

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**JAIPUR BENCH**

**CORAM: SHRI DEEP CHANDRA JOSHI,**  
**HON'BLE JUDICIAL MEMBER**

**SHRI PRASANTA KUMAR MOHANTY,**  
**HON'BLE TECHNICAL MEMBER**

**CP No. (IB)- 87/9/JPR/2020**

*(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:**

**APOLLO PIPES LIMITED**

**...Applicant/Operational Creditor**

**Versus**

**TONK WATER SUPPLY LIMITED**

**...Respondent/Corporate Debtor**

**Memo of Parties**

**Apollo Pipes Limited**

CIN: L65999DL1985PLC022723

37, Hargobind Enclave,

Vikas Marg, Delhi- 110092

**...Operational Creditor/ Applicant**

**VERSUS**

**Tonk Water Supply Limited**

CIN: U41000RJ2015PLC056084

F-2, 1<sup>st</sup> Floor, Jagdamba Tower,

Amarpali Circle, Vaishali Nagar,

Jaipur, Rajasthan- 302021

**...Corporate Debtor/ Respondent**

***CP No. (IB)- 87/9/JPR/2020***

For the Operational Creditor : Karan Gandhi, Adv.  
For the Corporate Debtor : Nikhil Yadav, Adv.  
Mudita Sharma, Adv.

**Order Pronounced On: - 16.09.2022**

**ORDER**

**Per: Shri Deep Chandra Joshi, Judicial Member**

1. This Application has been filed by M/s Apollo Pipes Limited ('Applicant') to initiate Corporate Insolvency Resolution Process ('CIRP') against Tonk Water Supply Limited ('Corporate Debtor') under Section 9 of IBC, 2016 for alleged default of repayment of Operational Debt amounting to Rs. 71,33,363/-. The said Application has been filed through Mr. Ankit Sharma who is duly authorized vide Board Resolution dated 11.12.2019 which is duly annexed with the Application.
2. The Corporate Debtor is a Public Company incorporated under the provisions of the Companies Act, 2013 on 15.10.2015 and duly registered with the Registrar of Companies, Jaipur having CIN: U41000RJ2015PLC056084. The registered office of the Corporate Debtor is situated at F-2, First Floor, Jagdamba Tower, Amrapali Circle, Vaishali Nagar, Jaipur. The authorized share capital of the company is Rs. 1,00,000/- and the paid up share capital is also Rs. 1,00,000/-.
3. The details of the transactions leading to the filing of the Application as averred by the Applicant are as follows:

- (a) The Applicant has submitted that the Corporate Debtor placed Orders with the Operational Creditor for supply of HDPE pipes ('goods') for water line works on various dates during the period from 21.04.2016 to 14.03.2018. In furtherance of the same, the Operational Creditor supplied goods to the Corporate Debtor and subsequently raised invoices which have been annexed as Annexure- 4 of the Application.
- (b) The Operational Creditor maintained a running account of the Corporate Debtor and the payments received from the Corporate Debtor were adjusted on first in first out basis. The Operational Creditor further submitted that the Corporate Debtor has made part payment and the last payment of Rs. 20,00,000/- was received on 09.12.2018. Thereafter no payment has been received from the Corporate Debtor.
- (c) The representative of the Corporate Debtor has acknowledged his liability towards pending payments vide e-mail dated 25.08.2018 & 13.09.2018. The liability was further acknowledged by Mr. Kalpesh Soni vide e-mail dated 21.01.2019. Thereafter, the representative of the Corporate Debtor continuously sought time to make payment but failed to do so.
- (d) It is also contended that the Operational Creditor sent various reminder letters dated 19.07.2019, 13.07.2019 & 27.07.2019 to ESSEL Infra Projects, a group company which is handling the project in Tonk,

Rajasthan through Corporate Debtor, for making the outstanding payments. Since no response was received from either ESSEL Infra Projects or the Corporate Debtor, the Operational Creditor was constrained to issue demand notice under Section 8 of Code dated 28.12.2019. The said demand notice was issued to the registered address of the Corporate Debtor, address other than registered office and address where goods were delivered. However, the demand notice was served at the address other than registered office. The Applicant also served the demand notice at the Email ID of the Corporate Debtor but till date no payment against the goods supplied has been made to the Applicant.

- (e) The Applicant contends that the amount against which goods have been supplied and invoices are raised, becomes due from expiry of 30 days of the date of invoice and interest of 24 % ought to be levied on the payments received after the expiry of 30 days. Therefore, the date of default for each invoice is calculated as per the above statement. The calculation sheet for interest is annexed at Annexure- 7.
- (f) The details of the amount of debt due and the date from which such debt due has been mentioned in Part- IV of the application which is as follows: -

<b>PART IV PARTICULARS OF OPERATIONAL DEBT</b>																																						
1.	Total amount of debt.  Details of transactions on account of which debt fell due, and the date from which such debt fell due	<u>Total amount of debt:</u> Rs. 71,33,363/- (Rupees Seventy-One Lacs Thirty-Three Thousand Three Hundred and Sixty-Three Only) comprising of Rs. 52,29,636/- (Rupees Fifty-Two Lacs Twenty-Nine Thousand Six Hundred and Thirty-six Only) as principal amount and Rs. 19,03,727/- (Rupees Nineteen Lacs Three Thousand Seven Hundred and Twenty-Seven only) as interest calculated @ 24 %.																																				
2.	Amount claimed to be in default and the date on which the default occurred	<u>Amount claimed to be in default:</u> Rs. 71,33,363/- (Rupees Seventy-One Lacs Thirty-Three Thousand Three Hundred and Sixty-Three only)  <u>Due Date:</u> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 10%;">S. N.</th> <th style="width: 40%;">Date of Invoice</th> <th style="width: 50%;">Due Date</th> </tr> </thead> <tbody> <tr><td>1.</td><td>6/4/2018</td><td>7/4/2018</td></tr> <tr><td>2.</td><td>6/4/2018</td><td>7/4/2018</td></tr> <tr><td>3.</td><td>6/4/2018</td><td>7/4/2018</td></tr> <tr><td>4.</td><td>6/4/2018</td><td>7/4/2018</td></tr> <tr><td>5.</td><td>6/4/2018</td><td>7/4/2018</td></tr> <tr><td>6.</td><td>6/4/2018</td><td>7/4/2018</td></tr> <tr><td>7.</td><td>6/4/2018</td><td>7/4/2018</td></tr> <tr><td>8.</td><td>6/3/2018</td><td>7/3/2018</td></tr> <tr><td>9.</td><td>6/2/2018</td><td>7/2/2018</td></tr> <tr><td>10.</td><td>6/2/2018</td><td>7/2/2018</td></tr> <tr><td>11.</td><td>5/31/2018</td><td>6/30/2018</td></tr> </tbody> </table>	S. N.	Date of Invoice	Due Date	1.	6/4/2018	7/4/2018	2.	6/4/2018	7/4/2018	3.	6/4/2018	7/4/2018	4.	6/4/2018	7/4/2018	5.	6/4/2018	7/4/2018	6.	6/4/2018	7/4/2018	7.	6/4/2018	7/4/2018	8.	6/3/2018	7/3/2018	9.	6/2/2018	7/2/2018	10.	6/2/2018	7/2/2018	11.	5/31/2018	6/30/2018
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		17.	5/30/2018	6/29/2018
		18.	5/29/2018	6/28/2018
		19.	5/29/2018	6/28/2018
		20.	5/29/2018	6/28/2018
		21.	5/29/2018	6/28/2018
		22.	5/29/2018	6/28/2018

4. Consequent to the notice issued by the Adjudicating Authority, the Corporate Debtor filed its reply vide Diary No. 2066/2021 dated 08.10.2021 whereby following has been stated:

- (a) The Corporate Debtor has submitted that the money claimed as Operational Debt cannot be recovered under IBC proceedings since there is an Arbitration Clause in the purchase orders by virtue of which Courts of Mumbai will have jurisdiction to adjudicate the dispute.
- (b) The Corporate Debtor further submitted that the goods delivered by the Operational Creditor were defective and of inferior quality which was duly intimidated to the Operational Creditor and as the same was not acted upon, arbitration is the remedy available to the Applicant and not IBC.

- (c) The Corporate Debtor stated that for a petition to be maintainable under Section 9 of IBC, 2016 certain aspects are to be followed such as the money claimed qualifies to be termed as 'claimed' debt and later 'Operational Debt'. It is only on satisfaction of the aforesaid term; the claim amount is liable to be qualified or adjudicated by this Authority. In the present manner the Respondent is not a Corporate Debtor to the Operational Creditor as the money claimed does not fall under the definition of Operational Debt as mentioned under Section 5(21) of the IBC, 2016.
5. The Operational Creditor filed Written Submissions vide Diary No. 2497/2022 dated 22.08.2022 whereby it is submitted that the principal amount of Rs. 52,29,636/- arising out of 22 invoices is still pending after adjusting the last payment of Rs. 20 lakhs. The liability towards the pending payment has been acknowledged by the Debtor in e-mail dated 25.08.2018, 10.09.2018, 21.09.2019 & 20.07.2019. Further the Applicant has relied on the case of *M/s ATE Projects Pvt. Ltd. V/s Rajasthan Drugs Pharmaceuticals Ltd. & Ors.* to dispute the contention of the Corporate Debtor regarding maintainability of the petition.
6. This Adjudicating Authority has perused all the relevant papers and found them in order. The registered office of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this application.

7. With respect to limitation, it is seen that this petition was filed on 09.03.2020 seeking initiation of CIRP against the Corporate Debtor. It is seen from the documents produced before us that the last payment was made on 19.12.2018 for an amount of Rs. 20 Lakhs. Further vide e-mail dated 21.01.2019 Mr. Kalpesh Soni acknowledged the debt stating “*once again we are very sorry for this delay of work on release of the same. Please bear with us till 15<sup>th</sup> February*”. Thereafter, the Applicant sent various reminders to the Corporate Debtor and finally sent a demand notice vide letter dated 28.12.2019. The date of default as mentioned in the petition is the due date when the invoices have to be cleared i.e., expiry of 30 days from the date of invoices. It is pertinent to take into account Section 18 & 19 of the Limitation Act, 1963, according to which a fresh period of limitation will be computed from the time when the acknowledgment of debt was so signed and when the last payment was made before the expiration of the prescribed period. In the present case, the Corporate Debtor has made the last payment on 19.12.2018. Hence, the Corporate Debtor has failed to make payments against the invoices raised in the year 2018 and the petition came to be filed on 09.03.2020. Therefore, the present application is well within limitation.
8. The Applicant has stated that the goods delivered by the Operational Creditor were not defective whereas the Corporate Debtor has stated that the goods delivered were with defects and of inferior quality which was intimidated to the Applicant. It is seen that the Corporate Debtor has failed

to provide any proof regarding intimation of the alleged defective goods being given to the Applicant. Hence, there is no pre-existing dispute as prescribed under the provisions of Law. A bare perusal of the e-mails show that the Corporate Debtor has clearly defaulted in payments of the goods that were availed from the Applicant. Hence, there is a clear debt arising in the present matter.

9. The Corporate Debtor has raised a contention stating that since there is an Arbitration Clause in the purchase Orders, this Court will not have jurisdiction over the present matter. It is pertinent to note here that the Hon'ble Supreme Court in a *Tata Consultancy Services Ltd. v/s Vishal Ghisulal Jain, Resolution Professional, SK Wheels Pvt. Ltd.* has stated that “*In terms of Section 238 and the law laid down by this Court, the existence of a clause for referring the dispute between parties to arbitration does not oust the jurisdiction of the NCLT to exercise its residuary powers under Section 60(5)(c) to adjudicate disputes relating to the Insolvency of the Corporate Debtor*”. Therefore, in light of the law laid down by the Supreme Court the contention of the Corporate Debtor does not hold ground.
10. In *Mobilox Innovations Private Limited Vs Kirusa Software Private Limited*, para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9. Para 34 is as follows:-

*“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:*

- (i) *Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) *Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and*
- (iii) *Whether there is existence of a dispute between the parties or the record of the 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

*If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”*

However, the defence has to be plausible and while not examining it on merits, it must not appear as a moonshine defence.

11. Therefore, in the present matter at hand, there is a clear debt, repayment of which has been defaulted by the Corporate Debtor and there appears to be no pre-existing dispute between the parties. It is also observed that the conditions under Section 9 of the IBC stand satisfied. Hence, this Adjudicating Authority is inclined to commence CIRP against the Corporate Debtor as envisaged under the provisions of IBC.
12. Under sub-section (4) of Section 9 of the Code, the Operational Creditor may propose the name of a Resolution Professional to be appointed as Interim Resolution Professional (‘IRP’) but it is not obliged to do so. In the instant case, the Operational Creditor has proposed the name of Mr. Amit Gupta. Hence, this Bench is appointing Mr. Amit Gupta as the IRP.

13. In view of this Mr. Amit Gupta, duly registered with the Insolvency and Bankruptcy Board of India, with Registration No. IBBI/IPA-002/IP-N00021/2016-2017/10048 (email: amitguptacs@gmail.com), is hereby appointed as the IRP. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15, 17, 18, 19, 20 and 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, and Rules and Regulations thereunder.
14. Consequences of initiation of CIRP shall be inter-alia as follows:
- (i) The IRP appointed by the Adjudicating Authority, Mr. Amit Gupta, is directed to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the provisions of Code including issue of publication in widely circulated Newspapers as contemplated under the provisions of the Code and calling for claims from the creditors of the Corporate Debtor; and collation of the same shall be done.
  - (ii) Further, as a sequel of admission, moratorium as envisaged under Section 14 of the Code is invoked in relation to the Corporate Debtor which will be in vogue during the CIRP of the Corporate Debtor. The IRP shall carry out CIRP strictly as per the timelines specified and as envisaged under the provisions of the Code in relation to the Corporate Debtor.

- (iii) The said IRP shall act strictly in accordance with the provisions of the Code and with a view to defray his expenses to be incurred and fees on account, the Applicant is directed to deposit a sum of Rs. 2,00,000/- (Two Lakhs Only) within seven days from the date of this order. This amount shall be proportionately contributed and reimbursed to the Applicant upon formation of the Committee of Creditors. In terms of Section 17 and 19 of the Code all personnel of the Corporate Debtor including promoters and Board of Directors, whose powers shall stand suspended, shall extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.
- (iv) In terms of Section 9 of the Code, this order shall be communicated at the earliest, not exceeding one week from today, to the Applicant, Corporate Debtor as well as the IRP appointed by this Adjudicating Authority to carry out CIRP. A copy of this order shall also be communicated to IBBI for its records.

15. Accordingly, CP No. (IB)- 87/9/JPR/2020 is admitted.

DEEP  
CHANDRA  
JOSHI

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**(DEEP CHANDRA JOSHI)**  
**JUDICIAL MEMBER**

PRASANTA  
KUMAR  
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**(PRASANTA KUMAR MOHANTY)**  
**TECHNICAL MEMBER**