

In the National Company Law Tribunal

Kolkata Bench

Kolkata

C.P. (IB) No. 971/KB/2018

In the matter of:

An application for initiation of corporate insolvency resolution process by an Operational Creditor 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.

And

In the matter of:

M/S. RDC CONCRETE (INDIA) PRIVATE LIMITED, Corporate Identity Number U74999MH1993PTC172842 and having its office at DIL Complex, 701, 7th Floor, Thane One, Ghodbunder Road, Majiwade, Thane 400 610, Maharashtra.

... Operational Creditor/Applicant

-Versus-

In the matter of:

M/s. SIMPLEX INFRASTRUCTURES LIMITED, having Corporate Identity Number L45209WB1924PLC004969 and Registered Office at Simplex House, 27, Shakespeare Sarani, Kolkata 700 017, West Bengal.

... Corporate Debtor

In the matter of :

M/S. RDC CONCRETE (INDIA) PVT. LTD.

] OPERATIONAL CREDITOR

M/S. SIMPLEX INFRASTRUCTURES LIMITED

] CORPORATE DEBTOR

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Date of pronouncement of order : 09/08/2019

Coram: Shri Jinan K.R., Hon'ble Member (Judicial) &

Shri Harish Chander Suri, Hon'ble Member (Technical)

Counsel on Record :

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| 1. Mr. Rahul Chitnis, Advocate |] | |
| 2. Mr. Chirag Sanchiti, Advocate |] | For Operational Creditor |
| 3. Ms. Minu Rohila, PCS |] | |

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| 1. Mr. Joy Saha, Sr. Advocate |] | |
| 2. Mr. Shaunak Mitra, Advocate |] | For Corporate Debtor |
| 3. Ms. Ishani Sengupta, Advocate |] | |
| 4. Mr. Ryan Sinha, Advocate |] | |

ORDER

Per Shri Harish Chander Suri, Member (T).

1. This application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by **M/s. RDC Concrete (India) Private Limited**, (hereinafter referred to as the Applicant/Operational Creditor), having its Registered Office at Thane, Maharashtra, through its Authorised Representative Mr. Anant Kodyal, Assistant Manager, Credit Control, against **M/s. Simplex Infrastructures Limited**, (hereinafter referred

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to as the Corporate Debtor) having its Registered Office at Kolkata, West Bengal, for initiating Insolvency Resolution Process against the Corporate Debtor.

2. It is submitted in the application that pursuant to orders having been placed by the Corporate Debtor, the Applicant sold and supplied Ready-Mix Concrete (RMC) to the Corporate Debtor and its various Projects in Mumbai and Kolkata and raised several invoices on the Respondent for the supply of ready-mix concrete aggregating to Rs. 5,51,42,721/- (Rupees Five Crore Fifty One Lakhs Forty Two Thousand Seven Hundred Twenty One only) against which the Applicant has received Rs. 2,31,38,380/- (Rupees Two Crore Thirty One Lakhs Thirty Eight Thousand Three Hundred Eighty Only) towards certain invoices and a sum of Rs. 3,20,04,341/- (Rupees Three Crore Twenty Lakhs Four Thousand Three Hundred Forty One Only) is still outstanding to be paid by the Corporate Debtor which it had failed and neglected to pay. Consequently, the Applicant issued a demand notice dated 2nd April, 2018 which was received by the Corporate Debtor on 4th April, 2018.
3. It is submitted that the Corporate Debtor failed to reply to the demand notice nor did it make any further payment except a sum of Rs. 51,747/- (Rupees Fifty One Thousand Seven hundred Forty Seven Only) on April 4, 2018. Therefore, the Operational Creditor has outstanding dues of Rs.3,63,45,375/- (Rupees Three Crores Sixty Three Lakhs Forty Five Thousand Three Hundred and Seventy Five Only) as on 30th April, 2018 which the Corporate Debtor has

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not paid as yet compelling the Operational Creditor to file the present application. The Operational Creditor has not proposed any name for being appointed as Interim Resolution Professional.

4. In reply to the application, the Corporate Debtor has filed an affidavit of Mr. Gautam Dasgupta, Vice President (Business Development) and the Authorised signatory of Corporate Debtor, who has deposed in the affidavit that the present application is abuse of process of law and instituted with ulterior motive to make wrongful gain at the expense of the Corporate Debtor. It is further submitted that the **Application** is not maintainable as it deliberately suppressed and concealed several material facts and that there is no compliance with the mandatory provisions of Section 9(3)(c) of IBC and that no certificate from Bank nor any certified bank statements supports the application. It is submitted that the claim of the Operational Creditor is not based on any 'Purchase Order'.
5. It is further submitted in the affidavit that the Corporate Debtor has made payment of Rs. 2,02,67,480/- approximately to the Operational Creditor during the course of its dealings and transactions with the Operational Creditor since September, 2016. It is submitted that the e-mails relied upon by the Operational Creditor are vague, ambiguous and devoid of any material particulars.
6. The Corporate Debtor further submits that the Operational Creditor had

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been invited from time to time for reconciliation of accounts but despite that the Operational Creditor failed and neglected deliberately to reconcile the accounts and that the entire claim of the Operational Creditor is fabricated. In para 3(p), it is admitted by the Corporate Debtor as under:-

"I state that upon receipt of the said notice in form 3, the Corporate Debtor once again approached the Operational Creditor for the reconciliation of accounts. The Operational Creditor went on assuring the Corporate Debtor that it would duly visit the office of the Corporate Debtor and reconcile accounts. Believing in and relying upon such representations the Corporate Debtor did not reply to the said notice in form 3 issued under section 8 of the Act".

7. It is submitted that the Corporate Debtor reconciled the accounts and by its letter dated 10th August, 2018 made payment of Rs. 2,43,268/- (Rupees Two Lakh Forty Three Thousand Two Hundred Sixty Eight Only) to the Operational Creditor which according to the Corporate Debtor was the total amount due and owed by the Corporate Debtor to the Operational Creditor. The Corporate Debtor denied and disputed that the principal amount of Rs.3,20,04,341/- is outstanding to be paid by the Corporate Debtor which according to the Corporate Debtor is ex facie baseless and highly unjustified and inflated. The Corporate Debtor further denies the demanded sum of Rs. 43,92,781/- on account of interest. According to the Corporate Debtor no claim is due and the Applicant not having complied with the provisions of IBC, it is liable to be dismissed.

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8. In the rejoinder to the reply, the Operational Creditor has submitted that the Corporate Debtor has not made mention of any pre-existing dispute between the parties because of which the Corporate Debtor did not pay the operational debt. It is submitted that there are numerous e-mails to the Respondent since 16th May, 2017 requesting the Respondent to pay the Operational debt and not even once the Corporate Debtor has raised any kind of dispute with respect to the operational debt being claimed by the Applicant herein. The Respondent has received the demand notice dated 4th April, 2018 and despite the expiry of 10 days from the receipt of the notice the Respondent did not raise any dispute. Even the affidavit in reply was filed after two opportunities were granted by the Tribunal to the Corporate Debtor.
9. In the Sur Rejoinder filed by the Sr. Manager (Legal) of the Corporate Debtor, it was submitted that the Applicant has disclosed several new documents along with the rejoinder and the Applicant is attempting to enlarge the scope of its application. It is submitted that the reply affidavit disclosed pre-existing dispute between the parties and thus the application ought to be dismissed. The Corporate Debtor denied the averments and contents of the rejoinder. It is denied that disputes raised are belated or that the defence of the Corporate Debtor should be rejected. It is denied that the offer given by the Corporate Debtor was strictly without prejudice to its rights and contentions and was given in good faith and was a confidential offer to bring to an end

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the disputes that existed between the parties. The Corporate Debtor denied the liability.

10. Both the parties have filed a large number of documents to prove their respective versions of the story. The Corporate Debtor has referred to and relied upon the work order dated 21st February, 2017 running into 8 pages (Annexure-01) mentioning therein the technical terms and conditions, scope of work and other terms, minimum assured quantity, schedule of rates, payment schedule of rates, measurement and arbitration clause etc. The Corporate Debtor further referred to a letter dated 20th April, 2017 (Annexure – 02) written to the Operational Creditor, to indicate that there was pre-existing dispute between the parties. The relevant extracts of this letter are reproduced as under:-

*“It is amply clear that due to the reasons of major non-compliance of standard & specifications along with overall Quality issues from M/s. RDS concrete, the **said U-Girder is rejected by our Client & General Consultants.***

In view of above, it is deemed to accept that your quality team is ineffective and slipshod, resulting the rejection of said U-Grider. Kindly also note that due to this negligence, our image has been torn down in front of client & consultant.

In this regards, it is regretfully informed you that the cost of said rejected Pre-cast U-Girder is attributable to you and the same shall be deducted from your monthly bill”.

11. The Corporate Debtor was sent reply to the aforesaid letter and in its letter dated 26th April, 2017, the Operational Creditor wrote that –

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“please note that rejection of U-girder on account of non-setting of concrete is due to malfunctioning of M1 batching plant weighing scale calibration which went faulty and the admixtures feed to plant mixer was unaccounted and uncontrolled. After this was noticed, plant operations was immediately stopped”.

- 12.** The exchange of correspondence took place between the parties and both the parties wrote letters after letters making allegations and counter allegations. These letters include the ones dated 5.5.17, 9.5.17, 18.5.17, 20.5.17 (Annexure 7), 20.5.17 (Annexure 8), 27.5.17, 29.5.17, 15.6.17, 14.6.17, 5.7.17 (Annexure 13), 5.7.17 (Annexure 14), 5.7.17 (Annexure 15), 12.7.17, 17.7.17, 11.8.17, mail dated 11.8.17 (Annexure 19), letter dated 14.8.17 (Annexure 20), 26.3.19.
- 13.** On the basis of the above said correspondence between the parties, the Corporate Debtor had more or less convinced us that there were pre-existing disputes between the parties, but fortunately when the Counsel for the Operational Creditor again took his turn and referred to various aspects that were even more convincing, he was able to tilt the scale of justice towards the Operational Creditor.
- 14.** The Operational Creditor has referred to the e-mail dated 13th August, 2018 received from the Corporate Debtor mentioning “we requested and also sent many reminders to come and reconcile your account but nobody visited till today. Now we are enclosing herewith the reconciliation statement and outstanding for your reference and you are requested to go

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through the same and confirm within 7 days otherwise we will treat this as our final statement and close the accounts”.

15. In reply to the aforesaid mail the Operational Creditor sent the details of payment due from the Corporate Debtor being Rs. 3,16,17,000/- as net outstanding. The reply affidavit in this matter was filed on 28th January, 2019 much after the e-mail of the Corporate Debtor dated 13th August, 2018, but even in this reply to the application there is no mention of any pre-existing dispute between the parties. If there had been any dispute the Corporate Debtor surely would have mentioned in detail the particulars of the dispute between them. In the rejoinder, when the Operational Creditor specifically pointed out that in the reply there was no mention of any pre-existing dispute between the parties because of which the Corporate Debtor did not pay the operational debt, the Corporate Debtor first time filed the Sur-rejoinder and referred to disputes.
16. The Operational Creditor further submitted that it had sent numerous e-mails to the Corporate Debtor since 16th May, 2017 requesting them to pay the operational debt and not even once the Respondent raised any kind of dispute with respect to the said operational debt. Secondly, the Corporate Debtor received the demand notice on 4th April, 2018 and in spite of the expiry of 10 days from the date of receipt of the said notice the Corporate Debtor did not raise any such dispute. Thirdly, even after the application was filed before the Tribunal the Corporate Debtor was given a fairly reasonable

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opportunity to file its affidavit in reply not just once but twice and the last opportunity was given on 27th November, 2018. Only thereafter the reply affidavit was filed and for the first time the Corporate Debtor has come up with a dispute which is nothing but a Cock-and-bull story made with a malafide objective of prolonging the present matter.

- 17.** It is submitted by the Operational Creditor that there was no pre-existing dispute at all which is proved on the basis of documents placed on record by the parties. The Corporate Debtor had not at all mentioned or referred to any dispute prior to the notice nor did it reply to the demand notice sent by the Operational Creditor. It is submitted that only when the Operational Creditor had taken this plea that there was no pre-existing dispute, that the Corporate Debtor has raised this issue of there being a dispute for the first time.
- 18.** The fact of the matter is that the earlier disputes had been settled. The payment of Rs. 2,02,67,480/- had already been made by the Corporate Debtor to the Operational Creditor pursuant to a settlement of the issue and even the Bank Guarantees had been canceled. It is submitted that the bank statement sent by the Operational Creditor has not been disputed by the Corporate Debtor. It is insisted upon by the Operational Creditor to note that if there had been any dispute as regards faulty supplies or the quality being below the agreed standards, the Corporate Debtor would not have canceled the Bank Guarantees because they would have rather encashed the Bank

Guarantees instead of canceling them to make up their losses. In reply to the argument as regards cancellation of the Bank Guarantees, the Ld. Sr. Counsel appearing for the Corporate Debtor submit that in fact the Bank Guarantees had been misplaced and that is why it was stated that the Bank Guarantees were canceled. In the above said peculiar circumstances, the above said submission is unbelievable and unacceptable. Bank grantee is a valuable document which could be invoked by the corporate debtor whenever the operational creditor committed breach of the terms in the work order. Misplacement of such a document is impossible to believe.

19. Having heard both the parties at great length, we are clear in our mind that there were no dispute between the parties and the Corporate Debtor did not need any Bank Guarantee or Security. The reconciliation statement admitting the balance amount was sent on 13th August, 2018. The Corporate Debtor had paid money to the Operational Creditor and the Bank Guarantees were also canceled. By no stretch of imagination can we infer that there was any existing dispute. If at all there had been any dispute unsettled, that should have been raised and stated before the service of notice under Section 8 of the Code which according to the documents placed before us, was no more existent and the disputes if at all referred to by the Corporate Debtor had already been settled and the Corporate Debtor cannot be allowed to refer to the same in the present proceedings.

20. We, therefore, feel convinced that the attempt of the Corporate Debtor to bring forth the already settled old disputes to avoid the payment of the current dues is misplaced and cannot be taken note of. Existence of a dispute as alleged stands not proved. What is claimed by the operational creditor is an operational debt. The debt is found legally payable by the corporate debtor and had not been paid even after the receipt of the demand notice. The applicant has not proposed the name of any insolvency professional. The application is otherwise complete under section 9 of the Code. The application of the Operational Creditor must succeed and accordingly this application is admitted and we pass the following orders:-

ORDER

- i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, **M/s. Simplex Infrastructure Limited**, is hereby **admitted**.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii) 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

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Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

- iv) Moratorium under Section 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 judgement, 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 the possession of the corporate debtor.

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- v) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi) 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.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) 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 Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) **Mr. Sanjeev Jhunhunwala**, an Insolvency Professional, registered with Insolvency and Bankruptcy Board of India, having **registration Number IBBI/IPA-001/IP-P00325/2017-18/10595**, E-mail ID: sanjeevjhunhunwala@gmail.com, Mobile No. 9831248361 is hereby appointed as Interim Resolution Professional by this Tribunal for

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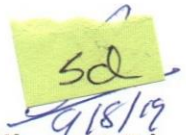
ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xi) The Corporate Applicant is directed to deposit Rs. 5,00,000/- (Rupees Five Lacs Only) in the ESCROW Account in SBI to be operated through the Registrar NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP/RP. IRP/RP can withdraw the said amount subject to the approval of the CoC to be constituted.
- xii) Registry is hereby directed under section 9(5) of the I & B Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through E-mail.

- xiii). List the matter on **17th September, 2019** for filing of the progress report.
- xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(Harish Chander Suri)
Member (T)



(Jinan K.R.)
Member (J)

Signed on this, the 9th day of August, 2019.

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