

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

CP(IBC)/44/KOB/2022

*(Under Section 9 of the IBC, 2016 read with Rule 6 Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016)*

In the matter of:

Winntus Scaffolding Pvt Ltd Vs. Aishwarya Business Corporation Pvt Ltd;

MEMO OF PARTIES

WINNTUS SCAFFOLDING PRIVATE LIMITED, Office at House No. 1154
Near Community Center, Sector 10A, Gurgaon, Haryana – 122 001;

...Operational Creditor/Applicant

-Versus-

AISHWARYA BUSINESS CORPORATION PRIVATE LIMITED, Aishwarya
31, Aishwarya Nagar, Kaniyamkulam Sanathanapuram P.O, Alappuzha, Kerala
– 688 003.

... Corporate Debtor/Respondent

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing)

For Petitioner : Mr. Gursat Singh, Advocate

For Respondent : Mr. Sreekumar, Advocate

Order reserved on: 15.02.2023
Order pronounced on:26.04.2023

ORDER

1. The petitioner has filed this application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as “IB Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as Adjudicating Authority Rules, 2016) for initiation of Corporate Insolvency Process by the Operational Creditor - Winntus Scaffolding Private Limited against the Corporate Debtor, Aishwarya

Business Corporation Private Limited. The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional (IRP).

2. The Operational Creditor is a company incorporated under the provisions of the Companies Act, 1956, represented through its Authorized Representative Mr. M.D Arora having office at House No. 1154 Near Community Center, Sector 10A, Gurgaon Gurgaon HR 122001. The Corporate Debtor is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Aishwarya 31 Aishwarya Nagar, Kaniyamkulam, Sanathanapuram P.O. Alappuzha Kerala-688003.
3. **The brief contents of the Applicant are as follows: -**

- i. The Operational Creditor stated that they have entered into an agreement with Corporate Debtor dated 07.12.2018 and work order dated 01.12.2018 and 24.10.2019 for Project Site - JSW Vijaynagar Works, Vidyanagar, Toranagallu, Ballari Kamataka-583275 for the supply of shuttering and scaffolding material from the Operational Creditor to the project sites of the Corporate Debtor. Thereon, in pursuance of the Work Order, the Operational Creditor commenced with the supply of shuttering and scaffolding material on hire basis at the project sites of Corporate Debtor. The Operational Creditor started with the supply of shuttering and scaffolding material at the project sites of the Corporate Debtor, and thereafter, started raising monthly invoices from 25.12.2018.
- ii. The Operational creditor further stated that in pursuance of the promises made by the Corporate Debtor, the Operational Creditor continued to supply the shuttering and scaffolding material on the site of Corporate Debtor. The aggregated outstanding total sum of Rs. 1,40,25,511 /- the amount which is in fact, reflected in the ledger

account of the Corporate Debtor maintained in the books of Accounts of Operational Creditor is unpaid by the Corporate Debtor. Accordingly, the Corporate Debtor has made a part payment; in response to the constant communications which were underway between the Corporate Debtor and the Operational Creditor. However, after 13.11.2020, till date, no payments whatsoever; had been credited in favour of the Operational Creditor, thereby resulting in an outstanding operational debt of Rs. 1,40,25,511/- in favour of the Operational Creditor. That as per the policy of Operational Creditor, any delay in Clearance of outstanding amount would attract an interest at 18% per annum, consequently Rs. 21,27,846 as interest amount has added up and is due and payable by the Corporate Debtor in favour of the Operational Creditor. Along with the unpaid principal amount and interest amount, there is shuttering and scaffolding material which has not been returned by the Corporate Debtor amounting to Rs. 38,83,244/-. Thus, in toto the amount pending along with Principal, interest and shuttering material amounts to Rs. 2,00,36,601 /-.

- iii. The learned counsel for the applicant submitted that the liabilities of the Corporate Debtor in the books of the Operational Creditor had crossed over a crore of Rupees in its books, and were mounting, unabated, on account of the interest component. Due to the stoic silence which was been evidenced from the conduct of the Corporate Debtor, the Operational Creditor was forced to issue demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016, which was sent via speed post 23.08.2021 as well as through e-mail on 21.08.2021 to the registered address and email address mentioned in the MCA-Master Data maintained in respect of the Corporate Debtor. It is further submitted that the Operational Creditor has complied with all the mandatory provisions of Section 9(3) (a), (b) and (c) of the IBC, 2016.

4. The brief contents of the Reply are as follows: -

- i. The Corporate Debtor stated that there was a meeting between the parties hereto and on 07-12-2018 a sum of Rs. 1,13,92,865 (Rupees One Crore thirteen lakhs ninety—two thousand sixty five Only) vide undated Cheques bearing Nos. 602367, 602368 and 602369 was given to the Operational Creditor herein towards security deposit, which are not cashed until now. Another advance amount after GST Rs. 6,97,452 (Rupees Six Lakhs Ninety—seven thousand four hundred and fifty-two only) vide RTGS Transfer dated 10.12.2018 was also given to the Operational Creditor. Therefore, it is denied that this Respondent has not paid any amounts subsequent to 13.11.2020. The conditions regarding the sale and purchase of articles were also entered into in a printed form subsequently which are not signed on all pages. Thereafter, several sale and purchase had taken place by and between the parties hereto which were all promptly paid by this Respondent.
- ii. The learned counsel for the Corporate Debtor submitted that the Operational Creditor had required the materials that were lying unused on the site. This Respondent never objected to or prevented the Operational Creditor from taking back the materials on site. The damages, if any, cost to the materials taken by the Operational Creditor, as alleged, is on account of the lethargy and timely inaction of the Operational Creditor. At any rate, Rs 38,83,244/- has to be deducted from the total amount, if any, from payable, as it is admitted in the petition by the Operational Creditor. We had categorically stated that the demand of the Operational Creditor is exaggerated and false.
- iii. It is further stated that this Operational Creditor is showing alacrity to declare this Respondent as insolvent. This Respondent is making

earnest attempts to settle all debts through a financier, of which talks are going on. Our request for referring the alleged claims by Operational Creditor to arbitration under Section 32 of Arbitration and Conciliation Act, 1996 is not heeded to by the Operational Creditor knowing full well that the claims put forward by the Creditor are false and baseless.

- iv. Another defence taken by the learned counsel for the Corporate Debtor is that the Operational Creditor was preferred before Micro and Small Enterprises Facilitation Council (MSEFC), Haryana, which is contested and pending. That being so there could not be an adjudication before this Tribunal unless the said proceedings are either transferred to this forum or withdrawn because new allegations are made out before this Tribunal. It is pointed out that the Operational Creditor has falsely alleged that it has not preferred any proceedings for the same relief before any other forum. Therefore, this complaint is not bona fide.
5. We have heard Ld. Counsel for both the parties and perused the averments made in the application and reply filed by the parties. The relevant documents annexed with the respective submissions have also been examined. The Operational Creditor has been in the business of supply of shuttering and scaffolding material at the project sites of the Corporate Debtor, and thereafter, started raising monthly invoices from 25.12.2018. It is understood that entered into an agreement with Corporate Debtor dated 07.12.2018 and work order dated 01.12.2018 and 24.10.2019 for Project Site.
6. As per the ledger accounts of the Corporate Debtor maintained by the applicant, a total sum of Rs. 1,40,25,511/- along with interest was due and payable. Thereafter, the Applicant had sent various reminders and requested to clear the dues. Accordingly, the Corporate Debtor has made a part payment, however, after 13.11.2020, no payment had been credited in favour of the Operational

creditor. As a consequence, the Applicant was constrained to send the demand notice on 20.08.2021 demanding payment of an unpaid operational debt i.e., Rs. 2,00,36,601/-. The Corporate Debtor replied to the demand notice on 28.08.2021 stating to refer to the letter dated 23.08.2021. Where it is mentioned that the Corporate Debtor deny that a sum of Rs. 2,00,36,601/- is payable. While arguing and in the counter, the Corporate Debtor mentioned that the same matter is contested and pending before the Micro and Small Enterprises Facilitation Council (MSEFC), Haryana and therefore this application cannot be admitted and is not *bona fide*.

7. Considering the above facts, the Points for consideration are:
 - (I) Whether non-mentioning of date of default in part IV of the petition is fatal?
 - (II) Whether there is any pre-existing dispute?
8. **Point No.1:** The petitioner/operational creditor filed this petition alleging that the respondent/corporate debtor committed a default in payment of Rs.2,00,36,601/- The petitioner and respondent had entered into an agreement dated 07.12.2018, work order dated 01.12.2018 and 24.10.2018 for supply and renting of Shuttering and Scaffolding Material at the Project site of corporate debtor i.e., JSW Vijayanagar works, Vijayanagar, Toranagallu, Ballari Karnataka 583275. The petitioner claims a sum of Rs. 1,40,25,511/- towards principal amount and a sum of Rs. 21,27,846/- towards interest and a sum of Rs.38,83,244/- towards the cost of unreturned hired shuttering and scaffolding materials.
9. The significant aspect in the petition is an absence of the date of default. In the petition in the relevant column Part IV (2) it is mentioned that the debt fell due from 09.01.2019. The details of outstanding amounts are given in (*Annexure 2 page 34*) of the petition. From the annexure 2 it reveals that the first invoice was raised by the petitioner for the period December 2018 for a sum of Rs.1,45,580/- the due date for the said amount is mentioned as 09.01.20219. There are 26 invoices raised by the petitioner for the period covering from

December 2018 to 30th June 2021 (In annexure 2 it is mentioned as June 20 it might be typographical error) for total amount of Rs.2,49,62,342/- out of which a sum of Rs. 1,09,36,831/- is shown as amount paid by the respondent till October 2020 the balance amount towards principle as on 30th June 2021 is shown as Rs. 1,40,25,511/- and a sum of Rs.21,27,846/- is shown as interest at 12% till 30.06.2021. It is made clear that the default amount of Rs.1,40,25,511/- towards principle is due from 16.02.2021. Further as on 09.1.2019 the due amount is only Rs.1,45,580/- but in the petition it is mentioned as if full debt amount is due from 09.01.2019, so the default date is not mentioned in the petition. From the Bank statement (*Annexure page 203 II volume of petition*) it appears that last payment of Rs.2,00,000/- was paid on 13.11.2020. Last invoice is HC01345 dated 01.01.2021-31.01.2021 (*Annexure 4-page 210 Volume II of petition*) there it is written as Running Bill then the due date is mentioned as 01.02.2021. The petitioner issued notice (*Annexure 8 page 204 of petition*) under the caption final notice before legal action to the respondent on 6.03.2021 granting time till 10.03.2021 to pay the outstanding amount. From the above sequences it appears that the default might be either ascertained from the last payment made on 13.11.2020, or from the due date mentioned in last invoice as 1.02.2021 or the final opportunity date given in legal notice 10.03.2021, but definitely not on 09.01.2019.

10. The petitioner before filed this petition filed an application dated 29.07.2021 before the MSEFC, Haryana (*Annexure B1 page 8 of reply*) for Arbitration/conciliation there the respondent appeared and contesting proceeding is pending. The petitioner suppressed this fact. In the application filed before the MSEFC the petitioner mentioned the last invoice No. HC01345 and mentioned the amount due date as 01.02.2021. Thus, the petitioner reiterated the date of default is 01.02.2021.
11. The petitioner sent statutory section 8 demand notice dated 20.08.2021 (Page 208 of petition) but there also the petitioner not mentioned the default date. In the petition para 13 the petitioner stated that demand notice dated 18.08.2021

was sent since there some error occurred, he sent again on 23.08.2021. The respondent received statutory notice dated 20.08.2021 sent by post on 23.08.2021, but copy of the notice dated 18.08.2021 not produced.

12. The Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 prescribed form 5 for filing petition under section 9 IBC 2016 by operational creditors. In the form Part IV Serial No.2 specifically required to mention the date of default, so furnishing the date of default is must. In this case the petitioner not given the date of default instead in the relevant column he mentioned the Debt due from 09.01.2019, this is the date where the 1st payment ought to have been paid. The omission to mention the date of default cannot be taken lightly specially in this case because all other dates referred supra viz the date of last payment 13.11.2020, the date of due mentioned in the last invoice 01.02.2021, the date of due mentioned in MDEFCA application 01.02.2021, the final date mentioned in the legal notice 10.03.2021 all falls between 25.03.2020 to 24.03.2021 the suspended period to initiate Corporate Insolvency Process. No petition under sections 7,9, and 10 IBC 2016 can be filed for the defaults between 25.03.2020 to 24.03.2021 in view of the specific bar provided in first proviso to Section 10A of IBC2016 read with Notification S.O.4638(E) dated 22.12.2020. In these circumstances, it is answered that non-mentioning of date of default in the petition is fatal to the petition.
13. **Point No.2:** The petitioner filed an application before MSEFC, Haryana for Arbitration on 29.07.2021. The respondent entered appearance, contesting the matter, now the proceeding is pending. After filed the application before MSEFC, the petitioner sent section 8 statutory notice dated 20.08.2021. If the application is filed before MSEFC and proceeding is not initiated it is different, here proceeding started and pending even before the issuance of notice under section 8 IBC 2016. As per section 8(2)(a) of IBC 2016 arbitration proceeding filed before the receipt of section 8 notice is amounts to existence of dispute. Here petitioner filed an application before MSEFC for Arbitration on

29.07.2021, issued statutory demand notice under section 8 IBC 2016 dated 20.08.2016 by Registered post on 23,08,2021, the same was received by respondent on 25.08.2021, thus before the receipt of demand notice, application for arbitration proceeding filed, hence it is clear that existence of dispute is there. Further the petitioner in the application filed before MSEFC given a statement that if the award is passed by MSEFC he assured to apply to National e-Governance service Ltd (NeSL) for recovery of due amount as per the provisions of IBC 2016. But when the proceeding is pending before MSEFC the petitioner filed this petition. In the circumstances, it is answered that there is pre-existing dispute.

14. In view of the answer given to the points, this petition is **Dismissed**.
15. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
16. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities

Sd/-
Satya Ranjan Prasad
Member (Technical)

Sd/-
P. Mohan Raj
Member (Judicial)

Signed on this, 26th day of April, 2023.