

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 326/KB/2021

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:

Prism Johnson Limited, RMC (India) Division, (CIN: L26942TG1992PLC014033), a company incorporated under the provisions of the Companies Act, 1956, having its registered office at 305, Laxmi Niwas Apartments, Ameerpet Hyderabad – 500016.

... Applicant/ Operational Creditor.

Verses

Simplex Infrastructure Limited, (CIN: L45209WB1924PLC004969) a company incorporated under the Companies Act, 1956, having its registered office at Simplex House, 27, Shakespeare Sarani, Kolkata 700017.

... Respondent/ Corporate Debtor.

Date of Hearing: November 28, 2023.

Date of Pronouncement: December 15, 2023.

CORAM:

SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)

SHRI D. ARVIND, MEMBER (TECHNICAL)

Appearance:

For the Operational Creditor: Mr. Ratnanko Banerji, Sr. Adv.; Mr. P.K. Dutt, Adv.; Mr. Rupak Ghosh, Adv.; Mr. S.K. Dutt, Adv. and Mr. Syamantak Banerjee, Adv.

For the Corporate Debtor: Mr. Joy Saha, Sr. Adv.; Mr. Snehashis Sen, Adv. and Mr. Danyal Ahmed, Adv.

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ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Court is congregated hybrid mode.
2. Heard the Learned Senior Counsels for both parties.

Factual Matrix:

3. This instant application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by **Prism Johnson Limited, RMC (India) Division**, hereinafter referred to as Applicant/Operational Creditor against **Simplex Infrastructure Limited**, hereinafter referred to as Respondent/Corporate Debtor seeking the direction from this Adjudicating Authority to initiate Corporate Insolvency Resolution Process, for brevity "CIR Process" in respect of the Corporate Debtor.
4. The Corporate Debtor is a company incorporated on December 19, 1924, having Nominal Share Capital of Rs. 75 Crore and Paid-up Share Capital of Rs. 11.47 Crore.
5. The Total amount claimed to be in default is of **Rs. 5,28,78,029.69/-**. The Date of Default is claimed as mentioned in the Tabular Statement enclosed as Annexure H.

Applicant's submissions:

6. The Ld. Sr. Counsel for the Applicant submits that the Operational Creditor and Corporate Debtor had entered into the Work Order dated 24.04.2018 for the supply of Ready-Mix Concrete to the site located at metro 2B for "Part design and construction of elevated viaduct of Mumbai Metro Rail Project" and Casting Yard Area at Juhu and also Bank Guarantees forwarded by the Applicant amounting to Rs. 4,33,04,792.69/- fell due on 23.03.2020. Interest on the said amount calculated up to 31.01.2021 amounting to Rs. 74,66,258.00/- Total aggregated sum including interest calculated up to 31.01.2021 amounted to Rs. 5,07,71,050.69/-. The Respondent was repeatedly requested to pay the arrear

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amount relating to the Work Order dated 24.08.2018 by various correspondences dated 11.02.2020, 18.11.2019, 07.11.2019, 04.11.2019, 30.10.2019, 17.10.2019, 16.10.2019, 14.10.2019, 03.10.2019, 01.10.2019, 30.09.2019 and 26.09.2019, however, it has failed to do so.

7. The Ld. Sr. Counsel for the Applicant further submits that another Work Order dated 25.10.2017 between the Operational Creditor and Corporate Debtor entered into for the supply of Read-Mix concrete for civil works for CHP Piling work of your NTPC, Gadarwara Site amounting to Rs. 3,57,697/-. The interest calculated up to 31.01.2021 on the above outstanding amounted to Rs. 2,07,747/-. The total outstanding on the above Work Order fell due on 07.02.2018 and amounted to Rs. 5,65,444/-. The Corporate Debtor was repeatedly asked to pay the arrear amount relating to the Work Order dated 25.10.2017 by various correspondences dated June 04, 2018, however, it has failed to pay.
8. Further, it is submitted that the materials the Applicant supplied to Raheja Imperia, Lower Parel Site pursuant to another Work Order which is also fell due on 02.07.2018 and the total outstanding amount is of Rs. 9,25,644/- The interest calculated up to 31.01.2021 on the above outstanding is Rs. 6,15,891/- The total aggregated amounting to Rs. 15,41,535/-. The Corporate Debtor was repeatedly intimated to pay the arrear amount relating to the work order by various correspondences dated June 01, 2019, and June 25, 2019, however, it has not responded.
9. The Ld. Senior Counsel further contends that the Notice of Demand has been served on 26.02.2021, annexed at Page 1033-1040 to this application.

Respondent's submission per contra:

10. The Ld. Senior Counsel for the Corporate Debtor has alleged that the application filed by the applicant is not in the prescribed format and hence not maintainable *in limine*.

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11. The Ld. Senior Counsel has further claimed that the service rendered by the applicant pursuant to the alleged work orders suffered from latent defect. It is alleged that:
 - (a) The concrete supplied by the Operational Creditor was of sub-standard quality,
 - (b) The Batching Plant installed by the applicant at the project sites was non-functional and suffered breakdowns for several days which affected the supply of concrete considerably leading to delay in the completion of the works of the Respondent.
 - (c) There was acute inadequacy of manpower supplied by the Operational Creditor.
 - (d) The representative of the Operational Creditor on several occasions refused to supply RMC citing the unavailability of raw materials at their end, which caused severe losses and damages to the Corporate Debtor.
12. The Ld. Senior Counsel has claimed that all the facts relating to defective supplies, quality issues, non-functioning and/or breakdown of batching plant and manpower issues were brought to the notice of the Operational Creditor prior to the demand notice sent by the Applicant by way of several emails and letters which are annexed to the Reply Affidavit as Annexure "A" at Pages 16-37.
13. It is further claimed that the defaults and non-performance of the contract on the part of the applicant, the Performance Bank Guarantee of Rs. 3 Crore as submitted by the applicant in connection with the work order dated 24.04.2018 was invoked by the respondent to mitigate the losses and damages suffered by it and thus the claim of the of operational debt raised by the applicant carries a plethora of disputes. Such disputes are within the domain of pre-existing disputes as they are raised and intimated to the Operational Creditor by the Corporate Debtor prior to the issuance of the demand notice under Section 8 of the I&B Code.
14. It is further claimed that the applicant had issued a demand notice dated 10.09.2021 under Section 8 of the I&B Code, annexed at Page 39 as Annexure

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“B” and the Respondent replied to it by way of notice of dispute on 21.09.2021, annexed at Page 88 as Annexure “C” to the Reply Affidavit.

Reply in Counter by the Applicant:

15. The Ld. Senior Counsel has claimed that there is no pre-existing dispute and the Operational Creditor had always tried to solve the issues agitated by the Corporate Debtor but due to payments due from the Corporate Debtor, the Operational Creditor could not solve the issues. The operational Creditor had never ignored the issues raised by the Corporate Debtor.
16. It is further claimed that a mere statement of the pre-existing dispute by the Corporate Debtor does not make the claim of the Operational Creditor barred under the I&B Code.

Analysis and Findings of this Adjudicating Authority:

17. Before, analyzing the facts of the present case, the statutory scheme regarding the Application under Section 9 needs to be recapitulated. Section 8(1) of the I&B Code says that an operational creditor may, on the occurrence of a default, deliver a demand notice of the unpaid operational debt and in terms of Section 8(2) of the Code, The Corporate Debtor within ten days of the receipt of such demand notice shall bring to the notice of the Operational Creditor of the existence of dispute, if any. Section 9(1) of the Code envisages that after the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under section 8(1) if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under section 8(2), the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process. Thus, a combined going through of Section 8 and Section 9 of the Code provides the following interpretation that an Operational Creditor can trigger the Corporate Insolvency Resolution Process in respect of an undisputed debt and a default in payment thereof.

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- 18.** In the case at hand, it is evident that the Corporate Debtor had issued several notices to the Operational Creditor raising the fact that the service rendered by the applicant pursuant to the alleged work orders suffered from latent defects. To substantiate its claim, the Corporate Debtor has annexed the copies of the emails/ letters served to the Operational Creditors as under:
- (a) Letter dated 06/11/2019 of the Corporate Debtor annexed at Pages 12-13 to the Reply Affidavit, sharing the deficiency of goods and services;
 - (b) Email dated 04/11/2019 of the Corporate Debtor annexed at Page 20 to the Reply Affidavit, sharing the deficiency goods and services;
 - (c) Email dated 04/11/2019 asking for ratification, annexed at Page 21 to the Reply Affidavit;
 - (d) Email dated 04/11/2019 asking for the shortage of manpower, annexed at Page 25 to the Reply Affidavit.
 - (e) Email dated 02/04/2019 annexed at Page 34 to the Reply Affidavit regarding the frequent breakdown of chilling plan;
 - (f) Email dated 03/02/2019 annexed at Page 36 to the Reply Affidavit, sharing the quality issues;
 - (g) Email dated 23/02/2019 annexed at Page 37 to the Reply Affidavit, sharing another quality issue;
 - (h) Email dated 03/02/2019 annexed at Page 38 to the Reply Affidavit, sharing again the quality issues.
- 19.** It is evident that all the disputes raised by the Corporate Debtor prior to the issuance of both the demand notices dated 26.02.2021 and dated 10.09.2021 under Section 8 of the I&B Code, 2016. Further, it is evident that pursuant to the Demand Notice dated 10.09.2021, the Corporate Debtor has replied to it by way of notice of dispute on 21.09.2021, annexed at Page 88 as Annexure “C” to the Reply Affidavit.
- 20.** Thus, we would infer that there is “pre-existing dispute” between the parties which is rightly brought to our notice by the Ld. Counsel for the Corporate Debtor.

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21. We are of the view that the Insolvency and Bankruptcy Code, 2016 is not recovery legislation and the provisions of the Code cannot be applied for prevailing a recovery mechanism or enforcing the recovery of the claim raised by the Operational Creditor. The object of the I&B Code is to resolve the insolvency of the Corporate Debtor in a time-bound manner and to reorganize it for the purpose of reviving its business to secure corporate justice. To understand the objective of the Code, it would be appropriate to read its Preamble, that:

“An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.”

22. Hence, an application under Section 9 of the I&B code cannot be converted into proceedings for recovery, which is contrary to its objective. To reinforce our position, we would rely upon the judgment passed by the Hon’ble Apex Court in the case of ***Swiss Ribbons Pvt. Ltd. v. Union of India*** reported in (2019) 4 SCC 17: MANU/SC/0079/2019

“12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. ...”

(Emphasis Added)

23. Further, we would rely upon the judgment passed in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited*** reported in (2018) 1 SCC 353: MANU/SC/1196/2017 that:

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“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application Under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

(Emphasis Added)

24. In view of the foregoing, *inter-alia* including the pre-existing dispute, this application filed under Section 9 of the I&B Code, being **Company Petition (IB) No. 326/KB/2021** cannot be entertained and **dismissed** accordingly.
25. No Cost.
26. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 15th Day of December, 2023.

Bose, R.K. [LRA]