is also submitted that the Corporate Debtor agreed to act as a surety of the M/s. ERA Infra Engineering Ltd. to the Operational Creditor. Accordingly, the Operational Creditor served a demand notice dated 26.11.2021 under Section 8 of the Insolvency and Bankruptcy Code, 2016 claiming an amount of Rs. 10.86 crores from the Corporate Debtor. Operational Creditor was also awarded a letter of Award dated 26.07.2018 and the Demand Notice dated 26.11.2021 includes a claim of Rs. 3.76 crores concerning a letter of Award Dated 26.07.2018. Hence, the Operational Creditor is also filing a separate Section 9 Petition

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concerning the dues under Letter of Award Dated 26.07.2018 since the same is a separate transaction. Respondent replied to the Demand notice dated 26.11.2021 raising a frivolous and moonshine dispute, hence this petition.

6. On advance notice, Ld. Counsel for the Respondent has appeared and argued that the petition is not maintainable as there is a forum shopping and there was no privity of contract between the Applicant and the Corporate Debtor rather the contract was given to the ERA Infra Engineering Limited and not to the Applicant herein. Further, the Applicant has also filed a claim before the R.P. as the M/s. ERA Infra Engineering Ld. is under CIR proceedings, Ld. R.P. confirmed only an amount of Rs. 51,79,028/-. Hence, the present applicant is indulged in forum-shopping and filing petitions here & there before different forums accordingly, prayed for dismissal of the present applicant being not maintainable.

7. Heard, Record has been thoroughly perused. Undisputedly, the contract was given by NBCC to M/s. ERA Infra Engineering Limited and there was no agreement executed between the Applicant and the Respondent herein. No such agreement has been placed on record, whereby ERA Infra Engineering Limited

might have been authorised to engage the sub-contractor and for that purpose the Respondent can be held liable and vice-versa. In this context, the affidavit has also been filed on behalf of Applicant stating that no such contract was ever executed between M/s. ERA Infra Engineering Limited as well as the Applicant herein with respect to the completion of the contract with the Respondent. Although, the vide letter dated 03.11.2017, the Corporate Debtor has written a letter to the M/s. ERA Infra Engineering Limited that M/s Biosafe Lab India Private Limited vide letter dated 30.10.2017 requesting them to issue a comfort letter qua payment directly in case M/s. ERA Infra Engineering Limited is unable to make the payment to them. Accordingly, they under-take to make the direct to the M/s. Biosafe Lab India Private Limited from their 'due payment' in case, M/s. ERA Infra Engineering Limited failed to make the payment. The exact language of the letter is as under:

"This has reference to M/s Biosafe Lab India Pvt. Ltd.'s letter No. BI/ERA/17/0709 dated 31st Oct. 2017, vide which, they are requesting us to issue comfort letter to M/s. Biosafe to make payment directly in case you are unable to make payment to them. Accordingly, we undertake to make direct payment to M/s. Biosafe Lab India Pvt. Ltd. from your due payments in case you fail to make payment to them on your request."

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8. Accordingly, the stress has been laid down by the Applicant herein that once this undertaking has been given, there responsibility has been shifted to the Respondent to make the entire payment, which has not been paid and relied upon a judgment *"Godrej & Boyce Mfg. Co. Ltd. Vs. Satec Envir Engineering India Pvt. Ltd. Company Appeal (AT) (Insolvency) No. 438 of 2022 passed by NCLAT Delhi vide its order dated 06.05.2022."* There is no dispute about the proposition laid down, but it is to be mentioned that M/s. ERA Infra Engineering Limited is already under-going CIR proceedings vide order dated 08.05.2018. Further, the responsibility has been owned by the Respondent to make the payment out of the due payment of M/s. ERA Infra Engineering Limited, if any, against the work done by the present applicant. It is also worthwhile to mention that the present applicant has fairly admitted that it has filed a claim before Ld. R.P. appointed qua the M/s. ERA Infra Engineering Limited, which was rejected stating that only a sum of Rs. 51,79,028 are net payable and rejected the rest vide e-mail dated 04.04.2019.

9. From the record, it is not proved on the record that there was any privity of contract between the applicant and the Respondent

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herein except to the extent that one letter, which has been written by the Respondent to the M/s. ERA Infra Engineering Limited as stated above that too was only with request to 'due payment' if any of M/s. ERA Infra Engineering Limited. Further, on 08.05.2018 M/s. ERA Infra Engineering Limited had undergone CIR proceedings therefore, any amount lying even if any with the Respondent qua the contract with M/s. ERA Infra Engineering Limited that cannot be made payable to the Applicant herein due to 'Moratorium'.

10. Apart that, there is a serious dispute qua the amount also, as the balance sheets of M/s. ERA Infra Engineering Limited is showing a sum of Rs. 51,79,028 due, whereas the Applicant has been claiming a sum of Rs. 7,10,07,021/-. Moreover, the Applicant has already availed the remedy before the Hon'ble High Court, Delhi by virtue of filing a writ petition 12427/2021, which was filed on 28.10.2021 against the respondent, whereas the demand notice was issued on 26.11.2021. The applicant also filed claim before Ld. R.P. of M/s. ERA Infra Engineering Limited, which was also rejected. Therefore, even otherwise, there is a pre-existing dispute. Apart that the applicant is indulged in forum shopping. Even, the citation, which has been referred by the

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Applicant i.e. Godrej & Boyce Mfg. Co. Ltd., the petition was dismissed on the ground of 'pre-existing dispute' relying upon the citation *'Mobilox Innovations Pvt. Ltd.'* The similar facts are herein.

11. In view of the above said discussion, this Tribunal is also affirm view that there is a serious dispute about the 'due payment', which cannot be decided in a summary manner and requires a detailed enquiry.

12. Consequently, the present application being devoid of any merits stands rejected, as to no order to costs.

File be consigned to Record.

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SUMITA PURKAYASTHA
MEMBER (TECHNICAL)

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DHARMINDER SINGH
MEMBER (JUDICIAL)