IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD BENCH

COURT - 1

ITEM No. 161

CP (IB) No. 307/NCLT/AHM/2019

Order under Sections 9 of Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF:

Montecarlo Ltd.

….Operational Creditor

Versus

GRG Infrastructure Pvt Limited

….Corporate Debtor

Order delivered on: 23/11/2022

Coram:

Dr. Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:
For the Applicant :

ORDER

The case is fixed for the pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-	**-SD-**
KAUSHALENDRA KUMAR SINGH **MEMBER (TECHNICAL)**	**DR. MADAN B GOSAVI** **MEMBER (JUDICIAL)**

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1

CP (IB) No. 307/NCLT/AHM/2019

(A petition filed under Section 9 of Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process)

<u>In the matter of:</u>
Montecarlo Ltd.
CIN – U40300GJ1995PLC025082
<u>Having Registered Office at:</u>
706, 7th Floor Shilp Building,
Nr. Municipal Market, C.G. Road,
Navrangpura, Ahmedabad, Gujarat – 380009

....Operational Creditor

Versus

GRG Infrastructure Pvt Limited

<u>Having Registered Office at:</u>
Survey No. 54 Otala, Tankara Latipur
Highway, Taluka - Tankara,
District: Rajkot, Gujarat – 363650

.... Corporate Debtor

Order Delivered on: 23:11:2022

Coram: Madan B.Gosavi, Member (Judicial)
Mr. Kaushalendra Kumar Singh, Member (Technical)

<u>Appearance:</u>
Learned Counsel, Mr., appeared for the Operational Creditor.
Learned Counsel, Mr. Piyush Luktuke, appeared for the Corporate Debtor.

ORDER

1. This application has been filed by Montecarlo Limited, claiming to be an Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **IBC, 2016**) for initiation of Corporate Insolvency Resolution Process **("CIRP")** against the Corporate Debtor namely GRG Infrastructure Private Limited.
2. Registered office of the Corporate Debtor is situated in Rajkot, in the state of Gujarat and, therefore, this Tribunal has jurisdiction to entertain and try this application.
3. The amount of debt claimed in default is Rs.48,32,089.40/- without including interest @18% per annum and the date of default is 10.11.2017. The present application is filed on 16.04.2019, which is within limitation and not barred by limitation.
4. The facts, in brief, are that the Operational Creditor and the Corporate Debtor entered into an agreement on 9th April, 2016 at Ahmedabad in respect of casting of pipes (NP3 & NP4) and manholes. In furtherance of such agreement, Operational Creditor made an advance payment of Rs. 51 Lakhs in two tranches. The first Tranche of Rs. 41 lakhs

was paid on 28.11.2016 and the second tranche of Rs. 10 lakh was paid on 15.02.2017.

5. The Operational Creditor submitted that the Corporate Debtor was required to manufacture and supply the pipes (NP3 & NP4) and manholes and they were required to adhere to the specifications and quality requirements as provided in the agreement. Such goods manufactured by the Corporate Debtor were required to be inspected at their factory by Rites Limited, (Enterprise of Govt. of India) and also at the site by Third Party Inspection Agency. The goods manufactured by the Corporate Debtor were inspected by Rites Limited and pursuant to such inspection; the Rites Limited issued two certificates dated 7th January, 2017 and 15 January, 2017. The first certificate dated 7 January, 2017 shows that the goods mentioned in such certificate were rejected since the numbers of defective pipes in visual inspection were found more than permissible limits.

6. The second inspection dated 15 January, 2017 approved of the goods mentioned in such certificate. A part of the approved goods were subsequently transferred to the site. Thereafter on 26th February 2017, a site inspection was

conducted by Mr. S.K. Singh, representative of the Third Party Inspection Agency and upon such inspection, the goods which had been approved vide inspection certificate dated 15th January, 2017 were rejected as not adhering to the contractual specifications.

7. The Executive Engineer in-charge of the project addressed a letter dated 3 March, 2017 to the Corporate Debtor referring to such inspection by Prof. S.K. Singh directing the Corporate Debtor to remove all the pipes of that lot immediately. Thereafter, the Operational Creditor wrote a letter dated 6th March, 2017 to the Corporate Debtor, instructing them to remove those pipes from the site immediately.

8. The Operational Creditor further submitted that it had not received any goods from the Respondent till November 2017. The Operational Creditor made purchases of goods worth Rs. 2,67,910.60/- from the Respondent on 30 June, 2018. Thereafter adjusting this amount the remaining amount of Rs.48,32,089.40/ remains with the Corporate Debtor as unrecovered advance.

9. The Operational Creditor sent a Demand Notice under Section 8(1) of the Insolvency and Bankruptcy Code, 2016. A copy of the Demand Notice dated 26.02.2019 is annexed with the application. The Corporate Debtor has not replied to the Demand Notice under Section 8 within the statutorily prescribed time period nor has the Corporate Debtor provided details of any suit or arbitral proceedings commenced in relation to the unpaid operational debt as required by Section 8 of the Insolvency and Bankruptcy Code, 2016. The claim of the Operational Creditor is in respect of goods which the Corporate Debtor was required to supply against the advance of Rs.51,00,000/ received by them and except for the limited amount of Rs.2,67,910.60/- ,the Corporate Debtor has failed to supply the balance goods.

10. The Operational Creditor further submitted that the default in payment occurred on 10.11.2017 when the first notice for payment was sent to the Corporate Debtor i.e. 10.11.2017.

11. The Corporate Debtor appeared before this Authority and filed its reply to the present petition, and denied the

averments made by the Operational Creditor. The Corporate Debtor has submitted the following points:

- Mr. Gautam R. Patel being a vice president (contract-management and legal) is not authorized to issue the demand notice as well as to file the present petition on behalf of the Applicant Company.
- There has been no notice for termination of the contract and the debt arise out of the advance payment made to corporate debtor.
- That there is dispute in existence as the debt cannot be treated as an operational debt particularly when the goods were manufactured and there is an issue of supply of sub-standard goods in existence. Therefore there is issue of alleged defective goods in existence. It is suffice to say
- The defective goods, as stated by the Operational Creditor were lying at the Bhadra town. However when the respondent had gone there for lifting of these goods, it was found that goods were already used by the Operational Creditor.

- Petitioner failed to provide any proof that the default has occurred on 10th November, 2017.
- The Operational Creditor had not performed the work of severage instead the said work was allotted to the Eiffel Construction who in contravention of the terms of the agreement and diverted the work of severage of pipes to Eiffel construction. Therefore, in terms of quality of pipes and manholes the Eiffel construction purchased the same goods from the Corporate Debtor for the execution of work assigned by the Operational Creditor.
- As per the clause of agreement if there is any dispute in respect of quality of the goods, then there is a specific provision that the dispute shall be referred to the sole arbitrator appointed by the joint managing director of Operational Creditor.
- That the Corporate Debtor never refused to supply and manufacture the goods and even today ready to supply and to do work as per the work order but it is the Operational Creditor who is not willing to work .

12. The Operational Creditor submitted that the contention of the Corporate Debtor regarding the alleged no- termination of the contract between the parties is unsustainable in light of the facts of the present case and in view of the provisions of section 43 of the Sale of Goods Act, 1930 read with Section 74 of the Indian Contract Act, 1872. The Operational Creditor further submitted that the Operational Creditor is not bound to terminate a contract before claiming refund of an advance amount for which goods were not supplied or where goods supplied have been rejected. It is submitted that having rejected the goods supplied by the Corporate Debtor, the Operational Creditor became entitled to a refund of the advance, amounts paid, less of adjustments, under section 73 of the Contract Act 1872. It is also submitted by the Operational Creditor that no dispute, has been ever raised by the Corporate Debtor.

13. We have heard learned counsels for the Operational Creditor and Corporate Debtor and have gone through the record. The Operational Creditor has attached the Proof of advance payment and has also attached reminder notices given to the Corporate Debtor before giving the Demand

notice under 8 of the Insolvency and Bankruptcy Code, 2016. It is an undisputed fact that advance payment was made to the Corporate Debtor. In ***Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited***, the Supreme Court held that an amount given as advance to another person in lieu of availing goods or service shall be construed as an operational debt and the claimant of the amount shall come within the ambit of the definition of an operational creditor for purposes of the Insolvency and Bankruptcy Code, 2016. It is also noted that the Corporate Debtor has failed to produce on record the Documentary Evidence to establish pre-existence of any Dispute. It is also noted that the Corporate Debtor has never denied the amount paid in advance by the Operational Creditor in his Response. The letter of authorisation in the Board of Resolution is also annexed with the application filed by the Operational Creditor. The Contract between the Operational Creditor and the Corporate Debtor had a quality testing clause of all the raw materials and construction elements as per Operational Creditor Incharge/Client.

14. We have also observed that for filing the application under Section 9 of IB Code, 2016 the delivery of demand notice is mandatory. The proof of delivery of the said notice is on record. The present application is within the period of Limitation as per the applicable provision of the Limitation Act, 1963 and as such the application deserves to be admitted.

15. Accordingly, we allow the present application filed under Section 9 of the IB Code with following directions:

I. The Corporate Debtor, **GRG Infrastructure Pvt Limited** is admitted in the Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016.

II. The moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of Section 14(1) of the Code.

a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority;

b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

III. The order of moratorium shall affect the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor Company under Section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.

IV. We hereby appoint**, Mr. Pawankumar Jagetia having registration no. IBBI/IPA-001/IP- P00800/2017-**

18/11366, email: pjagetiaco@yahoo.co.in **(Ahmedabad, Gujarat)** to act as an IRP under Section 13(1)(c) of the Code. He shall conduct the Corporation Insolvency Resolution Process as per the provision of Insolvency and Bankruptcy Code, 2016 read with Regulation made thereunder

V. The IRP shall perform all his functions as contemplated, inter-alia, by Sections 17, 18, 20 & 21 of the Code. It is further made clear that all personnel connected with the Corporate Debtor, its Promoter, or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code extending every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter, or any other person required to assist or co-operate with IRP, do not assist or co-operate, the IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

VI. This Adjudicating Authority directs the IRP to make a public announcement of initiation of Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1) (b) of the Code.

VII. It is further directed that the supply of goods/service to the Corporate Debtor Company, if continuing, shall not be terminated or suspended, or interrupted during the moratorium period.

VIII. The IRP shall be under a duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016. The Operational Creditor is directed to pay an advance of **Rs.50,000/- (Rupees Fifty Thousand Only)** to the IRP within two weeks from the date of this order for smooth conduct of Corporate Insolvency Resolution Process ("CIRP") and IRP to file proof of receipt of such amount to this Adjudicating Authority along with First Progress Report. Subsequently, IRP may raise further demands for Interim funds, which shall be provided as per Rules.

IX. The Registry is directed to communicate a copy of this order to the Operational Creditor, Corporate Debtor and the Interim Resolution Professional, and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on the website immediately after pronouncement of the order.

16. Accordingly, we allow the present Petition. CP (IB) No. 307/NCLT/AHM/2019 stands admitted.

-SD-	**-SD-**
KAUSHALENDRA KUMAR SINGH **MEMBER (TECHNICAL)**	**DR. MADAN B GOSAVI** **MEMBER (JUDICIAL)**

Divya/LRA