

**THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 113/Chd/Pb/2019

**Under Section 9 of the Insolvency
and Bankruptcy Code, 2016.**

In the matter of:

IDBI Capital Markets & Securities Ltd.

having its registered office at
3rd Floor, Mafatlal Centre,
Nariman Point, Mumbai

...Petitioner-Operational Creditor

Vs.

Jindal Cotex Limited

having its registered office at
G.T. Road, Village Jugiana,
District- Ludhiana, Punjab-141017

...Respondent-Corporate Debtor

Judgement delivered on: 15.03.2023

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)**

For the Petitioner- Mr. Ajay Kalra, Advocate
Operational Creditor :

For the Respondent- Mr. Aalok Jagga, Advocate
Corporate Debtor : Mr. APS Madaan, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC' / 'Code'), by **IDBI Capital Markets & Securities Ltd.** through its Senior Executive Ms. Pooja Shah (for brevity 'Operational Creditor' / 'Petitioner'), with a prayer to initiate

Corporate Insolvency Resolution Process (**CIRP**) in case of Jindal Cotex Limited (**for brevity 'Corporate Debtor' / 'Respondent'**).

2. The Corporate Debtor, namely, Jindal Cotex Limited, is a Company incorporated on 18.02.1998 under the provisions of Companies Act, 1956 with CIN No. L17115PB1998PLC021084 with its registered office at G.T. Road Village Jugiana, District- Ludhiana (Punjab)-141017. Hence, the territorial jurisdiction lies with this Adjudicating Authority. Copy of master data of corporate debtor is attached with the main petition and marked as Annexure -I, Page-37A.

3. The facts of the case, briefly, as stated in the petition are that the Operational Debt arised out of the advisory services for debt restructuring rendered by the petitioner to the respondent in terms of an offer letter dated 13.06.2013. As per the Clause-5 of the offer letter, the respondent was liable to pay Rs. 60 lahks and in case of delay in the payment of the fee, it would attract interest @14.75% p.a. The respondent availed the advisory services and the debt became due as per Clause 5 of Master Restructuring Agreement. The invoices total amounting to Rs. 67,41,600/- (Rupees Sixty Seven Lakh Fourty One Thousand Six Hundred Only), principal amount of Rs. 44,94,400/- (Fourty Four Lakh Ninty Four Thousand Nine Hundred only) were never disputed. Despite repeated reminders, the respondent failed to pay the outstanding amount.

4. It is submitted by the petitioner in Form 5, Part IV that amount claimed to be in default is Rs. 76,79,364/- (Rupees Seventy Six Lakh Seventy Nine Thousand Three Hundred Sixty-Four Only). The default occurred on 31.12.2013 i.e. when the last invoice was raised by the

petitioner. Copy of offer letter dated 13.06.2013 (Annexure-II) letter dated 09.07.2013 (Annexure-III), invoice dated 10.09.2013, 01.11.2013, 12.12.2013, 31.12.2013 (Annexures-IV, VII, IX, XI respectively) letter dated 24.12.2013 and 27.12.2013 issued by CDR Cell (Annexure-VIII), Email dated 02.01.2014 sent by petitioner to respondent and lead bank (Annexure-X), reminder letter dated 30.06.2014, 03.07.2014, 01.10.2014, 27.07.2015 (Annexure-XII, XIII, XIV and XVI respectively), order dated 06.07.2015 passed in CP No. 182 of 2014 (Annexure-XV), letter dated 10.09.2015 sent to OBC (Annexure-XVII), letter dated 19.10.2016 sent by petitioner to Official Liquidator (Annexure-XIX), order dated 24.05.2017 passed in RA-CP No. 3 of 2015 (Annexure-XX), letter dated 10.04.2018 sent on behalf of petitioner to Provisional Liquidator (Annexure-XXI), letter dated 01.05.2018 sent by Official Liquidator (Annexure-XXII) are attached with the main petition.

5. No separate application for the condonation of delay in filing the present petition has been preferred but only an application alongwith the main petition is attached for condonation of 665 days in filing the present petition and the reasons for delay are explained therein. A demand notice dated 07.05.2018 is stated to be issued by the operational creditor and the same has been delivered to the corporate debtor on 12.05.2018 vide registered post, postal receipt and tracking report are attached at Annexure XXIII of the petition. The corporate debtor gave reply dated 21.05.2018 demand notice wherein it is denied that the claimed amount or any other amount is outstanding, with respect to services provided. The notice is the incomplete document and there is a pre-existing dispute between the parties

regarding the deficiency and incompleteness in part of the services provided. The dues are barred by law of limitation as the invoices relied upon by petitioner pertain to the year 2013 and the demand notice has been sent in the year 2018. The notice does not disclose material information in relation to the transaction between the parties. The offer letter under Clause 4.2(a) stipulates that the assignment would be completed within four months. The offer letter does not amount to an engagement letter or an agreement entered into between the parties. The letter does not bear the name of Authorized Signatory. The company made payment of Rs. 22,47,200/- (Twenty Two Lakh Forty Seven Thousand Two Hundred Only) on 18.06.2013, 20.06.2013 and 29.10.2013 to petitioner as a complete full and final settlement amount and it is evidenced by the fact that petitioner did not approach the company until notice dated 09.04.2016 i.e. almost more than three years later from raising of purported invoices. (Annexure XXIV).

6. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The affidavit of service was filed vide Diary No. 2688 dated 27.05.2019. The corporate debtor has filed reply vide diary No.3801 dated 31.07.2019, wherein it is stated that there is delay of 665 days in filing the petition. The last invoice submitted is dated 31.12.2013 and the limitation is of three years which expired on 30.12.2016 whereas the present petition has been filed on 17.10.2018. Therefore, the petition and claim is barred by limitation. The petitioner submitted a reminder to make payment followed by letter dated 30.07.2014 and 01.10.2014 and when no payment was made, no action was taken to file a recovery suit and initiation of Arbitration proceedings by

petitioner inspite of reply dated 03.05.2016. On 09.04.2016, the petitioner submitted notice under Section 433 and 434 of Companies Act, 1956 to initiate winding up proceedings. The petitioner violated the conditions of offer letter dated 13.06.2013, functions required to be performed by the petitioner were not done and the task was to be completed within four months but the same was not done leading to frustration of contract. An illegal letter was submitted by the petitioner to the Provisional Liquidator claiming Rs. 44,94,400/- (Forty Four Lakh Ninety Four Thousand Four Hundred Only) but there was no Provisional Liquidator. The Hon'ble High Court appointed Provisional Liquidator in Company Petition No. 182 of 2014 titled as **Vinod Corporation Vs. Jindal Cotex Limited** on 12.10.2015, the Hon'ble High Court passed order keeping admission order dated 06.07.2015 in abeyance. On 24.05.2017 the review application No. RA-CP 3-2015 was filed by respondent in CP No. 182/2014 in which application was allowed and admission order was recalled. On 10.04.2018, the petitioner stated that no reply has been given by the Provisional Liquidator. On 30.10.2019, the learned counsel for the petitioner submitted that the petitioner did not want to file the rejoinder.

7. The short written submissions have been filed by petitioner vide Diary No. 00514/01 dated 25.07.2022 wherein it is stated that on 17.06.2013 petitioner raised invoices towards commencement fees which were paid by the respondent. The flash report admitted by Corporate Debt Restructuring Empowered Group and raised invoice No. IB/13-14/82 dated 10.09.2013 for sum of Rs. 11,23,600/- (inclusive of taxes), there is no dispute regarding the same. The meeting pertaining to approval of package by CDR Cell were duly

attended by officials of petitioner. The final report was submitted to monitoring institutions and petitioner raised invoice no. IB/13-14/130 dated 01.11.2013 as per Clause V of the offer letter. The final report was approved and petitioner raised invoice no. IB/13-14/147 dated 12.12.2013. The Master Restructuring Agreement was executed and petitioner raised invoice No. bearing IB/13-14/168 dated 31.12.2013. The allegation of oral settlement between the parties is not supported by any evidence. The final Master Restructuring Plan fortified the submission that the petitioner rendered its services as per offer letter. The respondent never raised any dispute with respect to the services provided by the petitioner. The short written submissions have been filed by respondent-corporate debtor vide diary No.00574/3 dated 27.07.2022 reiterating the facts submitted in reply.

8. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

9. The first issue for consideration is whether the demand notice dated 07.05.2018 was properly served. The demand notice was served through a registered post, the postal receipt and tracking report are attached at Annexure XXIII of the petition. The corporate debtor gave reply dated 21.05.2018 demand notice wherein it is denied that the claimed amount or any other amount is outstanding, with respect to services provided. The notice is the incomplete document and there is a pre-existing dispute between the parties regarding the deficiency and incompleteness in part of the services provided. The dues are barred by law of limitation as the invoices relied upon by petitioner pertain to the year 2013 and the present notice has been sent in the year 2018. The notice does not disclose material

information in relation to the transaction between the parties. Therefore, the demand notice was duly served.

10. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. The claimed amount in the question is disputed by the respondent as the company made payment of Rs. 22,47,200/- (Twenty Two Lakh Forty Seven Thousand Two Hundred Only) on 18.06.2013, 20.06.2013 and 29.10.2013 to petitioner as a complete full and final settlement amount and the petitioner did not approach the company until 09.04.2016 i.e. almost more than three years later from raising of purported invoices (Annexure XXIV). Further, no action was taken to file a recovery suit and initiation of Arbitration proceedings when there was no payment made by the respondent despite the letters dated 30.07.2014 and 01.10.2014. As per the clause 12.10 of the offer letter 13.06.2013, which can be read as under:-

“a. In all cases of dispute or disagreement between the parties hereto as to any matter arising out of or relating to engagement under this proposal and provided no understanding between the parties can be reached for the settlement of the difference, the matter shall be finally settled by arbitration as per the provisions of the Indian Arbitration and Conciliation Act, 1996 or any modifications or substitutions thereof.

b. The Company and IDBI Capital shall appoint one arbitrator each and the two arbitrators shall appoint a third arbitrator or upon disagreement, the third arbitrator shall be appointed as per the provisions of the Indian Arbitration and Conciliation Act 1996. The third arbitrator shall act as the presiding arbitrator and the decision of the majority of the arbitrators shall be final and binding upon the parties. The arbitration proceedings shall be held at Mumbai or at any other place mutually agreed upon in writing by the parties. The language of arbitration shall be English.

c. Notwithstanding any pending reference to arbitration, both parties shall continue to perform their respective obligations under this Agreement and the parties shall not withhold, for any reason whatsoever, including pendency of arbitration proceedings, payment of any amount which has become due under this proposal”.

The above clause provides for referring the dispute between the parties to the arbitration in terms of Arbitration & Conciliation Act, 1996 and not under the Insolvency and Bankruptcy Code, 2016. Therefore, the debt does not fall under the ambit of the operational debt.

11. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 07.05.2018 attached as (Annexure XXIII) was duly served on the corporate debtor. However, the period of limitation would begin from the date of default i.e. 31.12.2013 i.e. when the last invoice was raised by the petitioner. The application was filed vide Dairy No 206 on 16.01.2019 and was re-filed on 26.02.2019. It is submitted by the petitioner under section 5 & 14 of the Limitation Act, 1963 the delay of 665 days in filing the present petition may be condoned in view of the reasons explained. However, this contention of petitioner is devoid of legal force because the last invoice was raised by the petitioner was on 31.12.2013. The period of 3 years would have expired on 31.12.2016 and the petition was filed on 31.10.2018, hence there is gap of 665 days. The petitioner issued a Legal Notice dated 9.4.2016 under section 433 & 434 of the Companies Act, 1956 for winding up of the respondent. While the petitioner was in process of filing the petition for winding up, in the meanwhile vide Order dated 06.07.2015 (Annexure A-15) was passed by Hon'ble High Court in CP No. 182 of 2014 titled as *M/s Vinod Cotton Corporation v. Jindal Cotex Limited*, the petition for winding up was admitted and provisional liquidator was appointed. On 12.10.2015, the Hon'ble High Court passed an order keeping admission order dated 06.07.2015 in abeyance. On 24.05.2017 the review application No. RA-CP 3-2015 was

filed by respondent in CP No. 182/2014 in which application was allowed and admission order was recalled. The petitioner did not approach the courts for impleadment, making the winding up notice *non-est* in law. On 10.04.2018, the petitioner stated that no reply has been given by the Provisional Liquidator. Thus, the period of 1032 days starting from 06.07.2015 the date of order of winding up till the receipt of letter dated 01.05.2018 i.e. on 03.05.2018 issued by provisional liquidator cannot be excluded in terms of Section 14 of the Limitation Act, 1963. The petition has been filed after four and half years as the claim expired on 30.12.2016. Although, it is contended by learned counsel for the petitioner that demand notice could not be issued earlier due to pendency of winding up proceedings before the hon'ble High Court and respondent did not know about the review order passed by Hon'ble High Court to recall the admission order. However, this contention of learned counsel does not appeal to the reasons because respondent came to know about the winding up order dated 06.07.2015 passed by Hon'ble High Court in the year 2015 and he also lodged the claim before provisional liquidator whereas actually at that time there was no such provisional liquidator as the order of his appointment was kept in abeyance by Hon'ble High Court vide order dated 12.10.2015. In these circumstances, when petitioner kept sleeping over his rights for more than two years serving demand notice then this inordinate and culpable delay of 655 days in filing the present petition can be condoned. Therefore, the present petition is badly barred by limitation as it does not fall within the ambit of 3 years.

12. In the given facts and circumstances, the petition is liable to be rejected, in terms of Section 9 of IBC, 2016. Therefore, the claim of the petitioner is rejected and the petition stands dismissed being time barred, however, without any order to the costs.

-sd-15.03.2023
(Subrata Kumar Dash)
Member (Technical)

-sd-15.03.2023
(Harnam Singh Thakur)
Member (Judicial)

March 15, 2023
SM/TB