

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

**I.A. No. 5694/2023
and
C.P. No. 1091/IBC/C-III/MB/2022**

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

IL & FS Engineering and
Construction Company Limited
Having registered office at:
Sanali Info Park, Cyber Towers,
Door No.8-2-120/113/3/1F, B Block
Road No.2, Banjara Hills, Hyderabad 500033

Operational Creditor/Petitioner

Vs.

Offshore Infrastructures Limited
Having registered office at:
22, Udog Kshetra, Mulund Link Road,
Mulund Road, Mumbai- 400080

.....Corporate Debtor/Respondent

Order delivered on: 21.02.2024

Coram:

MS. LAKSHMI GURUNG, HON'BLE MEMBER (J)
SH. CHARANJEET SINGH GULATI, HON'BLE MEMBER (T)

For the Operational Creditor: Adv. Shyam Kapadia

For the Corporate Debtor: Adv. Gaurav Dubey

Per: LAKSHMI GURUNG, MEMBER (J)

1. This Company petition is filed by *IL & FS Engineering and Construction Company Limited* (hereinafter called as “**Operational Creditors/IECCL/Petitioner**”) seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against *Offshore Infrastructures Limited* (hereinafter called as “**Corporate Debtor/Respondent**”) by invoking the provisions of Section 9 Insolvency and bankruptcy code (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. **Brief facts leading to filing of the present petition:**
 - 2.1. The Operational Creditor and Corporate Debtor entered into an agreement dated **26.03.2019** for hiring of construction equipment on monthly dry rent basis vide W.O. No. OIL/JDPL/HIRE/002 (“**work order**”) for project site at Ratnagiri on the terms and conditions contained therein for a period of 6 months.
 - 2.2. Pursuant to the said work order, Operational Creditor provided the machinery to the Corporate Debtor at its project site and Operational Creditor accordingly raised its Invoices from time to time starting from the month of April 2019 till the month of August 2020.
 - 2.3. The Corporate Debtor in spite of using the said construction equipment, had been negligent and irregular in making the payment of the Invoices which were raised by Operational Creditor from the month of June 2019 onwards. It was only after repeated requests and tremendous follow ups vide various emails dated 31.07.2019, 09.09.2019, 21.10.2019,

21.10.2019, 05.11.2019, 08.01.2020, 22.01.2020 addressed by Operational Creditor to the Corporate Debtor, that the Corporate Debtor made part-payments of the outstanding invoices between the period July 2019 to January 2020.

- 2.4. The Corporate Debtor while making the part-payments towards the outstanding invoices, had been admitting to Operational Creditor their liability to make the payment towards the outstanding invoices. Operational Creditor continued to follow up with the Corporate Debtor and vide its letter dated 08.01.2020 asked the Corporate Debtor to return the equipment to Operational Creditor in good condition.
- 2.5. Due to the Covid-19 pandemic, Operational Creditor raised its invoices for the months of March 2020 to May 2020 in the month of June 2020. At time, the Corporate Debtor initially requested that the said invoices be revised and also claimed that as the said machines were not in operations, the invoices were not acceptable. Since this was clearly against the terms and conditions of the work order, Operational Creditor did not accept the said request and the same was accordingly communicated to the Corporate Debtor, the Corporate Debtor was also called upon to make the payments immediately. The Corporate Debtor at that instance for the very first time by their email dated 10.07.2020 addressed to Operational Creditor alleged that the invoices submitted for payment are required to be certified from the site to enable them to release the payment. The said fact has been disputed and duly responded to by

the Operational Creditor by their email of even date addressed to the Corporate Debtor. However, to ensure that the payments are released, the invoices raised by Operational Creditor for the period March 2020 to May 2020 were certified at site and the same was intimated to the Corporate Debtor vide email dated 21.07.2020.

- 2.6. Operational Creditor vide its letter dated 28.08.2020 called upon the Corporate Debtor to pay its outstanding dues within 15 days and invoked clause 28 of the Work Order, terminating the said Work Order and called upon the Corporate Debtor to handover the equipments in good working condition.
- 2.7. Between August 2020 and September 2020, Operational Creditor raised concerns by their emails for the non-payment of the outstanding dues and for making arrangements for demobilization of the machinery lying at the project site however, no heed was given by the Corporate Debtor to either make the payment of the outstanding dues in full and/or to demobilize the machinery hired by the Corporate Debtor.
- 2.8. In September 2020, Operational Creditor, left with no option, was compelled to demobilize the said machinery at their own costs and expenditure in spite of the said work being within the scope of the Corporate Debtor.
- 2.9. The Operational Creditor issued demand notice dated 09.05.2022 in Form 3 as prescribed under the Insolvency and Bankruptcy Code, 2016 demanding payment in respect of the unpaid operational debt due from the Corporate

Debtor. However, the Corporate Debtor vide its letter dated 26.05.2022 refuted its liability to make the payment of Rs.2,53,18,369/- . Hence, this petition was filed.

3. The Corporate Debtor has filed reply to the Company Petition and also filed I.A. 5694/2023 challenging the maintainability of the Company Petition on the ground of applicability of 10A period from 25.03.2020 to 24.03.2021 and that during said period, threshold limit for filing application under Section 7 & 9 was increased from Rs.1,00,000/- to Rs.1,00,00,000/-.

4. **Submissions of Corporate Debtor in reply:**

- 4.1. Major faults were observed in the equipment/machinery supplied by the Operational Creditor and the same were intimated to the Operational Creditor by the Corporate Debtor time and again, both orally and in writing.
- 4.2. Since, the Operational Creditor did not repair the equipments, the Corporate Debtor's work progress was hampered, resulting in idling of the manpower. In furtherance to this, while Clause 5 of the Work Order puts the burden on the Operational Creditor to bear with all the expenses regarding major breakdowns of the equipment, in the present case, the Corporate Debtor had to incur expenses out of its own pockets to rectify the equipment in order to put them in a working condition.
- 4.3. The Work Order, as per Clause 12, also required for the invoices raised by the Operational Creditor to be accompanied with a certified (jointly signed) log book copy.

However, none of the invoiced raised by the Operational Creditor were ever certified by the Corporate Debtor's site representative as the equipment were always in breakdown condition. The Corporate Debtor had even notified the Operational Creditor that the invoices must get certified from the Corporate Debtor's site representative for it to be deemed payable vide emails 10.07.2020 and 04.08.2020.

- 4.4. The Respondent has always failed to get the log sheets and invoices certified from the site representative, project manager and/or the Head of Department of the Respondent company. Despite the failure of the Applicant to provide for certified copies of the invoices, the Respondent kept making ad hoc payments solely based on the promises made by the Applicant to rectify the equipments supplied by them.
- 4.5. Payment for the invoices raised from April 2019 till December 2019 had been duly made by the Respondent, in consonance with the Work Order in place. As the equipments were not serviceable from December 2019 onwards and remained unserviceable till the end, due to the failure on part of the Applicant to take any corrective measure, it is submitted that no rent can be claimed for the period starting from December 2019 till date.
5. The Corporate Debtor has filed I.A. 5694/2023 challenging the maintainability of the Company Petition.

Submissions on behalf of Corporate Debtor on non-maintainability of the petition:

- 5.1. Section 10A of the IBC prefaces with a non-obstante provision which has the effect of overriding Sections 7, 9 and 10. It provides a cut-off date of 25.03.2020 and it makes it clear that no application can be filed for initiation of the CIRP for a default occurring on and after 25.03.2020 till 24.03.2021.
- 5.2. The Applicant in Demand Notice under Form 3 as well as the Application has admitted that due to the COVID-19 pandemic, it raised its invoices for the months of March 2020 to June 2020 together in the month of June 2020 i.e., on 30.06.2020. The Applicant has also claimed that it had raised invoices for the months of July and August which were payable on 08.08.2020 and 08.09.2020 respectively, as per Clause 12 of the Work Order.
- 5.3. Out of the six (6) invoices raised by the Applicant, five (5) invoices i.e., Invoice no. PNM/HIRE/001, PNM/HIRE/002, PNM/HIRE/003, PNM/HIRE/004 dated 30.06.2020, PNM/HIRE/020 dated 31.07.2020 and PNM/HIRE/024 dated 31.08.2020 have been issued after 25.03.2020, hence, being barred by Section 10A of the IBC. The only invoice that does not fall within the ambit of section 10A i.e., the invoice dated 29.02.2020 bearing invoice no. PNM/HIRE/106 amounting to Rs. 3,50,893/-.
- 5.4. Without the five invoices that are barred by Section 10A, the invoice dated 29.02.2020 being for an amount of Rs.

3,50,893/- fall short of the amended threshold of Rs. 1 crore. The said the invoice dated 29.02.2020 ought to be barred by Section 4 of IBC.

- 5.5. The Respondent relied upon the judgment of Hon'ble NCLAT in its recent judgment of Mr. Anil Kaushal V. M/s Colliers International & Ors. [CA (AT) (Ins.) No. 448 of 2022].
- 5.6. It is, thus, submitted that the present Application is non-maintainable on account of being barred under section 10A read with section 4 of the IBC and requested to dismiss the present company petition.

ANALYSIS AND FINDINGS

6. Heard Ld. Counsel for the parties in both I.A well as Company Peition and perused the records. Rival submissions have been considered.
7. The Company Petition bearing No. 1091/2022 has been filed by IECCL under Section 9 of the Code against the Corproate Debtor to initiate Corporate Insolvency Resolution Process ("**CIRP**") for non-receipt of Rs. 2,65,73,255/- comprising of unpaid principal amount towards the outstanding invoices and interest at the rate of 24% p.a. from the due date of each invoice.
8. The Corporate Debtor has filed I.A. No. 5694/2023 challenging the maintainability of the above Company Petition on the ground of applicability of 10A period from 25.03.2020 to 24.03.2021 and that during said period, threshold limit for filing application under

Section 7 & 9 was increased from Rs.1,00,000/- to Rs.1,00,00,000/.

9. Both I.A. as well as Company Petition are being disposed of by this common order.

10. The Operational Creditor is claiming debt of Rs. 2,65,73,225/- including interest on the invoice amount particulars of which are given below:

Sr. No.	Invoice s Month	Date of Invoice	Due Date of Payment	Invoice amount	Interest amount	Total amount
1.	Feb. 2020	29.02.2020	08.03.2020	350893	210190	5,61,083
2.	March 2020	30.06.2020	08.07.2020	2548800	1275370	38,24,178
3.	April 2020	30.06.2020	08.07.2020	2548800	1275378	38,24,178
4.	May 2020	30.06.2020	08.07.2020	2548800	1275378	38,24,178
5.	June 2020	30.06.2020	08.07.2020	2548800	1275378	38,24,178
6.	July 2020	31.07.2020	08.08.2020	2548800	1275378	37,90,569
7.	August 2020	31.08.2020	08.09.2020	2548800	1189906	37,38,706
8.	Total					2,33,87,160
10.	Less TDS					1,37,275
11.						2,32,49,881

12.	Estimated costs incurred by Operational Creditor for repair of the said machinery	30,78,940
	Charges incurred by the Operational Creditor for demobilization of the machinery	2,44,434
	Grand Total	2,65,73,255

11. It is noted from the Work Order No. OIL/JDPL/HIRE/002 dated 26.03.2019 that one of the terms and conditions of the said agreement relating to payment is as follows:

“DEPLOYMENT:

*12) Two months advance rental to be paid and the monthly running bills shall be paid **within 7 days from the date of submission of IECCL bill along with the certified (joint signed) log book copy.** IECCL reserve the right to demobilize equipment. The Billing cycle will be calendar month basis and the first / last month hire charges invoice may be the part of a month. Failing which an interest @2% p.m. would be charged extra in the next bill. Idel working/machine stop due to non-payment shall be treated as working hours and chargeable as per contract rate.”*

12. According to the averments in the petition the Corporate Debtor has paid all invoices raised till January 2020 and default in payment of invoices has occurred for the months of February 2020 to August 2020. The details of outstanding amount claimed against said seven invoices with due date of invoice are given below:

Sr. No.	Invoices Month	Date of Invoice	Due Date of Payment	Amount
1.	February 2020	29.02.2020	08.03.2020	5,61,083/-
2.	March 2020	30.06.2020	08.07.2020	38,24,178/-
3.	April 2020	30.06.2020	08.07.2020	38,24,178/-
4.	May 2020	30.06.2020	08.07.2020	38,24,178/-
5.	June 2020	30.06.2020	08.07.2020	38,24,178/-
6.	July 2020	31.07.2020	08.08.2020	37,90,569/-
7.	August 2020	30.08.2020	08.09.2020	37,38,706/-

13. Ld. Counsel for the Operational Creditor submits that the equipments were provided to the Corporate Debtor on hire basis vide Work Order dated 26.03.2019 wherein payment towards hiring charges were to be made on monthly basis. Therefore, in view of the Work Order dated 26.03.2019, the monthly payments for the month of February 2020 became due on 08.03.2020 and the default continued from 08.03.2020 onward. Since the work order dated 26.03.2019 and date of default is prior to 10A period, hence the Company Petition is maintainable.

14. We are unable to agree with the submissions of the Operational Creditor. It is noted that separate invoices have been raised for each month and as per the terms of the Work Order dated 26.03.2019 payments shall be made within 7 days from the date of submissions of the bill. Therefore, due date of the bills is after seven days from the date of the invoices. It is not disputed that all invoices have been paid till January, 2020. The first invoice for

which default occurred is dated 29.02.2020 for Rs. 3,50,893/- which became due and payable on 08.03.2020 which is prior to Section 10A period. The due and payable amount with interest is stated to be Rs. 5,61,083/- However, all subsequent invoices for which default has occurred became due and payable during the period from 08.07.2020 to 08.09.2020 which is clearly falling within Section 10A period for which no petition can ever be filed.

15. For the sake of clarity the section 10A of IBC are extracted herein under:

“10A. Suspension of initiation of corporate insolvency resolution process-

*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 month 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 sections before 25th March 2020”

16. Vide S.O. 3265(E) dated 24.09.2020 and S.O. 38(E) dated 22.12.2020 such period under section 10A was extended upto 24.03.2021.

17. By way of proviso to section 10A of IBC, it made expressly clear by statute that no application can ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the default occurring during the said 10A period. Therefore, we have to exclude the invoices falling under 10A period for the purpose of default under IBC.
18. Considering the above position of law and the facts of the present case, we find default amount, even after including the interest is Rs. 5,61,083/- which became due and payable on 08.03.2020. Admittedly, the Company Petition has been filed on 03.08.2022 which is after the notification dated 24.03.2020 issued by Ministry of Corporate Affairs which has enhanced the threshold limit under Section 4 of the Code from Rs. 1,00,000/-to Rs. 1,00,00,000/-. In view of the above fact that the default amount is merely Rs. 5,61,083/- much less than Rs. 1,00,00,000/- as required under Section 4 of the Code, we hold the Company Petition is not maintainable. In view of the above finding, there is no need to deal with the issue of dispute raised by the Corporate Debtor.
19. In the light of above discussions, the I.A. 5694 of 2023 is **allowed** and C.P. No. 1091/IBC/MB/2022 is **dismissed**. Accordingly, both I.A. as well as Company Petition are **disposed of**.
20. Registry is directed to send copy of this order to the parties as well as IBBI forthwith.

File be consigned to records.

Sd/-
CHARANJEET SINGH GULATI
MEMBER (TECHNICAL)

Sd/-
LAKSHMI GURUNG
MEMBER (JUDICIAL)