IN THE NATIONAL COMPANY LAW TRIBUNAL
CUTTACK BENCH
CUTTACK

TP.NO.211/CTB/2019

(Formerl*y* COPET N.O 26 of 2016 on the file of High Court of Orissa)

***In the Matter of*:**

Section 9 (1) of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016

-And-

In the Matter of:

Ahluwalia Contracts (India) Limited, (ACIL), having its Regd. & Head Office: A-177, Okhla Indl Area, Ph-1, New Delhi- 110020 and regional office at KB-25, 5th Floor, Salt Lake City Sector-3, (Near Charnok City) Kolkata- 700106

...Applicant/Operational Creditor

-Versus-

Assotech Milan Resorts Pvt Ltd., Represented through its Authorized Officer. Having its Corporate Office at A- 354, Sector- 19, Noida- 201301, (U.P) Noida and Registered Office at 7th Lane, Amlapara, Angul, Orissa- 759122

...Respondent/Corporate Debtor

***Appearances (through video conferencing*)**

For the Petitioner	:	Mr. Anil Kr. Airi Sr. Advocate for Mr. Anand Prakash Das, Adv.
For the Respondent	:	Mr. Swayamjit Rout, Adv.

Order reserved on: 30.06.2022
Order pronounced on: 07.07.2022

Coram:

Shri P. Mohan Raj	:	Member (Judicial)
Shri Satya Ranjan Prasad	:	Member (Technical)

ORDER

Per P. Mohan Raj, Member, (Judicial)

1. This application was originally filed before the High Court of Orissa on 12.04.2016 under Sections 433(e) read with 434 & 439 of the Companies Act 1956, the same was taken on file as Copet No. 26 of 2016. Before the High Court Respondent appeared then by order dated 19.04.2019 the High Court ordered to transfer the petition to this Adjudicating Authority. After the receipt of records from the High Court new number assigned as T.P.NO. 211/CTB/2019 and notices were ordered to both sides. On the appearance of both sides' proceedings continued. On the petitioner side in compliance of proviso to Rule 5 of Companies (Transfer of Pending Proceedings) second Amendment Rules 2017, the petition under Section 9 of IBC,2016 format was filed on 09.08.2021, there after respondent filed reply on 23.09.2021.

The brief contention of petition are as follows: -

2. The Operational Creditor (**hereinafter referred to as the "Petitioner")** is a public Limited Company operates as a construction company in India which engages in the construction of building of large Institutional Buildings and Corporate Office Complexes, Industrial Complex Buildings, Township

Development Projects, Hospitals, Medical Colleges and Laboratory Buildings. projects, etc. It is stated that the corporate debtor/Respondent namely Assotech Milan Resorts Private Limited (hereinafter referred to as "Respondent') is also a company duly registered under the Companies Act, 1956 and is involved in the business of Residential, Retail, Corporate & Hospitality spaces and other provision of short-stay accommodation having its registered office at 7th Lane, Amalapada in the district of Angul, Orissa. On the petitioner side stated that the respondent company being the owner of the land situated at Bhubaneswar had obtained the requisite licence for Radisson Hotel to be developed over the said land consisting of 110 rooms and other facilities. The petitioner after making its survey and inspection participated in the tender and submitted its tender on 05.11.2009.

3. In furtherance of the same, after various communications between the parties, the petitioner entered into the Contract Agreement with the Respondent company on 02.02.2011 with a condition of the date of commencement of works as 01.01.2011. In furtherance of the aforesaid a Revised Letter of intent bearing no. AMRPL/ACL/LOI/BHU/DEC/10 dated 21.12.2010. The petitioner continued to carry out the work as per schedule but the execution of work was kept in abeyance by the Respondents company, due to the reasons which were disclosed vide letter dated 09.03.2012 bearing no AM/BHUBNESWAR/ACIL/LOS/MAR/2012 confirming to suspend all activities at the site and to wait for further communication due to some unforeseen government restraints. Therefore, all work at Hotel Radission Bhubaneswar were suspended since December 2011. Similarly, vide communication dated

12.10.2012, on account of stoppage of work, establishment cost adds other expenses amounting to Rs.2,64,59,850/- apart from outstanding payment against earlier work done amounting to Rs.49,05,614/- and thereby requested to release payment on that account.

4. It is relevant to state that as the matter stood thus, the Respondent company vide its letter dated 06.07.2013 intimated that since they got a resumption order with regard to the construction, and the Respondent company vide communication dated 07.08.2013 admitted its dues confirming therein that the claims on account of salary, idle equipment, rental and depreciation for the material other than perishable material are settled as agreed for sum of Rs. 1,75,000.00/- (Rupees One Crore Seventy-Five Lakhs) and outstanding payment against the verified bills would be for an approx. amount of Rs. 40,26,474/-(Rupees Forty Lakhs Twenty-Six Thousand four hundred seventy-four only) and assured that the payments and also agreed to start the work at an increased rate of 14% over and which will compensate the loss incurred due to stoppage of work. However, it is relevant to state that even after coming forward with a proposal which was accepted by the petitioner, the respondent company did not take any steps to release the outstanding dues nor respondent to the repeated requests of the petitioner, hence the Petitioner was constraint to issue the statutory notice under Section 433 read with Section 434 of the Companies Act, 1956 dated 28.12.2015 which was served at the Respondents Company's Registered office.

5. The respondent not responded to notice, hence after the expiry of three weeks. the petitioner was constrained to approach the Hon'ble Odisha High Court

for winding up of the Respondent Company by filing an application u/s 433 read with Section 434 & 439 of the Companies Act, 1956 bearing no. Copet No. 26 of 2016 dated 12.04.2016. In spite of receipt of the aforesaid notice, neither the Respondent Company has made payment nor replied to the same. Therefore, it is evident that the respondent is admitting the aforesaid claims of the petitioning creditor and they have no defence whatsoever in respect of such claim made by the petitioning creditor. Notwithstanding the demands, the Respondent Company has failed to pay the aforesaid sum or any part thereof. Hence, this petition.

The brief contention of reply are as follows: -

6. The respondent stated that at the very outset, the respondent humbly submits that the application in the present form is liable to be dismissed for non-compliance of Section 8 of the Insolvency and Bankruptcy Code, 2016 and it is submitted that form the bare reading of Section 9, it is clear and evident that delivery of demand notice is necessary and mandatory for initiating the Corporate Insolvency Resolution Process under Section 9 of the Code, 2016 and the compliance in Form-3 or delivery of a copy of an invoice attached with a notice in Form-4 as per Rule of IBC, 2016. Respondent submitted that the Hon'ble NCLAT in its judgment dated 05.02.2021 passed in CA (AT0 (Insolvency) No. 775 of 2020 held that Section 8 of the Code read with Rule 5 of the Rules clearly stipulates that the service of demand notice to the corporate debtor on the 'Registered Address' is a mandatory one.

7. The respondent stated that after the contract was awarded to the application on 2nd Feb 2011, the work commenced in full swing. In fact, mobilization advance of Rs.1,48,30,054.00 was paid in 2 (Two) instalments of Rs. 74,15,027.00 each on 20.01.2011 & 31.03.2011 respectively. However, the Bhubaneswar Development Authority (BDA) abruptly stopped the construction work.

8. The respondent stated that clause 52 of the General Terms and conditions of the contract provides dispute resolution mechanism between the parties. The arbitration clause therein wide enough to cover the disputes between the parties which are commercial in nature. The present application is a dressed-up petition. There the action of the applicant in invoking the jurisdiction of this Hon'ble Tribunal is abuse of Process of Law.

Point for determination is:

Whether notice under Section 8 of IBC 2016 is mandatory for the petition filed under Section 433 (e) of Companies Act 1956 then received by Transfer from the High Court?

Point: -

9. This is a case received by transfer from the High Court of Orissa. On the respondent side taken a defence, that notice under Section 8 of IBC 2016, is mandatory, in the absence of such a notice under Section 8 of IBC 2016 this petition is liable to be dismissed. The Contention of the respondent is even if the

petition is received by transfer from High Court, notice under Section 8 of IBC, 2016 is must.

10. The Insolvency and Bankruptcy Code, 2016 came into force on 01.12.2016. This application has been filed on 12.04.2016 prior to the advent of the Insolvency and Bankruptcy Code, 2016. This petition was filed under Section 433 (e) of the Companies Act 1956. After the advent of Insolvency and Bankruptcy Code,2016, the petition was transferred by the Hon'ble Hight Court in pursuance of the Companies (transfer of pending proceedings) amendment rules 2017.

11. As per Section 8 (1) of the IBC,2016 the operational creditor may deliver demand notice before filing Petition under Section 9 of IBC 2016; Section after the receipt such a notice the respondent within 10 days shall respond under Section 8(2) of IBC, 2016. This made clear that Section 8 of IBC, 2016 notice to be issued prior to filling of Section 9 application.

12. Here, the case is received by transfer, it is continuation of proceedings filed on 12.04.2016 before High Court If any notice is given after the receipt of case records from Hon'ble High Court, It will amount sent a notice during the pendency of the Petition. This is not the scope an object of the Section 8 of IBC. So, the contention of the respondent that Section 8 notice is mandatory even to the transferred applications is not sustainable. The Petitioner before filed the petition served notice under Section 434 (1) of Companies Act 1956, on 28.12.2015 and filed the petition on 12.04.2016 after the expiry of three weeks as enumerated in Section 434 (1) of Companies Act 1956.

13. On the petitioner side relied upon the NCLAT order passed in Company Appeal (AT) (Insolvency) No. 775 of 2020 between Jyoti Stripes Private Limited vs Jsc Ispat Private Limited. This is a case pertaining to the petition filed under Section 9 of IBC 2016 after the advent of IBC, 2016 where it is held that delivery of the Section 8 notice is mandatory here, in our case, this is the petition filed before the Hon'ble High Court under Section 433 of the Companies Act 1956 and received by transfer. In such a circumstance this citation is not applicable to facts and circumstances of this case.

14. As per the notification no. G.S.R. 1119 (E) dated 07.12./2016 issued by the Ministry of Corporate Affairs as per Rule 5 of the Companies (Transfer of pending proceedings) Rules, 2016 which came into effect from 01.04.2017. The Registry of the Hon'ble High Court of Orissa on 29.06.2019 vide Memo No.9061 had transferred the winding up petition to the 'National Company Law Tribunal', Cuttack Bench and the same was numbered as TP (IB) No.211/CTB//2019.The proviso to Rule 5 of the Companies (transfer of pending proceedings) Rules, 2016 which reads as under: -

> *"Provided that the petitioner shall submit all information, other than information forming part of the record transferred in accordance with rule 7, required for admission of the petition under sections 7,8, or 9 of the code, as the case may be, including details of the proposed insolvency professional to the Tribunal ……*

15. As per the supra notification necessary information to be furnished to admit the petition under section 7, or 9 of IBC 2016 and there is no reference to send a demand notice afresh, nor filing of the petition in Form-5, when the petition was transferred from the Hon'ble High Court had this information already on record of the petition transferred. In compliance with Rule 5 of the Companies (transfer of pending proceedings, Rules, 2016) a fresh 'Demand Notice' is not essentially required to be served in Form 3/Form 4 because of the fact that in the records transferred from the High Court to the 'National Company Law Tribunal', statutory notice u/s 433 of the Companies Act 1956 as part of the record. As far as the present case is concerned, a fresh Demand Notice is not essentially required to be served in Form-3/Form-4 because of the fact in the records transferred from the High Court in respect of the winding up petition, to the 'National Company Law Tribunal' statutory notice u/s 433 of the Companies Act is part of the record so transferred. Further as per supra notification no fresh court fee needs to be paid in respect of records transferred from the High Court to Tribunal, similarly when already required information are available on records transferred from High court there is no necessity again to furnish the same particulars afresh.

16. In this case in respect of amount payable towards works carried out by the petitioner after held a negotiation the respondent sent a letter dated 07.08.2013. agreeing to pay a sum of Rs. 1.75.000.00/- towards the salary, Ideal equipment and

depreciation etc and also a sum of Rs. 40.26.474/- towards verified bills. The said arrangement was accepted by the petitioner by his reply notice dated 13.08.2013.

17. Even after the continuation of the work the petitioner not paid the amount hence the respondent sent a legal notice dated 10.07.2015 thereafter sent a notice dated 28.12.2015 under Section 433 (E) r/w 434 of the Companies Act 1956 thereafter filed the petition before the High Court. It is also stated that during the pendency of this petition the respondent also paid a sum of Rs. 10 Lakhs In this case on the respondent side not disputed the claim amount and amount paid during the pendency of the petition. From the records it is proved that respondent failed to pay the debt.

18. In respect of arbitration clause found in agreement is concern there is no bar to file petition under Section 9 of IBC 2016, the bar is only if there is any arbitration proceeding is pending.

19. In view of the forgoing reason this Authority is of the view that CIRP needs to be initiated against the Corporate Debtor. The Operational Creditor has not suggested the name of any Interim Resolution Professional. Therefore, this Tribunal appoints **Mr. Suresh Chandra Pattanayak Registration No:** IBBI/IPA-002/IP-N00759/2018-2019/12384 and **Email Id.:** sureshpattanayak@yahoo.co.in residence of GKV-38,GATI KRUSHNA VILLA,TANKAPANI ROAD ,BRAHMESWAR BAGH,BHUBANESWAR ,Khordha,Orissa ,751018 from the list of Interim Resolution Professional,

Liquidator, Resolution Professional and Bankruptcy Trustee for Cuttack Zone, issued by the Insolvency and Bankruptcy Board of India. There is nothing on record to say that any disciplinary proceedings against the proposed Interim Resolution Professional is pending.

In view of the above, we are inclined to **ADMIT** the application by following Order.

O R D E R

(i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Insolvency Resolution Process against **Assotech Milan Resorts Pvt Ltd.**

(ii) Moratorium Order is passed for a public announcement as stated in Sec. 13 of the IBC, 2016. The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

(iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(iv) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

(v) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(vi) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

(vii) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made by the Resolution Professional upon receipt of the copy of this order.

(viii) **Mr. Suresh Chandra Pattanayak Registration No:** IBBI/IPA-002/IP-N00759/2018-2019/12384 and **Email Id.:** sureshpattanayak@yahoo.co.in residence of GKV-38,GATI KRUSHNA VILLA,TANKAPANI ROAD ,BRAHMESWAR BAGH,BHUBANESWAR ,Khordha,Orissa ,751018 is appointed as Interim Resolution Professional registered with the ICSI Insolvency Professionals Agency, as Interim Resolution Professional for ascertaining the particulars of Creditors and convening a meeting of Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this Order. He shall file Form-2, and that no disciplinary proceedings are pending against her with the Board.

(ix) We direct the Operational Creditor to deposit a sum of ₹ 1,00,000/- (Rupees One Lakh only) with Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Debtor) Regulations, 2016. The needful shall be done within three days from the date of receipt of this Order by the Operational Creditor. The amount, however, is subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.

(x) Directions are also issued to the ex-management to provide all documents in their possession and furnish every information in the knowledge within a period of one week from the date of admission of the petitioner to the IRP, otherwise coercive steps to follow.

(xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

(xii) Registry is hereby directed to communicate the order under Section 9 (5) (i) of the I.B. Code, 2016 to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through E-mail.

20. Interim Resolution Professional to file 1st Progress Report on 12.08.2022 List the matter on 17.08.2022

21. Let the certified copy of the order be issued upon compliance with requisite formalities.

22. 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,

23. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD

Digitally signed by SATYARANJAN PRASAD
Date: 2022.07.07 16:27:40 +05'30'

PANDIAN MOHAN RAJ

Digitally signed by PANDIAN MOHAN RAJ
Date: 2022.07.07 16:47:13 +05'30'

Satya Ranjan Prasad
Member (Technical)

P. Mohan Raj.
Member (Judicial)

Signed on this 7th of July, 2022

Supriya p.s