

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 192/KB/2022

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

IN THE MATTER OF:

High Ground Enterprise Limited, (CIN: L74999MH1986PLC222681), a company incorporated under the provisions of the Companies Act, 1956, having its registered office No. 2, Om Heera Panna Mall, 2nd Floor, Oshiwara, Andheri (West), Mumbai, Maharashtra- 400053

... Applicant/ Operational Creditor.

Verses

Sendoz Implex Limited, (CIN: U52321WB1994PLC064327), a company incorporated under the Companies Act, 1956, having its registered office at 33/1, N.S. Road 634, Marshall House Kolkata 700001.

... Respondent/ Corporate Debtor.

Date of Hearing: November 28, 2023.

Date of Pronouncement: December 12, 2023.

CORAM:

SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)

SHRI. D ARVIND, MEMBER (TECHNICAL)

Appearance:

For the Operational Creditor: Mr. Avishek Guha, Adv, Ms. Arunika Dutta, Adv, Mr. Kaustav De Sarkar, Adv.

For the Corporate Debtor: Ms. Manju Bhuteria, Adv, Mr. Uttam Sharma, Adv, Ms. Vrinda Kedia, Adv.

ORDER

Per: D Arvind, Member (Technical)

1. This Court is congregated hybrid mode.
2. Heard the Learned Counsels for both parties.

Factual Matrix:

3. This instant application has been filed by **High Ground Enterprise Limited**, hereinafter referred to as “Applicant”/ “Operational Creditor” (OC) under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity “I&B Code”

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for initiating the Corporate Insolvency Resolution Process. (CIRP) against **Sendoz Impex Limited**, hereinafter referred to as “Respondent”/ “Corporate Debtor” (CD).

4. The Operational Creditor is a company which is engaged in the business of engineering, procurement, construction and management.
5. The Operational Creditor entered into a contract with the Corporate Debtor to provide above mentioned services. In terms of work orders appearing at Pages 29, 30, 31 and 32 of the application, services were rendered.
6. Corresponding invoices against such services have been raised from April 2017 to February 2019.
7. It is the submission of the Operational Creditor that a running contract has been maintained and consequently a running account of the Corporate Debtor in the books of the Operational Creditor has been maintained.
8. The Corporate Debtor started defaulting and failed to honour the payment for invoices amounting to Rs. 6,73,14,434/- accumulated as on 29.01.2019.
9. As per the work order the payment will have to be paid within 45 days from the date of Invoice
10. The Operational Creditor has provided a breakup of the default as under:
 - a. Principal claim for trade receivables is Rs. 6,73,14,434/- and interest on the said principal amount till 25.04.2022 at 18% is Rs. 5,02,19,405/- Hence the default according to the OC is Rs. 11,75,33,839/-
 - b. Therefore, a demand notice dated 27.04.2022 was issued in terms of Section 8 of the I&B Code which is in Page No. 69 of the application and no reply was filed to the Section 8 notice by the Corporate Debtor and hence this application under Section 9 of I&B Code 2016.

Applicant's submissions:

11. The Learned Counsel for the applicant submits that the total default is Rs. **11,75,33,839** /- which includes principal amount of **Rs. 6,73,14,434**/- and interest of **Rs. 5,02,19,405**/-.

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12. It is claimed that the interest clause is mentioned in all the invoices and therefore interest is liable to be paid.
13. Further, it is claimed that the invoices issued by the Operational Creditor are from 2017 to 2019 and the last payment was made by the Corporate Debtor only on 20.06.2019.
14. Further, it is contended that all the payments were made on 'ad-hoc' basis and not based on 'invoice-to-invoice' basis and thus the provision of Section 60 of the Indian Contract Act, 1872 would be applicable herein and consequently the application is not barred by limitation.
15. Since the last invoice was issued on 29.01.2019 and payment was made on 28.06.2019, he submits that the application has been filed within the time limit prescribed under the I&B Code read with Section 60 of the Indian Contract Act.
16. Therefore, it is submitted that the existence of all the ingredients such as the defaulted amount being more than Rupee One Crore, the application is complete in all respects and the application is not barred by limitation are present in the case. Therefore, it is prayed that the application may be admitted and CIRP may be initiated, under Section 9 of the I&B Code.

Respondent's Submissions per contra:


17. The Learned Counsel for the Respondent submits that there were pre-existing disputes, in respect of service rendered to the Applicant.
18. For such deficiency in service the respondent has raised debit notes on Operational Creditor for an aggregate sum of Rs. 7,18,85,288/-. The said debit notes have been received by the applicant and till date, no dispute has been raised on such debit notes.
19. The Learned Counsel further submits that there has been a material breach of the terms of the work orders on the part of the applicant.

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20. It is claimed that the Applicant issued a demand notice on 23.08.2019 and subsequently again on 17.10.2019. Copy of which is annexed as **Annexure D to the Reply Affidavit**. The demand notice raised in October 2019 was adequately replied by the respondent on 01.11.2019 citing pre-existing disputes. Copy of which is annexed as **Annexure D** in Reply Affidavit.
21. Further, it is claimed that even after the demand notice was issued under Section 8 of the I&B Code, in Form 3 on 17.10.2019, the Operational Creditor has accepted in Para 2 of the Demand Notice dated 17.10.2019, annexed at Page 57 to the Reply Affidavit that the default fell due from 01.11.2017. The Relevant pages of the Demand Notice dated 17.10.2019 was reproduced as under:

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FORM 3
FORM OF DEMAND NOTICE / INVOICE DEMANDING PAYMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016
(Under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

17.10.2019

To,
M/s SENDOZ IMPEX LIMITED
33/1, N. S. Road, 634, Marshall House,
Kolkata, West Bengal- 700 001


From:
M/s HIGH GROUND ENTERPRISE LIMITED
Office No. 2, OM Heera Panna Mall, 2nd Floor,
Oshiwara, Andheri (West),
Mumbai, Maharashtra- 400 053

Subject: Demand Notice for payment of INR 6.73.14.433/- along with interest @18% per annum till the amount is received in respect of non-payment of dues by M/s Sendoz Impex Limited.

Madam/Sir,

This letter is a demand notice demanding payment of an unpaid operational debt arising out of Service Contract due from M/s Sendoz Impex Limited (hereinafter referred to as the "Corporate Debtor" or "Debtor")



1. Please find particulars of the unpaid operational debt below:



SENDOZ IMPEX LIMITED
Manoj Mukherjee
Assistant Manager

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PARTICULARS OF OPERATIONAL DEBT	
1. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	Total Amount of Debt is INR 6,73,14,433/- Rupees Six Crore Seventy Three Lakh Fourteen Thousand Four Hundred Thirty Three Only), along with interest @ 18% per annum till the dues are received. Operational Creditor amount was due as per the invoice. Such Debt fell due from 1.11.2017
2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF DEFAULT IN TABULAR FORM)	Debtor is liable to pay an amount of INR 6,73,14,433/- Rupees Six Crore Seventy Three Lakh Fourteen Thousand Four Hundred Thirty Three Only). Such Debt fell due from 1.11.2017.
3. PARTICULARS OF SECURITY HELD (IF ANY) THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.	N/A
4. DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS	N/A
5. RECORD OF DEFAULT WITH THE INFORMATION UTILITY (IF ANY)	N/A
6. PROVISION OF LAW, CONTRACT OR OTHER DOCUMENT UNDER WHICH DEBT HAS BECOME DUE	The Indian Contract Act, 1872 The Operational Creditor's retainer letter dated 12th November 2014 (the "Retainer Letter")

SENDOZ IMPEX LIMITED
Assistant Manager

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22. The reply was made to this Notice under Section 8 of the I&B Code, on 01.11.2019 by the Corporate Debtor herein mentioning all the reasons in detail for non-payment which predominantly includes deficiency in service rendered by Operational Creditor.
23. The Ld. Counsel for the Respondent has also pointed out that a petition has been filed by the Corporate Debtor before the Learned City Civil Court of Kolkata against the Applicant being TS No. 219 of 2020 and the matter is still pending for consideration, in respect of disputes arising out of the work orders mentioned above.
24. It is further claimed that the demand notice dated 27.04.2022 which is the subject matter of the instant case in respect of the same alleged claim that was raised in the earlier notice under Section 8 of the I&B Code dated 17.10.2019 and the same has been already replied conveying the “Pre-existing Dispute”.
25. It is contended that the Corporate Debtor has been making payment on invoice basis only and not on ad-hoc basis as claimed by the applicant herein. The payment was stopped only because of certain serious deficiencies on service rendered by the Operational Creditor. Thus, the Ld. Counsel argued that this petition is not maintainable on limitation as well.

Analysis and Findings of this Adjudicating Authority:

26. For the purpose of determining, whether the claims are time-barred or not, we find that there are serious challenges regarding the mode of payment, i.e., whether the payment is made ‘invoice-wise’ basis or on ‘ad-hoc’ basis. This is fundamental to decide whether **Section 59 or Section 60** of the Indian Contract Act, 1872 applies and accordingly the time-bar aspect. At this juncture, it would be appropriate to go through Section 59 and Section 60 of the Contract Act, 1872, which are reproduced in verbatim as below:

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Section 59: Application of payment where debt to be discharged is indicated. — *Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.*

Section 60: Application of payment where debt to be discharged is not indicated. — *Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.*

27. It is evident that both the parties to the matter have failed to prove conclusively that which payment mode has been adopted, i.e., whether ‘Invoice wise’ or ‘ad-hoc basis’. Therefore, being summary proceedings, we are not inclined to get into the depth of the matter relating to this issue and start examining the facts, circumstance evidences etc. to decide the issue relating to limitation one way or other.
28. We infer that there are pre-existing disputes in this matter which is evident from several correspondences made between the parties and the previous Section 8 notice and reply by the Corporate Debtor apart from the petition filed by the Corporate Debtor in the Learned Court of City Civil, Kolkata being TS No. 219 of 2020 in which is still pending for consideration, in respect of demand raised in Section 8 Demand Notice dated 17.10.2019 and more or less identical subsequent notice under section 8 of I&B Code dated 27-4-22 on same cause of action.
29. Hence, we are of the view that the contention of the Operational Creditor, herein to substantiate its claim in the application is not correct. We, without further probe into the mechanics of the dispute, infer that there is “pre-existing dispute” between parties and the Corporate Debtor has rightly brought to our notice, particularly through the previous Section 8 demand notice dated 17.10.2019 annexed at Page 56A-63 to the Reply Affidavit and the reply made by Corporate

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Debtor on 01.11.2019, as well as the dispute pending before the Learned Court of City Civil, Kolkata for consideration.

30. We are of the view that the Insolvency and Bankruptcy Code, 2016 is not recovery legislation and the provisions of the Code cannot be applied for prevailing a recovery mechanism or enforcing the recovery of the claim raised by the Operational Creditor. The object of the I&B Code is to resolve the insolvency of the Corporate Debtor in a time-bound manner and to reorganize it for the purpose of reviving its business to secure corporate justice. To understand the objective of the Code, it would be appropriate to read its Preamble, that:

“An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.”

31. Hence, an application under Section 9 of the I&B code cannot be converted into proceedings for recovery, which is contrary to its objective. To reinforce our position, we would rely upon the judgment passed by the Hon’ble Apex Court in the case of **Swiss Ribbons Pvt. Ltd. v. Union of India** reported in **(2019) 4 SCC 17: MANU/SC/0079/2019**

“12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. ...”

(Emphasis Added)

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32. Further, we would rely upon the judgment passed in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* reported in (2018) 1 SCC 353: MANU/SC/1196/2017 that:

“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application Under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

(Emphasis Added)

33. In view of the foregoing, *inter-alia* including the pre-existing dispute, this application filed under Section 9 of the I&B Code, being **Company Petition (IB) No. 192/KB/2022** cannot be entertained and **dismissed** accordingly.
34. No Cost.
35. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 12th Day of December, 2023.

Bose, R.K. [LRA]/ Tiwari, V. [LRA]