

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

C.P. (IB) 14/MB/2018

Under section 9 of the Insolvency and
Bankruptcy Code, 2016

In the matter of

**Kirby Building Systems India (Uttaranchal)
Private Limited**

Having address at:- Sector 11, Integrated
Industrial Estate, SIDCUL, Haridwar,
Uttaranchal – 249403

..... Petitioner/ Operational Creditor

Versus

**Gammon Engineers & Contractors Private
Limited**

Having address at: - Gammon House,
Veer Savarkar Marg, Prabhadevi,
Mumbai - 400023

..... Respondent/Corporate Debtor

Order Delivered on :- 28.02.2024

Coram:

**Mr. Anil Raj Chellan
Member (Technical)**

**Mr. Kuldip Kumar Kareer
Member (Judicial)**

Appearances:

For the Operational Creditor : Adv. Kunal Mehta a/w Adv. Udit Saxena

For the Corporate Debtor : Adv. P G Sabnis a/w
Adv. Kashmira Khedkar

ORDER

Per: - Mr. Anil Raj Chellan, Member (Technical)

1. The instant Petition is filed on 04.01.2018 by Kirby Building Systems India (Uttaranchal) Private Limited ('Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 claiming to be an Operational Creditor for initiation of Corporate Insolvency Resolution Process ('CIRP') against Gammon India Limited (GIL) for making default in payment of outstanding amount of Rs. 1,44,68,821/- together with interest of Rs. 71,62,056/- @ 18% p.a. from 06.11.2014 till the date of statutory notice, i.e. 30.10.2017. 'Gammon India Limited' was subsequently substituted with 'Gammon Engineers and Contractors Private Limited ('the Corporate Debtor') pursuant to an order passed by this Tribunal in I.A.No.687 of 2018 on 20.04.2022. Thus, the CIRP is sought to be initiated against Gammon Engineers and Contractors Private Limited, the Corporate Debtor.

2. **Facts of the case as submitted by the Petitioner in the Petition.**

2.1 The Operational Creditor i.e, Kirby Building Systems India (Uttaranchal) Private Limited, pursuant to work order issued by GIL dated 07.09.2009 read with amendment dated. 01.06.2012, undertook the work to procure, fabricate, sand blast, paint and transport to the site pre-fabricated steel bridge girders for putting up super structure at Nand Nagari Flyover Project at New Delhi

(‘the Project’). The Operational Creditor had been raising and submitting running account bills relating to the said Project on GIL from time to time and the said work was executed completely to the satisfaction of GIL.

- 2.2. It is submitted that the bills raised by the Operational Creditor had been accepted by GIL, but an amount of Rs. 1,44,68,821/- remains pending under the running account bill (RA Bill) and the Operational Creditor had been following up for balance payment through various letters, mails etc.
- 2.3. It is further submitted that GIL has failed and neglected to make payment of the admitted bills to the Operational Creditor, despite constant follow up and, therefore, the Operational Creditor through its advocate issued a statutory notice dated 09.11.2015 under Sections 433 & 434 of the Companies Act, 1956 calling upon GIL to pay the admitted dues of Rs 1,44,68,821/- along with interest @ 18% p.a. from the date of it becoming due, within 21 days of receiving the said notice. In spite of receipt of notice by GIL on 17-11 2015, it failed to reply to the notice or pay the dues. Consequently, the Operational Creditor initiated legal proceedings under Sections 433 & 434 of the Companies Act, 2013 before the Hon’ble Bombay High Court which was subsequently transferred to this Tribunal but the same got abated on 21.08.2017. The present Petition is filed thereafter pursuant to a liberty granted by this Tribunal vide order dated. 21.08.2017.
- 2.4 The Operational Creditor, in the rejoinder also stated that it raised RA bills on 11.08.2010, 05.10.2010, 29.11.2010 and

07.11.2013 and the payments thereon was followed up through emails dated 02.09.2014 and 16.09.2014. On the insistence of GIL, the Petitioner revised the bill dated 07.11.2013 and submitted revised bill along with its letter dated 06.10.2014. It is submitted that a copy of the letter dated 06.10.2014 is annexed to the Petition according to which the amount fell due on 06.11.2014. The payment was also followed up by email dated 28.11. 2014 and in response, GIL confirmed vide email dated 29.11.2014 that the Petitioner's bill had been processed for payment and that hopefully, the payment would be made by the end of 2015 from their head office.

2.5 It is averred that the Petitioner again issued a demand notice dated 30.10.2017 and called upon GIL to make payment of Rs. 1,44,68,821/- which fell due on 06.11.2014. Though the letter was issued to GIL, the Corporate Debtor vide its letter dated 13.11.2017 replied to the demand notice and denied the liabilities. In the circumstances, the Petitioner filed the present Petition against GIL seeking initiation of CIRP against GIL. Subsequently GIL was transposed with the Corporate Debtor, pursuant to an order dated 20.04.2022 passed by this Adjudicating Authority in IA. No.687/2018.

3. **Submissions of the Respondent.**

3.1. The Corporate Debtor, Gammon Engineers and Contractor Private Limited filed its reply stating that the Company Petition is not maintainable and has been filed beyond the period of limitation.

- 3.2. The Corporate Debtor stated that the alleged default is in respect of the work assigned by GIL in the year 2010 when the Corporate Debtor was not in existence and the Corporate Debtor is not in possession of any records stated in the Petition. The Corporate Debtor is, therefore, relying on the reply filed by GIL.
- 3.3. It also submitted that a demand notice under Section 8 of the Code was only issued to GIL and no demand notice as required under the Code has been issued to the Corporate Debtor. Hence, the present Petition is liable to be dismissed.
- 3.4. The Corporate Debtor further submitted that the RA bill dated 07.11.2013 annexed to the Petition is not a bill/invoice and it is a letter dated 06.10. 2014 in the nature of a reminder for payment as it states that the payment was pending for the last 3 years. The email annexed at page 100 of the Petition cannot be considered as an acknowledgement of debt as it does not contain any details of the bill and is not a signed document. Even otherwise, the email dated 29.11 2014 was issued after the expiry of the period of limitation from the RA bill dated 11.08.2010 and 29.10.2010.
- 3.5. The Corporate Debtor also submitted that the Operational Creditor filed a Company Petition under Section 433 of the Companies Act on 28.08.2016 before the Hon'ble Bombay High Court which got registered on 01.12.2016, after more than 3 months to remove the office objections. After the notification of the Code, the said Petition was transferred to this Tribunal but the same got abated as no steps were taken by the Operational

Creditor. In the circumstances, a fresh petition under Section 9 of the Code has been filed by the Operation Creditor. The present Petition is barred by limitation and is liable to be dismissed.

Analysis and finding

4. We have heard the counsel for the parties and perused the documents on record.
5. It is the case of the Operational Creditor that it executed the work placed by GIL and submitted revised bill dated 06.10.2014 for Rs.1,44,68,821/- which fell due on 06.11.2014. On the contrary, the Corporate Debtor disputed the revised bill dated 06.10.2014 stating that it is not in the nature of a bill or invoice but a reminder for payment and by no stretch of imagination can it be considered as a bill/invoice. It is noticed that the basic document relied on by the Operational Creditor in the Petition is this letter dated 06.10.2014 written by it to GIL stating that 5% payment is still pending for last 3 years against ROB work completion and a request is made to arrange to release all balance payment on top priority. The abstract sheet annexed to the letter mentions the description of work, total quantity, previous quantity, previous bill quantity, cumulative quantity executed, rate, percentage and amount; but does not bear a date or mention the due date for payment or any other term regarding payment. The amount of Rs.1,85,49,989/- mentioned therein is also different from the claim amount of Rs. 1,44,68,821/- in the Petition. Considering the nature and contents of the letter dated 06.10.2014 and the abstract sheet annexed, we concur with the submission of the Respondent that it

cannot be construed as a bill/invoice. Furthermore, the Petitioner in its rejoinder admitted that R.A bills were raised on 11.08.2010, 05.10.2010, 29.11.2020, and 07.11.2013 which, at the request of GIL got revised as per the R.A bill annexed to the letter dated 06.10.2014. Thus, even if we treat the abstract sheet as an invoice, one cannot take 06.11.2014 as the due date or date of default for the purpose of considering the Petition.

6. It is further contended vehemently by the Respondent that the Petition is barred by limitation and submitted various authorities of the Hon'ble NCLAT and Hon'ble Supreme Court. However, since the date of default cannot be ascertained based on the documents produced, we do not consider necessary to go into the applicability of those decisions in the present case.
7. It is further the contention of the Respondent that notice under Section 8 of the Code was only issued to GIL and no demand notice as required under the Code has been issued to the Corporate Debtor. It is observed that the Operational Creditor issued a Demand Notice dated 30.10.2017 to GIL, in response to which the Corporate Debtor vide its letter/reply dated 13.11.2017 informed about sanction of a Scheme of Arrangement between GIL and the Corporate Debtor pursuant to which the EPC business of GIL (including the project executed by the Operational Creditor) was transferred to the Corporate Debtor with effect from 01.07.2016. Thus, it is clear that the Operational Creditor was fully aware of the change of liability towards Operational Creditor from GIL to the Corporate Debtor even before filing of the present Petition under Section 9 of the Code. Therefore, it was incumbent and

mandatory for the Operational Creditor to have filed along with the application, inter alia, a copy of the invoice demanding payment or demand notice delivered to the corporate debtor and an affidavit to the effect that there is no notice is given by the corporate debtor relating to a dispute of the unpaid operational debt. In the present case, the Operational Creditor had not issued any demand notice to the Corporate Debtor though it became aware of change of liability to the Corporate Debtor before filing of the petition under Section 9 of the Code. Therefore, the Petition deserves to be dismissed for want of service of statutory notice upon the Corporate Debtor.

8. In the light of the above discussion, we conclude that CIRP cannot be initiated against the Corporate Debtor based on the letter dated 06.10.2014 /the abstract sheet attached, and also without issuing a proper notice to the Corporate Debtor under Section 8 of the Code.
9. As a result of the foregoing discussion, we hold that the Petitioner has failed to make out a case under Section 9 of the Code. Under the circumstance, the **Petition is dismissed** leaving the parties to bear their own cost. File be closed and consigned to records.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)