

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH – V, NEW DELHI
C.P (IB)/759(ND)2022

An application under section 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:

M/s INDEX LOGISTICS PRIVATE LIMITED

Throuh it's authorised representative,
Mr. Prabhat Rai,
Address: 105, Ascot Centre,
Near Hilton Hotel, Sahar Road,
Andheri (e). Mumbai-400099

....OPERATIONAL CREDITOR

Versus

NO.1 WORLD WIDE EXPRESS PVT. LTD.

Throuh it's Director: **Gaurav Kwatra**
Address: Khasra no.37, 1st & 2nd
Floor, NH-8, Near Smarna Wedding
Farm, Rajokari, Delhi-110038.

....CORPORATE DEBTOR

Order Delivered on: 07.02.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Shiv Shankar, Adv.

For the Respondent : Adv Mohd Anees

ORDER

PER: DR. SANJEEV RANJAN, MEMBER (TECHNICAL)

1. The instant application is filed by M/s Index Logistics Private Limited. (hereinafter referred as 'Applicant'/'Operational Creditor') on 13.08.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code/IBC') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process ("CIRP") against M/s No. 1 Worldwide Express Pvt. Ltd. (hereinafter referred as 'Respondent'/'Corporate Debtor') for non-payment of Operational Debt of Rs.2,80,74,618/- (Principle due is of Rs.1,76,11,143.07/- from April 2018 till September 2019 +(plus) Interest @18% is of Rs. 1,04,63,475/-).
2. The Respondent Company M/s No. 1 Worldwide Express Pvt. Ltd was incorporated on 08.06.2012 under the provisions of the Companies Act, 1956 having its registered office situated at Khasra no.37, 1st & 2nd Floor, NH-8, Near Smarna Wedding Farm, Rajokari, Delhi-110038. Since the registered office of the Respondent/Corporate Debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

Averments of the Applicants:

- 3.** Briefly stated the facts of the present case as averred by the applicant are that the Corporate Debtor (M/s. No.1 World Wide Express Pvt. Ltd.) through its Director “Mr. Gaurav Kwatra” approached the Operational Creditor and showed willingness to do business with the Applicant for airfreight/ express logistics Pan India Level. Applicant submitted that after winning the Operational Creditor's trust, the Corporate Debtor started duping the Operational Creditor in conspiracy and took credits of crores and at the end of financial year 2019-20, the due amount from M/s No.1 World Wide Express Pvt. Ltd that showed in Applicant Books of Account amounted to Rs. 1,99,30,406/-. Applicant further submitted that the Corporate Debtor vide balance confirmation letter dated 22.04.2019 admitted the debt liability of Rs.1,95,12,839/- against the outstanding dues of the Operational Creditor for the first time. It is further submitted that the Corporate Debtor kept informing the Operational Creditor about their due amount pending in Crores as per books of accounts but the Operational Creditor paid no heed to the request of Corporate Debtor of remitting the due amount that was pending in crores. Further, the Corporate Debtor to discharge its debt liability kept providing the Operational Creditor various cheques of different amounts vide different dates between 10.08.2020 to 12.10.2020 in discharge of their part liability to make the Operational Creditor believe for their genuineness.
- 4.** Applicant submitted that the Operational Creditor was flabbergasted to know that all the cheques given by the Corporate Debtor to the Operational Creditor got dishonored due to insufficient funds therefore the Operational Creditor informed to the Corporate Debtor about the dishonoured cheques but they remained non-chalant about the same.

Thereafter Operational Creditor vide several mails and telephonic calls informed and communicated with the Corporate Debtor about the due amount to which Corporate Debtor assured and deceived the Operational Creditor that they are facing little financial crunches but will remit the due amount in a few days on the pretext that several invoices bills from No.1 Worldwide clients are pending and awaited to them after which they shall clear the Operational Creditor bills but no amount was remitted and the amount kept pending due.

5. Applicant submitted that the Operational Creditor issued a statutory demand notice on 05.08.2020 under Section 8 of IBC. However, even after the expiry of the term of 10 days from the date of issue of demand notice, the Operational Creditor neither received any response from the Corporate Debtor nor any payment to Operational Creditors.
6. Applicant submitted that thereafter Operational Creditor proceeded with insolvency proceedings under section 9 of the Insolvency and Bankruptcy Code, 2016 and preferred an Petition vide CP(IB) 518/ND/2021 titled as "Index Logistics Pvt. Ltd. vs. No.1 Worldwide Express Pvt. Ltd." for operational debt of Rs. 2,61,63,393/- (Principle Rs. 1,92,33,225/ Plus(+) Interest @18% of Rs. 16,93,409/ Plus(+) GST Rs. 10.57,145/-) against the Corporate Debtor.
7. Further the Applicant submitted that after issuance of Notice from the Adjudicating Authority, New Delhi in reference to the Company Petition CP(IB) 518/ND/2021, the Corporate Debtor itself reached out to the Operational Creditor for the settlement of the due amount pending and agreed to be remitted to the Operational Creditor, thereby, the settlement agreement was being executed between the parties on 9th November, 2021 and the due outstanding was drawn out

to the tune of Rs. 1,80,00,000/- was agreed to be remitted by the Corporate Debtor in suitable installments which was equated for 19 instalments as of Rs. 5,00,000/- starting from November 2021 till December 2021 and then goes upto as of Rs. 10,00,000/- from January 2022 to till May 2023.

- 8.** Applicant submitted that on 02.12.2021, the aforesaid Company Petition CP(IB) 518/ND/2021 was withdrawn based upon the settlement between parties and the same stand dismissed by the Adjudicating Authority.
- 9.** Applicant submitted that as per the settlement agreement and against the discharge of legal liabilities the Corporate Debtor had issued and tendered various Cheques between 27.01.2022 to 27.04.2022 in total amounting to Rs.40,00,000/- (Rupees Forty Lac Only) drawn on HDFC Bank, Branch- Kapashera, New Delhi 110037 and the Operational Creditor upon presentation the said cheques through its Banker i.e. Bank ICIC Bank, Mumbai Branch, Pin 40099, the said Cheques returned dishonoured with remarks "Payment Stopped by Drawer", and "Funds Insufficient" and the same has been intimated to the Corporate Debtor but of no avail.
- 10.** Further the Applicant submitted that the Operational Creditor issue further the Demand Notice in Form 3 under the Code of IBC dated 17.05.2022 against the Corporate Debtor to remit the pending dues or else the Operational Creditor has no other alternative to revive the Petition for initiation of CIRP against the Corporate Debtor before the NCLT, Delhi. However, upon receipt of the Notice dated 17.05.2022 the Corporate Debtor stood unresponsive, therefore, the Operational Creditor present this Petition against the Corporate Debtor.

Reply of the Respondent/Corporate Debtor:

- 11.** Per contra, the respondent through his reply submitted that all averments, statements, submissions, grounds, contentions or allegations made by the Applicant are baseless, misconceived and false, and hence, are denied in entirety. Respondent submitted that the amount claimed being Rs. 2,80,74,618/- (1,76,11,143.07 as principle, and Rs.1,04,63,475 as Interest @18%), is neither supported by any contract, agreement, letter, business ledger, bills, etc.
- 12.** Respondent submitted that the instant Petitioner is not maintainable inasmuch as the amount claimed by the Petitioner is not an operational debt and the transaction does not fulfil the ingredients of the Section 5(21) of the IBC. As per the provision given under Section 5(21) of the IBC an operational debt means a claim in respect of provision of goods or services whereas the alleged debt framed as operational debt arises out of an alleged settlement agreement which has already been consummated and satisfied as per the order dated 02.12.2021 of this Adjudicating authority.
- 13.** Respondent further submitted that the mandatory Demand Notice under Section 8 of IBC on 17.05.2022 was never served upon the Respondent. It is further submitted that the Applicant has neither served the said notice under Section 8 of IBC by way of email nor by way of courier or dasti.

Rejoinder by the Applicants

- 14.** The Operational Creditor through its rejoinder has submitted that the Reply filed by the Corporate Debtor is totally false, frivolous and vexatious and is devoid of any merit. Further the Applicant submitted that the Corporate Debtor had issued multiple post-dated cheques in favour of the Operational Creditor against the discharge of their due

liability, however, during encashment of those PSD cheques got dishonoured with different reason either "payment stopped by drawer" or "Funds Insufficient" and none of the cheques cleared.

- 15.** The Operational Creditor further submitted that the Operational Creditor intimated the Corporate Debtor about the dishonor cheque and rigorously followed up for clearance of dues. But, the Corporate Debtor remains non-chalant to pay the unpaid due, that triggered the Operational Creditor to issue Notice under the provision of the code, 2016 for the amount of Rs.2,61,63,392/- on 05.08.2021 addressed to the Corporate Debtor and the same was duly delivered as per the Tracking Report. However, neither any reply nor any payments has ever received from the Corporate Debtor upon receipt of the Notice.
- 16.** Applicant submitted that the present Claim of the Applicant is fit case to falls under the category of "operational debt" as specified in section 5(21) of the IBC. Applicant further submitted that the present petition has filed on the basis of unpaid operational dues which remains unpaid and payable under the ledger account maintained with the Operational Creditor.
- 17.** The Operational Creditor submitted that the Corporate Debtor knowing-fully defrauded the Operational Creditor in terms of settlement to withdraw the proceedings from the NCLT and thereafter started dishonoring every single cheque issued in pursuant to the said settlement and continuing the same till the date.
- 18.** Further, the Operational Creditor submitted that the Corporate Debtor tried to mislead this Adjudicating Authority as to non service of demand notice dated 17.05.2022. It is submitted that the address upon which the demand notice was issued are same i.e. "Khasra No.

37,1 & and 2nd Floor, NH-8, Near Swarna Wedding Farm, Rajokari-Delhi-110038 and the tracking report attached with the instant Application.

Analysis and Findings

- 19.** We have heard Ld. Counsels for the applicant as well as the Ld. Counsel for the Respondent and perused the averments made in the application, counter affidavit and rejoinder. The relevant documents annexed with the submissions have also been examined.
- 20.** We have perused the proof of purchase orders, invoices of Operational Creditor and interest calculation sheet produced by the Operational Creditor. We have also perused the copy of Settlement Agreement executed between the both parties on 09.11.2021. While the Applicant has prayed for initiation of CIRP against the Corporate Debtor, the Respondent has prayed for dismissal of the present Application on ground that the unpaid installment to the Applicant as per the said Settlement agreement is not a debt as per the provision defined under section 5(21) of the IBC.
- 21.** We find that the applicant had filed a Company Petition (IB/518/ND/2021) on 27.03.2021 claiming an outstanding Operational Debt amounting Rs.2,61,63,393/- which consists of Rs.1,92,33,225/- as principal debt, Rs. 16,93,409/- as interest at the rate of 18% p.a. and Rs. 10,57,145/- as GST. The Petitioner seeking withdrawal of the (C.P.(IB)/518/ND/2021) on the basis of the settlement agreement dated 09.11.2021 which was allowed vide order dated 02.12.2021. The order dated 02.12.2021 is reproduced herein for ready reference:-

“(C.P.(IB)/518/ND/2021:

Mr. Animesh Kumar has appeared on behalf of the petitioner. Ms. Nisha Saha has appeared on behalf of respondent. Both the parties submits that the matter has already settled between the parties, so, the petitioner wishes to withdraw the application. Considering the submissions made on behalf of the petitioner's counsel, we permit the petitioner to withdraw the application. Accordingly, the present Company Petition Bearing No. IB-518/ND/2021 is dismissed as withdrawn.”

- 22.** On mere perusal of the order dated 02.12.2021, it is evident that the (C.P.(IB)/518/ND/2021) was allowed to be withdrawn on the submissions of the applicant only and further, no liberty was granted by this Adjudicating Authority to restore the application. From the documents on records, it is pertinent to note that pursuant to the settlement agreement dated 09.11.2021 entered between the parties, the parties had agreed to settle the outstanding operational debt amounting Rs. 2,61,63,393 at a settlement amount of Rs.1,80,00,000 only.
- 23.** That in Part IV of the Application it is submitted that the Demand Notice under section 8 of the IBC was issued against the Corporate Debtor by the Operational Creditor, based on the default equated of repayment as per the settlement agreement dated 09 November, 2021, for the debt amounting to Rs. 1,80,00,000/- 17.05.2022 vide speed post.
- 24.** That, as per the settlement agreement and in contradiction to the discharge of legally admitted liabilities of the Corporate Debtor, the Corporate Debtor issued multiple cheques that were dishonored. Furthermore, the date of default, i.e., 28.04.2022, in the payment of

Rs 2,80,74,618 occurred when the Settlement Agreement dated 09.11.2021 failed by the Corporate Debtor.

- 25.** From perusal of above admitted fact, it is observed that the Applicant filed the instant Application based on the failure of the Settlement Agreement dated 09.11.2021 on the part of the Corporate Debtor.
- 26.** The moment the parties entered into a settlement agreement dated 09.11.2021, the nature of the debt being operational debt defined under Section 5(21) of the Code, 2016 is gone as now the debt is not owed for the supply of goods or rendering of services. The amount outstanding pursuant to the settlement agreement is only a settlement amount which can merely be a debt as defined under Section 3(11) of the Code, 2016 but in no circumstances can be an operational debt as it has lost its substratum of operational debt and is only a debt pursuant to the settlement between the parties.
- 27.** The Hon'ble NCLAT in its order dated 17.01.2023 in **Company Appeal (AT)(Insolvency)No.36 of 2023 case titled Permal Wallace Private Limited versus Narbada Forest Industries Private Limited** while rejecting an Appeal filed against the Order dated 03.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Indore Bench) by which Application filed under Section 9 of the IBC, 2016 for some default in payment of the interest amount due pursuant to a settlement agreement was rejected by the Adjudicating Authority. Hon'ble NCLAT held that Adjudicating Authority did not commit any error in rejecting Section 9 Application. It has been laid down by the Hon'ble Supreme Court in **Swiss Ribbon Pvt. Ltd. Vs. Union of India**, IBC is not a recovery proceeding and the Application which has been filed by the appellant in the present case is only the application for

recovery of balance amount of the interest and application was not filed for resolution of any insolvency of the Corporate Debtor.

- 28.** It is no more res-integra that IBC is not a recovery proceeding where because the money or part of it has not come, the party may repeatedly come to the Adjudicating Authority for the recovery of the amount. **The Hon'ble Supreme Court in citation M/s. Invent Asset Securitisation and Reconstruction Private Limited v. M/s. Girnar Fibres Limited [Civil Appeal No. 3033/2022]** observed that *time and again, it has been expressed and explained by this Court that the provisions of the Code are essentially intended to bring the corporate debtor to its feet and are not of money recovery proceedings as such. The intent of the appellant had only been to invoke the provisions of the Code so as to enforce recovery against the corporate debtor.*
- 29.** Having regard to the conspectus of all relevant facts and discussions and the judgments cited supra, we are of the view that pursuant to the withdrawal of the (C.P.(IB)/518/ND/2021) on the strength of the settlement agreement dated 09.11.2021, the outstanding debt as claimed in the company application has lost its substratum of being operational debt as defined under Section 5(21) of the Code, 2016.
- 30.** Accordingly, the present application C.P.(IB)/759/ND/2022 stands dismissed. No orders to cost.

Sd/-

**(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)**

Sd/-

**(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)**