

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

Company Petition (IB) No. 102/KB/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:

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.

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
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Company Petition (IB) No. 102/KB/2022

ORDER

Per: D. Arvind, Member (Technical)

1. This Court is congregated hybrid mode.
2. Heard the Ld. Sr. 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 amount claimed as default is Rs. 3,52,70610/- and interest calculated up to 27.08.2021 is Rs. 15,62,639/- totalling to amount of Rs. 3,67,70,249/-.

Applicant's submissions:

6. The Learned Senior Counsel for the applicant submits, citing one of the invoices as an example which is annexed at Page 53 of the application to show that what has been claimed is a "shortfall claim" from September 2018 to November 2018. The invoices are raised for not meeting the contractual obligation of not lifting the agreed quantity of material by the Corporate Debtor. The claim has also been made for escalation of the price of goods supplied.
7. Learned Senior Counsel took us through Page 4 of the Work Order issued to the Applicant by the Corporate Debtor, which is in Annexure B to the application. In

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

Company Petition (IB) No. 102/KB/2022

page 4 of the contract (annexed at page 35 of the application), it has been agreed upon that:

“MINIMUM ASSURED QUANTITY

Total 1,00,000 cum qty for the Tenure of 30 months from the date of Amended Work Order.

Minimum assured concrete quantity per month is 3000 cum however is will be calculated based on Quarterly average. In case of shortfall in volumes, RMC shall be additionally compensated for the differential volume (9000 cum – Actual volumes produced in three consecutive months) @ Rs. 600/cum by Simplex in addition to payment for normal RA bill for actual quantity/volume of concrete produced.”

8. Learned Senior Counsel submits that since the claim arises out of the service work order, they are in the nature of “services” and the default of payment on such services would qualify for action under Section 9 of the I&B Code.

Respondent’s Submissions per contra:

9. Learned Senior Counsel for the Respondent submits that the instant proceedings against the invoices seeking “shortfall claim” would not qualify as operational debt as they are in the nature of compensation in accordance with the clause “Minimum Assured Quantity” of the work order dated 24.04.2018.
10. It is further submitted that in any event services rendered by the Operational Creditor suffered from blatant defect in as much as concrete supplied by the OC was of substandard quality and all this was brought to the notice of the operational creditor by way of several mails and letters. Copies of which are annexed in Annexure B to the reply.
11. The Learned Senior Counsel for the Respondent has pleaded that in view of above he submits that the application under Section 9 is not maintainable on two grounds:

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

Company Petition (IB) No. 102/KB/2022

- a) Invoices of “short claims” made by the Operational Creditor on Corporate Debtor do not qualify as “operational debt”.
- b) There are pre-existing disputes with reference to the supply of goods (Concrete) made by the Operational Creditor to the Corporate Debtor during the disputed period.

Analysis and Findings of this Adjudicating Authority:

- 12. We find from the application that invoices included in Page No. 53 to 59 are “shortfall claims” in terms of the work order made between the parties. As per the work order the corporate debtor is supposed to purchase a minimum quantity failing which the Operational Creditor is entitled to be compensated, at the rate of 600/cum of concrete and the same can be found at Page 4 of the Work Order dated April 24, 2018, (annexed at Page 35 of the Application) issued by the Corporate Debtor to the Applicant.
- 13. We are of the view that the invoices are in the nature of compensation and not for the supply of any goods or services. The Learned Senior Counsel for the Respondent has rightly submitted that the invoices of “short claims” made by the Operational Creditor on Corporate Debtor do not qualify the definition of “operational debt” catered to under the Code.
- 14. At this juncture, it would be appropriate to read the definition of the term “Operational Debt” defined under Section 5(21) of the I&B Code, 2016 as under:

““Operational Debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”
- 15. The invoices relied on by the Operational Creditor may be treated as services under GST law by way of a specific definition under the said act whereas the definition of operational debt simpliciter contemplates the provision of goods or

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

Company Petition (IB) No. 102/KB/2022

services in the Code. In the absence of this, the same cannot be treated as operational debt. In this regard, we are governed by the provision of Section 238 of the I&B Code which shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

16. We have also seen all the correspondences relating to the pre-existing dispute and we do find that the corporate debtor has pointed out several times about the deficiency in quality of goods/services.
17. The Co-ordinate Bench of NCLT Mumbai in ***TATA Chemicals Limited v. Raj Process Equipments and Systems Private Limited*** order dated **30.11.2018**, in **C.P. 21/IB/2018** had an occasion to deal with similar case wherein in Para 19, 20 & 21 it has been held that such claims cannot be called as operational debt. The Ld. Mumbai Bench observed that:

*“19. In this case, the Petitioner has raised claim of Rs. 5,00,000 per day for loss of production, which is not only in nature of consequential damages, but also completely arbitrary and baseless, which cannot be relied upon in absence of adjudication. **The alleged claim is not adjudicated by any competent authority in law, such a claim cannot be described as “Operative Debt”.**”*

*“20. In case of **E-city Media Private Limited vs. Sadhrta Retail Limited** in CP No. 367 of 2009, the Hon,ble High Court of Judicature at Bombay has held that **“The petition for winding up cannot be maintained upon a claim of damages.Damages become payable only when they are crystallised upon adjudication. Until and unless an adjudication takes place with a resultant decree for damages, there is no debt due and payable.Damages require adjudication. Until then, the liability of a party in alleged breach of a contract does not become crystallised.**”*

*“21. Further, in case of **Union of India vs Raman Iron Foundry** (1974 AIR 1265, 1974 SCR (3) 556), it has been held that **“the claim for unliquidated damages does not give rise to a debt until the liability is adjudicated upon and damages assessed by an adjudicatory authority. When there is a breach assessed by an adjudicatory authority. When there is a breach of contract, the party commits the breach does not eo instanti incur any pecuniary obligation nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach has is the right to sue for damages, and this is not an actionable claim.”**”*

“22. It is also important to point out that Petitioner had neither provided any goods nor any services to the Corporate Debtor. There is no amount

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

Company Petition (IB) No. 102/KB/2022

given by the Petitioner to the Respondent in nature of debt. On the other hand, the Corporate Debtor is a vendor, and the applicant has not made payment to it. Hence the petitioner is not an Operational Creditor as defined under the IBC.

(Emphasis Added)

18. Thus, we are of the view that the amount claimed to be in default does not pertain to the supply of goods and there are pre-existing disputes concerning the supply of goods and services made by the Operational Creditor to the Corporate Debtor during the disputed period. It is given that the Insolvency and Bankruptcy Code, 2016 is not recovery legislation and at any point, 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. We are fortified in our view by the judgment passed by the Hon'ble Apex Court in *Swiss Ribbons Pvt. Ltd. v. Union of India* reported in (2019) 4 SCC 17: MANU/SC/0079/2019 and *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* reported in (2018) 1 SCC 353: MANU/SC/1196/2017.
19. Hence, we find no difficulty in dismissing this application as not maintainable as both the grounds argued by the Learned Senior Counsel for the Corporate Debtor, found to be legally tenable.
20. In terms of the view above, the application being **Company Petition (IB) No. 102/KB/2022** is **dismissed** accordingly.
21. No Cost.
22. 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]/ Tiwari, V. [LRA]