

NATIONAL COMPANY LAW TRIBUNAL CHANDIGARH
BENCH (COURT-I)

Company Petition No. 135/CHD/HRY/2022

IN THE MATTER OF:

M/S SANJEEV ENTERPRISES

Block- III, Bhandari Bagh, Dehradun,
Uttarakhand 248001

...Petitioner/Operational Creditor

VERSUS

M/S REMSON PRIME TECHNOLOGIES PRIVATE LIMITED,

#846, 1st Floor, Udyog Vihar, Phase-5, Gurugram,
Gurgaon, Haryana 122016

...Respondent/Corporate Debtor

Section: 9 of the IBC, 2016

Judgement Delivered on: 24.04.2024

CORAM:

SH. HARNAM SINGH THAKUR, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT

For the Petitioner

: Mr. Shashwat Parihar, Advocate
Mr. Dhruva Vig, Advocate
Ms. Adya Singh, Advocate

For the Respondent

: Ms. Sakshi Mehley, Advocate
Ms. Harshita Kumar, Advocate

JUDGEMENT

PER: SH. L. N. GUPTA, M(T) & SH. HARNAM SINGH THAKUR, M(J)

M/s Sanjeev Enterprises (for brevity, hereinafter referred to as the '**Petitioner**')/ '**Operational Creditor**') has filed the present petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC, 2016') read with

Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process against M/s. Remson Prime Technologies Private Limited (for brevity, hereinafter referred to as the '**Respondent/ Corporate Debtor**').

2. The Respondent namely, M/s. Remson Prime Technologies Private Limited is a Company incorporated on 07.06.2017 with CIN U51909HR2017PTC069406 under the provisions of the Companies Act, 2013, having its registered office at 846, 1st Floor, 846, 1st Floor, Udyog Vihar, Phase-5, Gurugram, Gurgaon, Haryana-122016, which is within the jurisdiction of this Tribunal. The Authorized Share Capital of the Respondent is Rs.1,00,000/-, the Nominal Share Capital of the Respondent is Rs.1,00,000/-and the Paid-up Share Capital is Rs.1,00,000/-.

3. It is stated by the Petitioner that it was appointed as the C&F Agent (Consignment and Freight Agent) of the Respondent as reflected in the Agreement entered on 25.10.2017 (hereinafter referred to as the "**Agreement**") as per which the Petitioner had to make an initial security deposit of Rs. 70,00,000 (Seventy Lakhs) Only to cover the average inventory maintained by him. This security amount was paid in three parts;

a) **Rs.1,00,000/-** through NEFT dated 13.09.2017 bearing transaction ID PUNBH17256327577;

b) **Rs.59,00,000/-** through RTGS dated 24.10.2017 bearing transaction ID: PUNBR52017102418442303; and

c) **Rs.10,00,000/-** through a cheque bearing number 03265024802400729. The Cheque, however, was not encashed.

4. As per the terms in the “Remuneration Structure” attached as Annexure-1 to the Agreement dated 25.10.2017, the Petitioner has made claims of entitlement to the following:

- a. An interest @1.5% per month on the refundable security deposit.
- b. Minimum guarantee of 24% on the security deposit amount per annum.
- c. A sum of Rs. 35,000/- as monthly allowance.

5. The particulars of the Operational Debt in terms of the total amount of default, and the date of default are mentioned in Part IV of the application, the relevant extracts of which are reproduced below:

PART-IV

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 due : Rs 1,26,89,700.6 (Rupees One Crore Twenty Six Lakhs Eighty Nine Thousand Seven Hundred and Six Paise Only) + 18% interest on default payment will constitute the debt to be Rs.1,49,73,846.7 (Rupees One Crore Forty Nine Lakhs Seventy Three Thousand Eight Hundred Forty Six and Seven Paise), Date of default is 13.09.2017.

For Sanjeev Enterprises
Prop

As per the above, the Petitioner has claimed the unpaid debt of **Rs.1,49,73,846.7/- (Rupees One Crore Forty-Nine Lakhs Seventy-Three Thousand Eight Hundred Forty-Six and Seven Paise)** including interest at the rate of 18 % on the principal default amount of Rs.1,26,89,700.6/-

(Security Deposit of Rs. 60,00,000/- as well as invoices amounting to Rs. 66,89,700.55, and relied upon 13.09.2017 as the date of default.

6. The Petitioner has stated that since the Respondent did not make the due payment of its operational debt, it issued a Demand Notice dated 07.02.2022 under Section 8 of IBC 2016, which was served to the Respondent at its registered office vide email dated 17.02.2022 and also received by speed post on 21.02.2022. The said Demand Notice was replied to by the Respondent by speed post as well as email, whereby the Respondent refused to pay the amount of the alleged debt to the Petitioner within 10 days of the Demand Notice, and hence, the Petitioner moved the present application. The Petitioner has also placed on record the affidavit under Section 9(3)(b) of IBC, 2016 vide Diary no. 00844/1 dated 08.07.2022 stating that there was no pre-existing dispute between the parties.

7. Further, the Petitioner has made the following submissions:

- i. The invoices amounting to Rs. 66,89,700.55 (Rupees Sixty-Six Lakhs Eighty-Nine Thousand Seven Hundred and Fifty-Five Paise Only) were issued to the Respondent, who did not pay any heed to the invoices been issued. The inventory stock of the Respondent is still lying with the Applicant, for which rent has been calculated.
- ii. The initial security deposit should be considered as an 'operational debt'. In this regard, he has placed reliance on the Hon'ble Supreme Court's judgment in **Consolidated Consortium Construction vs Hitro Energy Solutions Private Limited in Civil Appeal No. 2839 of 2020**, wherein it was held that the debt in relation to operational

requirements of an entity, as well as the advance payment made to such an entity for the supply of goods and services, would be considered as Operational Debt and that the presence of an invoice is not a *sine qua non* since the demand notice can also be issued based on other documents which prove the existence of the debt.

- iii. The Respondent has admitted the debt and the liability of the outstanding amount vide its email dated 19.11.2018 sent to the Petitioner. The Applicant has requested the Respondent to reimburse the amount vide emails dated 29.03.2019 and 04.02.2020.

8. On issuance of the notice, the Respondent filed its reply vide Diary No 00844/3 dated 17.01.2023, and opposed the maintainability of the application on the following grounds:

- i. As a pre-condition for entering into the one-year-long C&F Agreement, the Applicant was to provide a refundable security deposit of Rs. 60 Lakhs, and the remuneration was paid to the Applicant by the Respondent for that one year.
- ii. The Petitioner has claimed amounts up to 31.01.2022 but has not filed documents/ invoices to substantiate the same. There was a pre-existing dispute between the parties as apparent from the issuing of emails dated 05.09.2018 and 14.11.2018 to the Petitioner, whereby the Petitioner was apprised that the bills raised by it have to be revised. The same was also communicated to the Petitioner in the reply to the Demand Notice dated 21.02.2022. Reliance is placed on the judgment of the Supreme Court in the ***Mobilox Innovations Pvt.***

- Ltd. vs Kirusa Software Pvt Ltd. [2018] 1 SCC 353** to state that the Code is not intended to be a substitute for a recovery forum and that wherever there is the existence of a real dispute, the provisions of this Code cannot be invoked.
- iii. The Petitioner has not been able to bring on record how it qualifies as an Operational Creditor or how it has the Locus Standi to issue the Notice under Rule 5 of the IBC, nor is there a debt to meet the criteria as per Section 4 of the Code. It is stated that the Applicant's reliance on the **Consolidated Construction Consortium Case** is misplaced as in the present case, out of the total amount alleged as Operational Debt, Rs.60,00,000/- is the refundable security deposit while the rest is against the provision of goods and services which is unsubstantiated, thus the entire amount alleged as Operational Debt by the Applicant cannot be construed as Operational Debt.
- iv. Further, the security deposit as well as the interest thereon cannot be construed as "Operational Debt" as per Section 5(21) of the Code. For the same, reliance is placed on the decision of NCLT Principal Bench in the **Sach Marketing Pvt Ltd vs Resolution Professional of Mount Shivalik Industries Limited, Ms Pratibha Khandelwal, Company Appeal (AT) Insolvency No. 180 of 2021**, which held that 'Security Deposit' and the interest thereon would lie within the ambit of 'Financial Debt' as defined in Section 5(8)(f) of the Code.
- v. The Applicant has stated the date of default as 13.09.2017, whereas the Agreement itself was executed on 25.10.2017 and the same was

valid for a year. Thereafter, the Agreement got terminated automatically on 25.10.2018, and as per its terms, the parties upon termination, were to undertake a full and final settlement within 30 days, therefore the alleged date of default at the best may be construed to be 25.11.2018 when the parties failed to reach a full and final settlement. The Applicant has calculated the interest @18% from 13.09.2017 to 31.01.2022, however, the invoices raised and the security deposits have been paid post 13.09.2017, thus the alleged due date is not tenable. And even if it is considered so, only security deposit payment of Rs.1,00,000/- only can be alleged as a claim therefore its claim of Rs.1, 49,74,846/- in default fails.

- vi. As the widest extent of the agreement, i.e., 30 days from the date of its termination, has been construed as 25.11.2017, the invoices raised after the same are not maintainable as they were issued unilaterally in contravention to the terms of the Agreement, and therefore these subsequent invoices cannot form part of the outstanding debt.
- vii. The Demand notice dated 07.02.2022 as per rule 5 of the IBC Rules 2016 served via email dated 17.02.2022 cannot be considered as proper delivery of the Notice because as per Rule 5(2)(b) of Rules, the electronic mail service of the notice has to be done on the whole time director or designated partner or key managerial personnel. However, in the present case, the delivery has been done to the Chartered Accountant of the Respondent who is neither a director nor a

designated partner or key managerial personnel as per the said Rule in the present case, therefore, the limitation of 10 days for applying Section 9 of the Code has not commenced in light of the defective delivery of the Notice and, therefore, the present petition is liable to be dismissed. With regard to the debt arising out of the invoices issued, the Notice should have been issued under Form 4 and not Form 3 of the IBC Rules 2016. Reliance is placed on the **Hon'ble NCLAT's decision in Neeraj Jain vs Cloudwalker Streaming Company, Appeal (AT) (Insolvency) No. 1354 of 2019** decided on 24.02.2020 that held that the Operational Creditor has no discretion to choose between Form 3 or Form 4.

- viii. The debt as alleged in the petition is unsubstantiated and is in the nature of both Financial as well as Operational Debt and none of them meet the minimum criteria of Rs. 1,00,00,000/- as per Section 4 of the Code as notified on 24.03.2020 by the Central Government.
- ix. If the amount in default is presumed to be Rs. 1,26,89,700/- as of 31.01.2022, the Petitioner will not be entitled to claim the interest of Rs. 22,84,146/- at 18% per annum from 13.10.2017 to 31.01.2022 as neither the agreement nor any invoice provides for the payment of any interest. For this reliance is placed on the Hon'ble NCLAT's decision in the case of **Mr. Prashant Agarwal, Member of Suspended Board of Bombay Rayon Fashions Ltd Vs Vikash Pararampuria in Company Appeal (AT) (Ins) No. 690 of 2022.**

9. The Petitioner filed its rejoinder vide Diary no. 00844/4 dated 03.03.2023 mainly stating the following:

- i. The bills raised by the Petitioner were in consonance of the services provided by the Petitioner based on the C&F Agreement as the inventory/ stock is lying with the Applicant in accordance with which rent has been calculated. In the Email sent by the Respondent to the Applicant dated 19.11.2018, the Respondent has admitted and accepted the debt and liability of the outstanding amount as well as admitted the fact of having sent the wrong cheques to the Applicant.
- ii. Petitioner is an Operational Creditor as per section 5(21) of the IBC 2016, Operational Debt means a claim in respect of goods and services including a debt in respect of repayment of dues arising under any law for the time being. Reliance is placed on the following two Judgments:
 - a. ***Hon'ble Supreme Court's decision in M/s Consolidated Construction Consortium Limited vs M/s Hitro Energy Solutions Private Limited in Civil Appeal 2839 of 2020***- it was held that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver, and that Operational debt is in relation to the operational requirements of an entity,
 - b. ***Hon'ble NCLAT's decision in Vibrus Homes Pvt Ltd vs Ashimara Housing Pvt Ltd & Anr in Company Appeal (AT) (Insolvency) No. 80 of 2022 on 22.04.2022***, held that advance security deposit will amount to Operational debt. The relevant excerpt of the judgment has been reproduced below;
"Be it as it may. It is for the Appellant to take remedies out of the Agreement and it is open for the parties to take legal proceedings as permitted in law. In view of the fact that the payment made was

initially towards the advance license fee, it was an operative debt, the Adjudicating Authority has rightly admitted the application under Section 9. We see no merit in the Appeal.”

- iii. The Demand notice is not defective merely due to the absence of an invoice, as an invoice is not sine qua non, and a demand notice can also be issued based on other documents that prove the existence of the debt, as was held in the case of **M/s Consolidated Construction Consortium Limited (Supra)**.
- iv. Debt is substantiated and has occurred due to non-compliance with the terms of the agreement by the Respondent.
- v. The present Petition is filed within the limitation period, i.e., within 3 years from the date of default of 13.09.2017, that would be completed on 12.09.2020. Reliance is placed on the Hon'ble Supreme Court's judgment in **Miscellaneous Application No.21 of 2022 in Miscellaneous Application No. 665 of 2021 in Suo Moto Writ Petition (Civil) No. 3 of 2020** held that:

“ III. In cases where the limitation would have expired during the period between 15.02.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996. Section 12 A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881, and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

10. We heard the parties and perused the pleadings on record. At the outset, we would like to examine whether the present Application is within the limitation period. As we have already noted in the present case, the date of default relied on by the Petitioner is 13.09.2017. The Petitioner further relies upon the Hon'ble Supreme Court's decision in the Suo Moto Writ Petition (C) No.3 of 2020 dated 10.02.2022, the period from 15.03.2020 till 28.02.2022 was to be excluded, and accordingly the Applicant has calculated the new time-period. We consider these facts in the following manner to conclude whether the present Application is within limitation period:

S. No	Document/ Fact	Date	Period of Limitation till
1.	Part IV of Application (Particulars of Financial Debt)	13.09.2017	12.09.2020
2.	Period to be excluded from the Period of Limitation vide Suo Moto Suo Moto Writ Petition (C) No.3 of 2020	15.03.2020-28.02.2022	29.05.2022 (90 days from 01.03.2022)
3.	Date of filing of Present Application	24.05.2022	

Thus, we find that the present petition is well within the limitation period.

11. Now, we examine the contention of the Respondent that there was a pre-existing dispute between the parties. For the same, the respondent has attached emails sent to the Petitioner, which reads thus:

Subject: Re: PAYOUT FOR THE MONTH OF JUL,AUG 2018
Date: 2018-09-05 01:33
From: rishabh@remson.co.in
To: sanjeev goyal <sanjeev.goyal.sir1@gmail.com>
Cc: ankit@remson.co.in, Pawan Sharma <finance@remson.co.in>, jayant@remson.co.in

Please change the bill as per discussion with you.accounts dept cant accept the bill

Subject: RE: Sep oct 2018 remson payout
Date: 2018-11-14 23:02
From: <rishabh@remson.co.in> ✓
To: "sanjeev goyal" <sanjeev.goyal.sir1@gmail.com>, <ankit@remson.co.in>, <jayant@remson.co.in>, "Pawan Sharma" <finance@remson.co.in>

Please send the revise bill. These bills have some corrections.

These emails, though never replied to by the Petitioner, have no mention regarding any dispute over quantity or quality of goods/services supplied by the Petitioner. Thus, mere writing of mails with a request to revise the bills without giving any specific details cannot be construed as enough ground for justifying a pre-existing dispute.

12. Now, we examine the contention of the Applicant regarding the demand for rent etc. by raising invoices. The Agreement as averred by the Petitioner itself is of 25.10.2017 and was valid for a Year. The Respondent has contended that thereafter, the Agreement got terminated automatically on 25.10.2018, and as per its

terms, the parties failed to reach a full and final settlement within 30 days, therefore the alleged date of default at the best may be construed to be 25.11.2018. Here, we consider it worthwhile to refer to the agreement dated 25.10.2017 placed on record, which reads thus:

e-Stamp Certificate No. G0E120171606

DURATION OF AGREEMENT:

This agreement shall commence from the date of signing of this agreement and shall remain operational for a period of One Year until terminated earlier, whether with or without any reason, by either party by giving the other party thirty days notice in writing. Any such notice shall be valid and effective the date of service if served in person or the date it is delivered by registered post. The accounts as between the parties to this agreement shall be settled within a month of the termination of the agreement.

The rates as mentioned in Annexure I shall be valid for a period of twelve months from the date of this agreement.

C&F AGENT'S RESPONSIBILITIES:

1. The C&F AGENT shall be responsible for unloading and storing the products in the said Godown that shall be dispatched on door delivery basis to the Distributor's/reseller's Godown.
2. The C&F AGENT shall issue such acknowledgements as may be required by the Transport Contractors and also issue (Goods Receipt Note) to the office of The COMPANY in a format to be provided by the COMPANY.
3. The C&F AGENT shall obtain open delivery and/or damage certificates from the carriers in accordance with the procedure laid down by The COMPANY from time to time in case of short or damage in transit.
4. The C&F AGENT shall maintain stock records as per COMPANY Requirement and shall be responsible for storing the products in proper condition to facilitate easy verification. The C&F AGENT shall cooperate with the COMPANY in taking physical inventory of the products as and when required by the COMPANY.

The C&F AGENT shall keep in its employment adequate number of personnel for discharging their obligations pursuant to this Agreement and keep the said Godown in a tidy condition and maintain the stocks in an orderly manner. It is clearly understood that the C&F AGENT shall be responsible for payment of salaries and other benefits to the personnel in their employment and keep The COMPANY indemnified against any claim from their employees and/or Government authorities for non-payment of salaries and other dues. There will be no employer employee relationship between the employee of C&F AGENT and COMPANY.

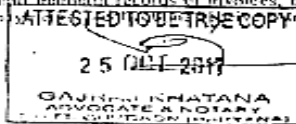
The C&F AGENT shall arrange to deliver the products to Dealers or end users in accordance with the instructions of The COMPANY and shall also arrange to dispatch the same to any destination in the state of Uttarakhand, specified by the COMPANY. The C&F AGENT shall obtain carriers negotiable receipts and/or customers acknowledgements for the products dispatched or delivered in accordance with the written dispatch instructions of the COMPANY. The C&F AGENT shall not dispatch/deliver the products to anyone except pursuant to a written delivery/dispatch instruction issued by the COMPANY.

7. The C&F AGENT shall allow Company's Commercial Executive to generate invoices on the Dealer or customer as per COMPANY policy. The C&F AGENT shall complete other documentation procedures covering delivery/dispatch of the products as per the invoice generated and as specified by The COMPANY from time to time.
8. The C&F AGENT shall maintain records of invoices, Lorry Receipts, Road / Transit permits, details of products dispatched and also records of any other



For Remson Prime Technologies Pvt. Ltd.

Director



For Sanjeev Enterprises

Sanjeev Enterprises Prop.

For Sanjeev Enterprises
Sanjeev Enterprises Prop.

Thus, it is observed that the aforesaid agreement was valid only for a period of 12 months only. The Petitioner has not placed any document to substantiate that the said agreement was renewed after 24.10.2018 to justify its right to raise invoices to the tune of Rs.66,89,700.55/-. As post-24.10.2018, the agreement ceased to

have an effect, in our considered view, the Petitioner could not have claimed any further amount for the services it could have rendered. Hence, we do not find any merit in the claim of the Petitioner on this account.

13. The Petitioner has claimed the date of default to be 13.09.2017. As per his own averments, the Petitioner has transferred only an amount of Rs.1,00,000/- through NEFT dated 13.09.2017 bearing transaction ID PUNBH17256327577. The next tranche of Rs.59,00,000/- through RTGS was transferred on 24.10.2017. Hence, till 13.09.2017, the Petitioner has deposited only an amount of Rs. 1,00,000/- which is far less than the minimum threshold limit prescribed under section 4 of the IBC. Even if, we ignore the date of default to be typographical error and add next tranche of Rs.59,00,000/- transferred to the Respondent on 24.10.2017, it amounts to a default of Rs 60,00,000/- only, which is still beneath the minimum threshold limit prescribed under Section 4 of IBC, 2016.

14. Hence, the petition is dismissed being non-maintainable under Section 4 of IBC, 2016.

15. However, nothing expressed herein shall be construed as an opinion in respect of the rights of parties to agitate their claim before any other forum.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(HARNAM SINGH THAKUR)
MEMBER (J)