

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

C.P. (I.B) No.535/9/NCLT/AHM/2018

Coram: MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE THE AHMEDABAD BENCH OF THE
NATIONAL COMPANY LAW TRIBUNAL ON 10.03.2021

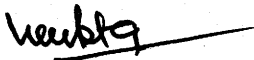
Name of the Company: Ace Resorts & Infrastructure Pvt. Ltd
V/s.
Aakash Polyfilms Ltd.

Section: 9 of the Insolvency & Bankruptcy Code, 2016

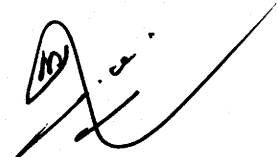
ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open court vide separate sheet.



(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)



(MADAN B. GOSAVI)
MEMBER (JUDICIAL)

Dated this the 10th day of March, 2021.

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1**

CP (IB) No.535/9/NCLT/AHM/2018

An application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of :

**Ace Resorts & Infrastructure
Pvt. Ltd.**

419, Rajhans Ornate, Beside Surat
People's Co-Op. Bank, Parle Point,
Surat-395007.

..Operational Creditor

Versus

M/s. Aakash Polyfilms Ltd.

CIN: U17119GJ1994PLC022937
ID-1/138-139-140,
GIDC Sachin,
Surat-394520

..Corporate Debtor

Order reserved on 8th Day of March. 2021
Order Pronounced on 10th Day of March, 2021

Coram: MADAN B. GOSAVI, MEMBER(J)
VIRENDRA KUMAR GUPTA, MEMBER (T)

Appearance:

Learned Senior Counsel Mr. Tirth Nayak for the Operational Creditor.

Learned Counsel Mr. S. Suryanarayan for the Corporate Debtor. .



ORDER**[Per VIRENDRA KUMAR GUPTA, MEMBER (T)]**

1. This application has been filed by Ace Resorts & Infrastructure Pvt. Ltd.- Operational Creditor to initiate CIRP against M/s. Aakash Polyfilms Ltd. being Corporate Debtor. The outstanding sum has been claimed at Rs.52,66,050/- and dates of default have been mentioned as per date of bills / invoices / running account bills submitted by the Operational Creditor.

2. The facts, in brief, are that on 04.03.2016, the Corporate Debtor gave work orders for civil work to be completed by Operational Creditor. As per terms and conditions of the work order, bill of Rs.25 lakhs was to be submitted as running account, 75% was to be paid in 7 days and balance 25% was to be paid within 30 days. The work to be done by the Operational Creditor was subject to third party inspection and certification. The Operational Creditor carried out the work and submitted 10 running bills totalling at Rs.2,81,96,097/-. All these running bills have been certified by third party viz. M/s. S & V Engineers to the effect that the said running account bills were in order. Their certificates have been attached in application from page no.62 to 70. The Corporate Debtor did not make the payment which resulted in writing of two emails by the Operational Creditor respectively on 13.10.2017 and 04.12.2017. However, without any result. Ultimately on 16.05.2018 Form-3 / Form-4 alongwith necessary

documentary evidences were issued and delivered on 18.05.2018 to the Corporate Debtor. The outstanding sum has been calculated at Rs.52,66,050/- and interest thereon has been calculated at Rs.11,03,244.39. The Corporate Debtor did not give any reply to such demand notice within 10 days being statutory period given under law to either show that payment has been made or their existed dispute as regard to said outstanding sum prior to issuance of such notice of demand under Section 8 of IBC, 2016.

3. Learned Counsel Mr. Tirth Nayak on behalf of Operational Creditor appeared and narrated these basic facts. He drew our attention to the supporting materials placed in the paper-book. Learned Counsel further submitted that all the running bill had been approved by the third parties. It was contended that initially in running account bill no.9A some disputes had been raised by the Corporate Debtor. Subsequently, third party had approved these bills and therefore, no dispute in fact remained even in regard to this running account bill. It was further contended that no dispute was raised in respect of any other bills if such bill was excluded even then the outstanding undisputed amount was more than Rs.1 lakh, hence, for this reason this application was liable to be admitted. It was also claimed that the reliance placed by the Corporate Debtor on Email dated 26.12.2016 and 01.03.2017 also of no use as these were in fact of the period before the issuance of

this running account bill. It was also contended that there was no time limit prescribed in the agreement for the completion of work, hence, there was no question of delay as alleged by Corporate Debtor in those mails. Thereafter, Learned Counsel further submitted that there were no pre-existing disputes as evident from the fact that the Operational Creditor wrote two mails dated 13.10.2017 and 04.12.2017 requesting the Corporate Debtor to make the payment which remained un-responded and if these were any disputes then for those could be brought to the notice of Operational Creditor at that point of time itself. It was also contended that Civil Suit had been filed after receipt of demand notice under Section 8 of IBC, 2016, hence, no cognizance of the same could be taken as sole purpose of such suit was to run away from its liability. Thereafter Learned Counsel for Operational Creditor placed on the following decisions for the preposition that such suit could not be termed as an instance of pre-existing dispute under;


- (i) *Mobilox Innovations Private Ltd. Vs. Kirusa Software Private Ltd reported in (2017) 1 SCC Online SC 353*
- (ii) *Ahluwalia Contracts (India) Ltd. Vs. Raheja Developers Ltd. (C.A.(AT)(Insolvency) No.703/2018.*

Learned Counsel for the Operational Creditor also contended that additional affidavit had been filed by the Corporate Debtor on 29.05,2019 which was objected by the Operational Creditor as the same had bene filed

without the permission of this Authority, hence, need not to be taken into consideration.

4. Written submissions on behalf of Corporate Debtor have been filed wherein Corporate Debtor contended that payment of Rs.17 lakhs had been made in cash in four instalments and the said fact had not been disclosed by the Operational Creditor, hence, application filed by the Operational Creditor suppressed the material fact and for this reason, the application was liable to be dismissed. For this proposition, reliance has been placed on the decision of Mumbai Bench of the NCLT in the case of NN Enterprise Vs. Relcon Infra Projects Limited reported in 2020 SCC Online NCLT 6. Learned Counsel for the Corporate Debtor also relied on the decision of the Hon'ble NCLAT in the case of Allied Silica Limited Vs. Tata Chemicals Limited reported in 2020 SCC Online NCLAT 613 for the proposition in that in case of pre-existing dispute, the application filed under Section 9 was liable to be dismissed.
5. We have considered the submission made by both sides and material on record. It is noted that in pursuance of work order placed by the Corporate Debtor, the Operational Creditor has carried out the work allotted to it by the Corporate Debtor. The said work has been carried out during the period from 04.03.2016, being date of work order. Over all 10 running account bills have been raised. First bill has been raised on 13.04.2016 and last running

account bill has been raised on 06.04.2017. In respect of all such running account bills, third party has certified such bills and found these bills in order. Thus, the condition of the work order given by the Corporate Debtor that the bills will be subject to certification / inspection by the third party has been fully met. It is noted that two emails were written as regard to some operational / issues and delays being committed by the Operational Creditor. However, such mails pertain to work which has been invoiced in running account bill No. 9, and as stated earlier, this bill has also been found to be in order by the third party, hence, whatever grievances Corporate Debtor had in respect of work billed by the Operational Creditor in this running account bill stand resolved. Further, mails written by the Operational Creditor for release of payment have remained un-responded. Third party certification / inspection has also not been challenged by the Corporate Debtor. Thus, on the basis of these facts, it can be safely concluded that there is no merit in the contentions of the Corporate Debtor that their existed disputes prior to the issue of receipt of demand notice under Section 8 of IBC, 2016 issued by the Operational Creditor. Civil Suit has been filed much after the receipt of said demand notice, hence, the same cannot be given any cognizance as settled by the Supreme Court in the Case of Mobilox Innovation.

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6. As far as payment in cash to the tune of Rs.17 lakhs is concerned, the outstanding undisputed amount, even after

adjustment of this sum is much more than Rs. 1 lakh. Further, no reply to demand notice issued under section 8 of IBC, 2016 and delivered to Corporate Debtor has been filed which mechanism is provided for this very purpose i.e to show the amount paid after the issue of such notice or thereafter or to bring to the notice of Operational Creditor the fact of pre-existing dispute. Thus, Corporate Debtor has forfeited its statutory right. Such affidavit has been filed without seeking permission of this Adjudicating Authority, hence, it cannot be taken into consideration in normal circumstances. However, this Authority vide its order dated 27.08.2019 directed the Applicant to provide particulars about the exact amount received from the Corporate Debtor. Hence, the plea of the Operational Creditor that such information of payment in cash furnished by the Corporate Debtor later on need not to be considered stand rejected. Having stated so, merely because such fact has not been mentioned by the Operational Creditor, the application filed by the Operational Creditor cannot be dismissed as even after consideration of this amount, the outstanding undisputed amount is much more than threshold limits of Rs.1 lakh. Further, the decision of the Tribunal relied on by the Corporate Debtor is not applicable to the facts of the case as in that case, two demand notices were issued and in the second demand notice/ objections taken by the Corporate Debtor in reply to earlier demand notice had been considered. Whereas, in the present case, no reply has

been submitted to the notice of demand issued under Section 8 of IBC, 2016 and no two demand notices have been issued. As far as earlier correspondences are concerned, the same are in the nature of commercial / operational issues which arise in the normal course of execution of project of such nature, hence, such correspondences by themselves cannot be termed as a dispute much less than the pre-existing dispute. Thus, for this reason also such emails do not help the cause of Corporate Debtor particularly when relevant running account bill has been raised thereafter which has also been certified by the third party as in order.

7. This application is also admissible on the ground that notice under Section 8 in Form-3 / Form -4 have been delivered alongwith all documentary evidences which are required to be attached and such Form-3 / Form-4 is complete and the Corporate Debtor neither filed reply thereto nor has shown any reasonable cause for not making such reply. Such action of non-reply is not a curable defect.
8. The name of IRP has not been proposed as it is not mandatory in case of application filed under Section 9 of IB Code, 2016. We will appoint the IRP from the list maintained by the IBBI.

9. Considering the facts and applicable legal position, the application filed by the Operational Creditor is admitted and stands disposed-off. We further order as under:

ORDER

1. Corporate Debtor M/s. Aakash Polyfilms Ltd. is admitted in Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016.

2. The moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of Section 14(1) of the Code.
 - (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

 - (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

 - (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of



Financial Assets and Enforcement of
Security Interest Act, 2002;

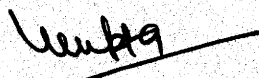
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
3. The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of the Section 31 or passes an order for liquidation of Corporate Debtor Company under Section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.
4. We hereby appoint Mr. Naresh Ghanshyamchandra Bheda having Registration No. IBBI/IPA-002/IP-N00953/2019-2020/13009, Email ID nareshbheda@yahoo.com to act as an IRP under Section 13(1) (c) of the Code. He shall conduct the Corporation Insolvency Resolution Process as per the provision of Insolvency and Bankruptcy Code, 2016 r.w Regulation made thereunder:
5. The IRP shall perform all his functions as contemplated, *inter-alia*, by Sections 17,18,20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any

other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or Co-operate, IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.

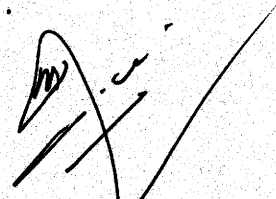
6. This Adjudicating Authority direct the IRP to make public announcement of initiation of Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1) (b) of the Code.
7. It is further directed that the supply of goods/service to the Corporate Debtor Company, it continuing, shall not be terminated or suspended or interrupted during moratorium period. The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016. The Operational Creditor is directed to pay an advance of Rs. 1,00,000/- (Rupees One Lakh Only) to

the IRP within two weeks from the date of receipt of this order for the purpose of smooth conduct of Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority alongwith First Progress Report. Subsequently, IRP may raise further demands for Interim funds, which shall be provided as per Rules.

8. The Registry is directed to communicate a copy of this order to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on website immediately after pronouncement of the order.
9. Accordingly, CP(IB) No.535/9/NCLT/2018 is allowed and stands disposed-off. However, Insolvency Resolution Professional / Resolution Professional to file progress report through IA so that which can be taken on record by this Authority.



(Virendra Kumar Gupta)
Member (Technical)



(Madan Bhalachandra Gosavi)
Member (Judicial)