

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH (Court-II)
KOLKATA**

C.P (IB) No.88/KB/2022

**An application under 9 of the Insolvency and Bankruptcy Code, 2016
read with Rule 6 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules,2016.**

In the matter of:

Prima Traders, having its registered office at Shop No.2,145, Abbas Manzil
Ground floor, S.V.Road, Khar (W), Mumbai-400052.

... Operational Creditor

Versus

In the matter of:

Simplex Infrastructures Limited (CIN 45209WB1924PLC004969), having
its registered office at Simplex House, 27, Shakespeare Sarani Kolkata, West
Bengal-700017

...Corporate Debtor

Date of hearing :06/01/2023

Order Pronounced on :01/09/2023

Coram:

Ms.Bidisha Banerjee, Member (Judicial)

Mr.Balraj Joshi, Member (Technical)

Counsels appeared through Physically/ Video Conference

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|-----------------------------|----------------------------|
| 1. Mr. Vignesh Kamat , Adv. |] For Operational Creditor |
| 2. Ms.Ira Mishra,Adv. |] |
| 1. Mr.Joy Saha, Sr. Adv. |] For the Corporate Debtor |
| 2. Mr.Snehashis Sen, Adv. |] |
| 3. Mr.Aditya Sarkar,Adv. |] |

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This is an application preferred under section 9 of the Insolvency and Bankruptcy, 2016, by **Prima Traders**, seeking initiation of Corporate Insolvency Resolution Process against the Corporate Debtor namely **Simplex Infrastructures Limited**.
2. The amount claimed by Operational Creditor is to the tune of Rs.7,11,261/- plus interest competent of Rs. 92,737/- aggregating to total Rs. 8,08,998/-. The alleged debt emanates from supply of goods, sold and delivered against invoices from 11 January, 2019 to 26th July, 2019 on diverse dates. While the Operational Creditor has admitted that received a part payment amounting to Rs.3,00,000/-, the amount that still remains unpaid is 7,11,261/-
3. Facts in brief as averred by the Applicant Creditor:
 - i. The Corporate Debtor failed to pay total outstanding is Rs. 7,11,261/- out of the total amount of Rs.10,11,261/- towards the 5(five) Tax Invoices for the goods sold, supplied and delivered by the Operational Creditor to the Corporate Debtor.
 - ii. The Operational Creditor had filed a petition, CP(IB)/1077/2022 on 11th March, 2020 i.e. just before the first lockdown due to COVID-19. It is claimed that there was a lot of confusion due to COVID-19 and lockdown and spread of COVID-19, hence the petition got wrongly filed online before the Hon'ble Mumbai Bench.
 - iii. The Hon'ble National Company Law Tribunal, Mumbai on 7th September, 2021 was pleased to allow the Operational Creditor to withdraw its petition with a liberty to file a fresh petition.

Submissions of the Respondent Debtor

4. The present petition filed on 22.12.2021 before this Kolkata Bench is not maintainable as the threshold of is without any jurisdiction One Crore is

not crossed over.

5. At hearing, Ld. Sr. Counsel Mr. Joy Saha, appearing for the Corporate Debtor thus raised the issue of maintainability of this application.
6. Mr. Joy Saha, the Ld. Sr. Counsel appearing for the Corporate Debtor submitted that this application was first preferred before the coordinate bench of NCLT at Mumbai by the Operational Creditor under CP/1077/MB/2020, on 11/03/2020. When the threshold was One lakh. This application was dismissed of by the Mumbai bench vide its order dated 7th September, 2021, wherein the following order was passed without any riders:

“1. Ms. Vinita Muley, Ld. Counsel for the petitioner present.

2. Counsel for the petitioner submits that the registered office of the Corporate Debtor is in Kolkata and seeks leave of the Court to file a petition before the appropriate Bench of NCLT in Kolkata.

Petitioner has liberty as per law to file a fresh petition.

3. The petition is dismissed as not pressed”.

Placing the above order, Ld. Senior Counsel would forcefully argue that the order dismissing the petition as not pressed, caused termination of lis and therefore even though the default is shown to have occurred in 2019-20, as per the Order VII Rule 11 of CPC, since no liberty was granted to continue the lis, due to change in the law the current threshold being applicable whereas amount of claim does not cross the barrier of the new threshold limit, the application is not maintainable.

7. Per contra, Ld. Counsel for the Operational Creditor would rely upon the judgment of the Hon’ble Apex Court in **Sesh Nath Singh vs Baidyabati Sheoraphuli Co** to contend that the very fundamental parameter of the plaint shall not extinguish, as such his cause of action was preserved, and so the application is maintainable.

8. Ld. Counsel for the Operational Creditor would strenuously urge that the lis should continue since the said order dated 7th September 2021 by the Coordinate bench of Mumbai has given a “liberty as per law to file a fresh petition”. Since the order mentions that the petitioner has sought leave to file a petition before the appropriate bench of NCLT, Kolkata Bench, as the registered office of the Corporate Debtor is situated in Kolkata, and liberty to that effect has been granted, the lis does not terminate but relates back to the earlier date of filing before the Mumbai Bench.
9. The following were the limited submissions made on behalf of the Operational Creditor to refute the allegations in regard to non-maintainability as raised by the Corporate Debtor:
1. That the order dated 07/09/2021 granted the Operational Creditor a liberty to file a fresh petition. The said liberty as granted would by itself allow the present petition to be entertained and tried by this Hon’ble Tribunal.
 2. The petitioner has diligently and bonafide pursued the matter and having done the same, equity demands that the right of the petitioner to initiate/maintain the action having been exercised before the change in the jurisdiction cannot be curtailed or taken away on a technical ground as in the present circumstances.

In view of the aforesaid submissions, the operational creditor claims that present Petition ought to be held as maintainable.

10. Ld. Sr. Counsel /counsels were heard, and records perused.
11. In order to decide the matter a closer look at Order 7 Rule 10 of the Code of Civil Procedure is required.
- Order 7 Rule 10 envisages the following, as extracted verbatim hereinbelow with supplied emphasis, for clarity:

10. Return of Plaint-(1) [*Subject to the provisions of rule 10A, the plaint shall*] at any stage of the suit be returned to be presented to the Court in

which the suit should have been instituted.

[Explanation- For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]

(2) Procedure on returning plaint- On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Further Rule 10(A) reads and mandates the following procedure in regard to return of plaint.

10A-. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return-

(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court-

(a) Specifying the Court in which he proposes to present the plaint after its return,

(b) Praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) Requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit, -

(a) Fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) Give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearance is given under sub-rule (3)-

(a) It shall not be necessary for the Court in which the plaint is

presented after its return, to serve the defendant with a summons for appearance in the suit, unless the Court, for reasons to be recorded, otherwise directs, and

(b) The said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

Thus Rule 10 and 10(A) are explicit that a plaint can at any stage of the suit be returned to be presented before the court in which the suit should have been initiated. The Order 7 Rule 10 read with 10A prescribes the procedure on return of the plaint, that on return of the plaint the judge shall endorse thereon the date of its presentation and return, the party presenting it statements of reason for returning, fixing a date of appearance before the Court to which it is returned, which is not the case here.

12. It is inarguably and irrefutably evident that in the instant case, the petition filed before NCLT Mumbai Bench was not “returned” for presentation before appropriate Bench, rather it was “dismissed as not pressed” as liberty was sought for to approach the Bench of complaint jurisdiction. The phrase “dismissed as not pressed” legally connotes termination/extinction of a lis with no bar to reagitate as no conclusive judgment/order was rendered on merits. There was also no abandonment of issue, but termination of the matter in Mumbai Bench, no continuation of the lis to Kolkata but with no impediment to reagitate in Kolkata Bench by way of a fresh CP.
13. Further, that the CP could have been, but not sought to be transferred in terms of Rule 16(d) of the NCLT Rule 2016 which reads as under: -

16. Functions of the President- *In addition to the general powers provided in the Act and in these rules the President shall exercise the following powers, namely: -*

- (a) Preside over the consideration of cases by the Tribunal;*
- (b) Direct the Registry in the performance of its functions;*
- (c) Prepare an annual report on the activities of the Tribunal;*
- (d) Transfer any case from one Bench to other Bench when the circumstances so warrant;**
- (e) To withdraw the work or case from the Court of a member;*
- (f) Perform the functions entrusted to the President under these rules and such other powers as (sic may) be relevant to carry out his duties as head of the Tribunal while exercising the general superintendence and control over the administrative functions of the Members, Registrar, Secretary and other staff of the Tribunal”*

If an application was made to the President, NCLT for transfer of the CP from Mumbai Bench to Kolkata Bench such transfer would have amounted to continuation of the earlier CP filed at Mumbai Bench, to the transferee Kolkata Bench. Instead the applicant on 07/09/2021 chose to withdraw itself from the pending CP at NCLT Mumbai Bench, allowed it to be “dismissed as not pressed”, filed a fresh CP before the Kolkata Bench with a fresh number being CP (IB) 88/KB/2022 on 05/02/2022, long after, the threshold in term of Section 4 of the IBC got amended on and from 24/03/2020 and the new threshold of 1 Crore was introduced.

14. **Section 4 of IBC reads:**

4. Application of this Part.

“This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is One Lakh rupees;

Provided that the Central Government may, by notifications specify the minimum amount of default of higher value which shall not be more than one crore rupees.

[Provided further that the Central Government may, by notification,

specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the prepackaged insolvency resolution process of corporate debtors under Chapter III-A.]”

15. In view of the provision, a new threshold of 1 crore was introduced with effect from 24.03.2020 vide MCA notification No.S.O.1205(E) dated 24.03.2020 probably to curb filing of frivolous application and to ease the stress of a large no. of MSME, caused due to COVID mayhem who were struggling during Lockdown and facing a threat of default.

Having noted that the threshold has been raised the applicant could have sought for a transfer of the lis before Kolkata Bench. The applicant is thus a victim of his own wrong which cannot be remedied.

14. In B.L.Polymers NCLT attempted to put a quietus to the controversy over the application of the notification, whether it will be prospective or retrospective: It held that nothing was applicable to defaults occurring prior to 24.03.2020. However, Hon’ble NCLAT in **Metal’s and Metal Electric P Ltd vs Goms Electricals P. Ltd (2022)** ibc law. in 196 NCLAT held that date of default was not meant to be taken into account for anything but computing the period of Limitation, and that the notification would apply to all Section 7 and 9 application filed on or after 24.03.2020.
15. Hon’ble NCLAT in **Royal Manpower Services v. Faridabad Autocomp System Pvt.Ltd.** has once again held that the revised minimum threshold of Rs.1 Crore is applicable from the date of filing of petition.
16. In view of the categorical finding of the Hon’ble NCLAT as noted above, we dismiss the application on the ground of maintainability as the threshold of Rs. One Crore in terms of amended Section 4 of IBC that was applicable from 24/03/2020 was not met when the present CP was

filed on 05.02.2022 before this Bench.

17. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on the 1st day of September, 2023

PJ.