

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT-2

ITEM NO. 302
C.P.(IB) No. 342(AHM)2022

Order under section 9 IBC

IN THE MATTER OF :

M/s. Gautam Highway Solution
V/s.

....Operational Creditor

M/s. Sadbhav Infrastructure Project
Limited

....Corporate Debtor

Order delivered on: 20/07/2023

Coram:

Mr. Shammi Khan, Hon'ble Member (J)
Mr. Ajai Das Mehrotra, Hon'ble Member (T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of order. The order is pronounced in the open court, vide separate sheet.

-Sd-

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
DIVISION BENCH
COURT-2**

CP (IB) NO.342/AHM/2022

(Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

M/s. Gautam Highway Solution

Through its proprietor

Mr. Brij Bhushan Jain

Registered office at:

Bhagwati Complex, Khazanchian Bazar,
Hisar, Haryana-125001

Email: highway.gautam@gmail.com

Also at:

1st Floor, Near New Punjabi Band,
Old Committee Chowk, Bahadurgarh,
Jhajjar, Haryana-124507

....Operational Creditor

VERSUS

**M/s. Sadbhav Infrastructure Project
Limited**

Registered office at:

Sadbhav House, Opp. Law
Garden Police Chowki,
Ellisbridge, Ahmedabad,
Gujarat-380006

Also at:

Sadbhav, Near Havmor Restaurant,
B/H. Navrangpura Bus Stand
Navrangpura, Ahmedabad-380009
CIN:L45202GJ2007PLC049808

....Corporate Debtor

Order reserved on: 09.06.2023
Order pronounced on: 20.07.2023

CORAM: Shammi Khan, Hon'ble Member(J)
Ajai Das Mehrotra, Hon'ble Member(T)

APPEARANCE:

For the Operational Creditor: Mr. Abhishek Grover, Advocate

For the Corporate Debtor: Mr. Ravi Pahwa, Advocate

ORDER

1. The instant Petition is filed on 29.08.2022 by **M/s. Gautam Highway Solution** (Operational Creditor) through its proprietor Mr. Brij Bhushan Jain, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 claiming to be an Operational Creditor for initiation of Corporate Insolvency Resolution Process (CIRP) against **Sadbhav Infrastructure Project Limited** (Corporate Debtor) for making default in payment of outstanding amount of Rs.1,35,79,097/- (Rupees One Crore Thirty Five Lakh Seventy-Nine Thousand and Ninety-Seven only.)
2. The Operational Creditor is engaged in the business of providing services with regards to maintenance of highways, roads etc. having its registered office at Bhagwati Complex, Khazanchian Bazar, Hisar, Haryana-125001.
3. The Corporate Debtor is a limited company, incorporated on 18.01.2007 under the provisions of Companies Act, 1956 duly registered with Registrar of Companies, Ahmedabad, Gujarat with CIN:L45202GJ2007PLC049808, having registered office at Sadbhav House, Opp. Law Garden Police Chowki, Ellisbridge, Ahmedabad, Gujarat-380006. Therefore, this Bench has jurisdiction to deal with this Petition.

4. Briefly, the facts of the case as mentioned in the Petition and submitted by the Ld. Counsel for the Operational Creditor are summarised as under:
- a) The Corporate Debtor had approached the Operational Creditor and issued work orders dated 01.04.2020 and 01.04.2021 for carrying out routine maintenance services of Rohtak-Panipat section of NH-71A in the State of Haryana. The said work orders were duly accepted by Operational Creditor. Copies of work order are enclosed with this Petition as Annexure A-5 (Colly) (Pg 53-75).
 - b) The Operational Creditor carried out the maintenance work and raised various invoices for the period from April, 2020 to July, 2021 amounting to Rs.1,87,24,699/-. (Rupees One Crore Eighty- Seven Lakh Twenty-Four Thousand Six Hundred and Ninety-Nine only). Pursuant to issue of invoices, Corporate Debtor made part payment to Operational Creditor. However, an amount of Rs.1,28,86,751/- (Rupees One Crore Twenty-Eight Lakh Eighty-Six Thousand Seven Hundred and Fifty-One only) is still outstanding. An amount of Rs.6,92,346/- (Rupees Six Lakh Ninety-Two Thousand Three Hundred and Forty-Six only) is also outstanding on account of unpaid Retention Money which became due and payable on 31.07.2021 after handing over of the project.
 - c) The total amount due and payable by Corporate Debtor to Operational Creditor is Rs.1,35,79,097/- [Rs.1,28,86,751/- (11 unpaid invoices) + Rs.6,92,346/- (retention money)] plus interest @ 18% per annum from due date till date of actual payment. Copies of invoices are enclosed with this petition as Annexure A-3 (Colly) (Pg. 37-47).

- d) Even after several requests and reminders, the Corporate Debtor failed to pay the said outstanding amount. Hence, the Operational Creditor, issued demand notice dated 25.05.2022 under section 8 of the IBC,2016 in Form 3 for the demand of Rs. 1,35,79,097/- and the same was delivered to Corporate Debtor on 30.05.2022. Thereafter, the Corporate Debtor neither paid aforesaid outstanding amount nor raised any dispute with respect to said outstanding amount. Hence, the present Petition to initiate CIRP against the Corporate Debtor.
5. The Corporate Debtor has filed its reply on 28.01.2023 and the averments of the Corporate Debtor in the reply are stated below:
- a) The Demand Notice sent by one Mr. Praveen Kumar Aggarwal, Advocate is null and void as the same is sent by the said Advocate without there being any authorisation of Operational Creditor. It is settled law that the demand notice should be issued by person who is authorised by Operational Creditor and in case of issuance of demand notice by a person not authorised by Operational Creditor, the Petition is liable to be dismissed. This view is taken by the Hon'ble National Company Law Appellate Tribunal in the case of *Ramco Systems Vs. Spice Jet*. Therefore, in view of the above facts read with settled legal propositions, the present Petition based on the aforesaid Demand Notice is null and void.
- b) The present petition is not tenable and liable to be dismissed on the ground that there is no privity of contract between the Operational Creditor and Corporate Debtor as the Corporate Debtor has not entered into any contract or placed any work order on the Operational Creditor.
- c) The invoices raised by Operational Creditor are on the basis of work order which is not placed by the Corporate Debtor, further

the same are neither received nor acknowledged by Corporate Debtor therefore, the demand raised by Operational Creditor on the basis of invoices is baseless and misconceived.

- d) The Corporate Debtor has averred that amongst the invoices raised by the Operational Creditor certain invoices fall within the period between 25.03.2020 to 24.03.2021. Therefore, the same needs to be excluded as per Sec. 10A of IBC. The details of the said invoices are provided below:

Sr. No.	Date of Invoice	Amount
1.	30.09.2020	11,92,656
2.	31.10.2020	11,92,656
3.	30.11.2020	11,92,656
4.	31.12.2020	11,92,656
5.	31.01.2021 (Proforma)	11,92,656
6.	28.02.2021 (Proforma)	11,92,656
	Total	71,55,936

In view of Section 10A an amount of Rs.71,55,936/- is required to be excluded from total amount of debt claimed by Operational Creditor. If an amount of Rs.71,55,936/- is excluded from the total amount of debt claimed by Operational Creditor, the amount goes below the threshold limit of Rs.1 Crore.

As per notification dated 24.03.2020 the minimum amount of debt specified for the purpose of filing petition u/s. 7 or 9 of IBC is Rs. 1 Crore and the present Petition is filed much after the notification came into force therefore, the present Petition is liable to be dismissed.

6. The Operational Creditor filed a rejoinder to the reply of the Corporate Debtor on 22.03.2023 and made the following submissions:
- a) The Operational Creditor states that the demand notice issued by Corporate Debtor is valid and legal as per the view taken by

Hon'ble Supreme Court in the matter of *Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited (2018) 2 SCC 6784* wherein it is held that a demand notice delivered by an advocate duly instructed by the Operational Creditor would be valid demand notice for the purpose of initiation of CIRP.

- b) The Operational Creditor submits that work order dated 18.10.2019 was issued by Corporate Debtor for carrying out routine maintenance services in a section of Rohtak – Panipat Section of Section NH – 71 A. The said work order was mutually extended by parties upto 31.03.2021 and the same was duly signed and sealed by Corporate Debtor and exchanged with Operational Creditor vide Email dated 11.11.2020. Further, the work order dated 01.04.2020, was stamped under the name of Rohtak Panipat Tollway Pvt. Ltd. which is wholly owned subsidiary company of the Corporate Debtor. The Corporate Debtor had given assurance that payment will be released timely despite the work order being stamped in the name of its subsidiary.

Accordingly, the Corporate Debtor has not only made payment for the said work order but has also deposited the amount of TDS with Income Tax Department. The form 26 AS where TDS payment made by Corporate Debtor for the transaction and invoices in question is duly reflected is enclosed in Rejoinder as “**Annexure A-13**” (Pg. No. 20-21). In view of the aforesaid, the contention of the Corporate Debtor regarding no privity of contract is liable to be rejected.

- c) The Operational Creditor States that Section 10A is not applicable to the present case as default committed by Corporate Debtor is continuous and beyond the prohibited period provided under Section 10A. Therefore, there is no bar for initiation of CIRP against the Corporate Debtor in respect of the invoices in question.

7. We have heard the Ld. Counsel for both the parties and perused the material available on record.
8. This Adjudicating Authority is of the opinion that before going into detailed discussion on the facts of the case on merits, it is relevant to examine the issue of maintainability of the present Petition in the light of the provision of Section 10A of the Code, 2016. The provision of Section 10A is reproduced herein verbatim:-

*“10A. Notwithstanding anything contained in section 7,9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March,2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf: **Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.***

Explanation – For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said section before 25th March, 2020” (Emphasis supplied).

Subsequently, the period was increased to one year after 25th March, 2020.

9. The proviso of Section 10A of the Code, stipulates that “**no application shall ever be filed**” for the initiation of CIRP “**for the said default occurring during the said period.** The expression “shall ever be filed” is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred during 25.03.2020 to 24.03.2021. Therefore, we cannot agree to the Operational Creditors submission that default committed by Corporate Debtor is continuous and beyond the prohibited period provided under Section 10A.

10. Accordingly, from the above discussion and relying on the averments made and documents submitted, we inferred that the date of default with respect to invoice dated 30.09.2020, 31.10.2020, 30.11.2020, 31.12.2020, 31.01.2021 and 28.02.2021 amounting to Rs.71,55,936/- will be 15.10.2020, 15.11.2020, 15.12.2020, 15.01.2021, 15.02.2021 and 15.03.2021 respectively and consequently their consideration for calculation of debt amount is barred by Section 10A of the Code,2016. Since, the instant Petition has been filed on 29.08.2022 and demand notice was issued on 25.05.2022, the pecuniary threshold limit of Rs.1 Crore of debt as envisaged under section 4 of the Code, 2016 will be applicable in the case before us.
11. The principal amount outstanding after considering the bar of Section 10A of the Code will be Rs.64,23,161/- which is below the minimum threshold requirement of Rs.1 Crore as stipulated under Section 4 of the Code, 2016, and hence the instant Petition is not maintainable under Section 4 of the Code, 2016.
12. In view of the above, we are of the considered view that the present Petition (CP(IB)No. 342/AHM/2022) is not maintainable. Accordingly, we reject this present petition.
13. Certified copy of this order, if applied for, to be issued to all the concerned parties upon compliance with all requisite formalities.

-Sd-

AJAI DAS MEHROTRA
MEMBER (TECHNICAL)

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

Arati-LRA