

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-201
IB - 46/ND/2020

IN THE MATTER OF:

GP GLobal Asphalt Pvt. Ltd.

Vs.

Soni Commercial Enterprieses Pvt. Ltd.

.....Respondent

....Applicant

SECTION

U/s 9 IBC

Order delivered on 28.07.2023

CORAM:

**SHRI P.S.N PRASAD,
HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open Court vide separate sheets.

IB-46/ND/2020 is **allowed**

Sd/-

**(DR. BINOD KUMAR SINHA)
MEMBER (T)**

Sd/-

**(P.S.N PRASAD)
MEMBER (J)**

IN THE NATIONAL COMPANY LAW TRIBUNAL

BENCH – V, NEW DELHI

C.P (IB)/46(ND)2020

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:

GP GLOBAL ASPHALT

PRIVATE LIMITED,

Plot No. 745, GIDC, Manjusar

Taluka-Savli, Vadodara,

Gujarat, India- 391775.

...Operational Creditor

Versus

SONI COMMERCIAL ENTERPRISES

PRIVATE LIMITED,

101, Guru Nanak Complex, 5/9,

W.E.A., Saraswati Marg, Karol Bagh.

New Delhi- 110005.

...Corporate Debtor

CORAM:

SHRI P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Adv. Mr. Dinkar Kumar

For the Respondent : None-appeared

Order Delivered on: 28.07.2023

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

1. The instant application is filed by GP Global Asphalt Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC/the CODE') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process ("CIRP") against Soni Commercial Enterprises Private Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor') for failing to make the payment

amounting Rs.50,00,000/- (Rupees Fifty Lakhs only) plus Interest @ 18% P.A from 17.01.2017 till the actual date of payment.

2.The Respondent Company Soni Commercial Enterprises Private Limited was incorporated on 23.11.2013 under the provisions of the Companies Act, 2013 having its registered office situated at 101, Guru Nanak Complex, 5/9, W.E.A., Saraswati Marg, Karol Bagh, New Delhi- 110005. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

Averments of the Applicants:

3.Briefly stated the facts of the present case as averred by the applicant are that the Operational Creditors is a Pvt. Limited Company and a leading Bitumen player in India and overseas market. The Operational Creditor and the Corporate Debtor have been in business relationship since 13.02.2014 wherein the Corporate Debtor through its Directors approached the

Operational Creditor herein for purchase of Bitumen and Bitumen products/allied products (“Product”).

4. That upon the requests and representations made by the Corporate Debtor, the Operational Creditor herein accepted Various Verbal orders placed for Bitumen and allied products from time to time. The Corporate Debtor was making the payment of the outstanding dues of the Operational Creditor on running account basis from time to time and as such the Operational Creditor last received a payment of Rs. 23,05,750/- (Rupees Twenty Three Lakhs Five Thousand Seven Hundred and Fifty Only) vide Cheque/ DD on 23-12-2016. Thereafter the Corporate Debtor tendered a further payment of Rs. 50,00,000 (Rupees Fifty Lakh Rupees Only) vide cheque no"750972" Dt. 23-12-2016 Drawn on State Bank of India, Karol Bagh, Delhi 10005 bank but the same was dishonoured on 16-01-2017

5. On 20.08.2018, the Operational Creditor issued a Statutory Notice Dated 20-08-2018 for recovery of Rs. 50,00,000 (Rupees Fifty Lakh Rupees Only) under Section 8 of the Insolvency and Bankruptcy Code, 2016 sent via speed post. The same was duly delivered to the Corporate Debtor. However

The Corporate debtor despite receiving the aforesaid Statutory Notice Dated 20.08.2018 under the provisions of Section 8 IBC, 2016 neither made any payment towards the debt nor submitted any reply to the aforesaid Legal Notice Dated 20.08.2018. Hence, this Application under section 9 of the Insolvency and Bankruptcy Code, 2016 was filed on 21.12.2019

6. On the other hand, the Respondent filed his reply on 19.03.2022. However, due to non appearance of the Corporate Debtor on various dates of hearing, vide order dated 22.09.2022 this Tribunal ordered the court officer to send e- notice to the Corporate Debtor as well as to their counsel on record and directed that if the counsel of Corporate Debtor fails to appear on the next date of hearing they will be set as ex-parte. As there was no appearance and no reason for their absence was shown by the Corporate Debtor in this matter, on 20.10.2022, the matter was proceeded as ex- parte. The matter was once again listed on 17.11.2022 and was finally heard on 18.01.2023 and the Corporate Debtor remained ex-parte. However in interest of justice we have considered the reply filed by the respondent in disposing the instant application. The respondent through its

reply submitted that the Application as filed by the Operational Creditor is not maintainable inasmuch as the same has been filed without cause of action and the same is false, vexatious and is part of harrowing tactics being employed by the Applicant in order to extort monies out of the Respondent. Hence, the Application under reply warrants to be immediately dismissed with exemplary costs.

7. Further, the Applicant is contesting a civil suit bearing CS (Comm) No. 1681 of 2020 titled "*GP Global Asphalt Ltd. versus Soni Commercial Enterprises Pvt. Ltd.*" against the Respondent in the court of District and Sessions Judge, Tis Hazari Courts Complex, New Delhi, in respect of the same transaction and for the same amount i.e. Rs. 50,00,000/- as in the present case.

8. It is further submitted by the Corporate Debtor that the accounts with the Petitioner stand fully and finally settled as on 23.12.2016 with the last payment of Rs. 23,05,750/-. It is submitted that as per the industrial practices, the Respondent had provided an undated signed security cheque of Rs. 50,00,000/- in 2014 which the Petitioner has misused

by presenting with the bank without the specific instructions of the Respondent. It is submitted that the quality of the goods supplied by the Petitioner on 18.06.2014 and 03.07.2014 were of highly inferior quality because of which the same was unusable in any manner whatsoever. It had been agreed mutually between the parties that the bad deliveries of goods as mentioned above can be settled later with the future transactions. That after considering and assessing the value of the inferior and unusable bitumen, the parties decided to settle the accounts for Rs.73,05,750/- and the Petitioner agreed to give up on its claim of Rs.50,00,000/- for the poor, inferior, and unusable quality of the goods and the Respondent also waived its claims for the losses suffered by it due to the inferior, poor, and unusable quality of the goods.

9. Thereafter, on 23.12.2019 i.e. just 2 days after the filing of the present petition, Petitioner applied for pre-institution mediation which is a statutory requirement under the Commercial Courts Act, 2015 prior to instituting a commercial civil suit in the court. In the said mediation process, the parties reached a consensus that the same will

be dismissed and no suit will be filed considering the good relations between the parties and the settled accounts. However, soon, the intentions of the Applicant turned malafide. The malice on part of the Petitioner was learnt by the Respondent only when the Respondent was served with the summons in the pending civil suit bearing No. CS(COMM) No. 1681 of 2020 in 2020.

10. It is submitted that the mandatory Demand Notice under Section 8 of IBC was never served upon the Respondent. It is submitted that apart from the forged and fabricated postal record, the Petitioner has neither served the said notice under Section 8 of IBC by way of email or by way of courier or dasti. The captioned petition is also faulty for non-compliance of Section 9(3)(c), 9(3)(d), and 9(3)(e) of IBC.

11. That the Operational Creditor through his rejoinder submitted that the cheque bearing no. 750972 dated 23.12.2016 for Rs. 50,00,000/- (Rupees Fifty Lakhs Only) drawn on SBI, Karol Bagh, Delhi, issued to discharge admitted financial liability, reported to have been dishonoured

on presentment vide Bank Return Memo dated 16.01.2017 with remarks "*Funds Insufficient*". Thereafter, statutory Notice dated 20.08.2018 u/S. 8 of IBC has been caused to be sent to the Respondent at the registered office of the Respondent which was duly served upon the Respondent at its registered address being maintained at present as well by the Respondent. However, the Respondent despite service of the said demand Notice, neither replied to the same nor even made the payment as per the demand Notice, in sheer abuse of the process of law.

12. Firstly, it is submitted that there is no "*Defendant No.1*" who has filed this Application and secondly the Application has been filed by the Applicant and not by any "*Defendant No.1*". Further it is denied that the Respondent is a going concern, since the Respondent has miserably failed to file alleged Income tax Returns, balance Sheets and annual returns with the RoC on the judicial record herein and in the absence of the same the version of the Respondent cannot be relied upon.

13. It is admitted by the Applicant that he has instituted recovery suit under the provisions of Commercial Courts Act,

2015 and Rules thereunder against the Respondent in November 2020 which is pending adjudication. It is further submitted herein that the Applicant by virtue of the said civil suit is seeking recovery of Rs. 84,02,740/- (Principal Rs.50,00,000/- & interest Rs. 34,02,740/- upto 17.01.2017) alongwith future interest against the Respondent. It has to be appreciated herein that the Applicant by virtue of the present Application is seeking initiation of CIRP proceedings against the Respondent for willful default and there is no bar in law. It is further submitted herein that the said CS(Comm.) No. 1681/2020 has been instituted after the issuance of Non-Starter Certificate dated 28.10.2020 when the Respondent failed to give its consent for participating in the mediation process before DLSA, District Central, Tis Hazari Court, Delhi despite affording numerous opportunities.

14. It is submitted that it is not true that no debt is due or accounts were ever settled for Rs.73,05,750/-only. Further, it is wrong to say at this stage that the quality of the goods supplied on 18.06.2014 and 03.07.2014 were of inferior quality or unusable or ever agreed mutually that the alleged bad deliveries would be settled with future transactions as

alleged. No alleged settlement of account took place in the year 2016 nor the Applicant ever agreed for giving up its claim of Rs.50,00,000/- as alleged.

15. We have heard Ld. Counsel for the applicant and perused the averments made in the application filed by the applicant. The relevant documents annexed with the submissions have been examined. The Respondent alleged that the instant petition is fault for non-compliance of section 9(3)(c), 9(3)(d) and 9(3)(e) of IBC. At this juncture, it will be advantageous to examine the requirement of Section 9(3)(c), 9(3)(d) and 9(3)(e) of IBC is reproduced below for better appreciation:

“9. Application for initiation of corporate insolvency resolution process by operational creditor.

(1).....

(2).....

(3) The operational creditor shall, along with the application furnish—

a)

b)

c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor if available; and

d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available: and

e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.”

16. A bare perusal of the aforesaid provisions shows that the section 9(3)(c) and 9(3)(d) of IBC provide an option to the Operation Creditor to comply with the provision of section 9(3)(c), 9(3)(d) of IBC, if the certificate from Financial Institution, or a record of non-payment by the Corporate Debtor issued by the Information utility is available. As regards compliance to the provision of section 9(3)(e) of IBC, we observe that the Operational Creditor has duly complied with the provision of section 9(3)(e) of the IBC by producing the dishonoured check bearing no. 750972 dated 23.12.2016 for Rs.50,00,000/- as returned by the SBI, Karol Bagh, Delhi with remarks of “Fund Insufficient”. The Pleadings and arguments throw-up the following three issues to be decided:

1. Whether Notice under Section 8(1) of IBC is duly served?
2. Whether the present application is filed within statutory limitation?
3. Whether there existed any disputes between parties before issue of notice under section 8(1) of the Code?

4. On going through the submissions made by the Learned Counsels for both the parties and on perusing the documents placed on record, it is observed that the Corporate Debtor has received the goods supplied by the Operational Creditor and is liable to pay for the same. Further, it is seen that section 8(1) notice was issued through speed post on 21.02.2018. The proof of dispatch and tracking report is filed, which shows that the same has been delivered on 24.08.2018, as shown below:

9/15/2018 Track Consignment

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Track Consignment

* Indicates a required field.

* Consignment Number

Booked At	Booked On	Destination Pincode	Tariff	Article Type	Delivery Location	Delivered On
A F Rajokari SO	21/08/2018 11:43:50	110051	29.50	Speed Post	Krishna Nagar HO	24/08/2018 19:15:27

Event Details For : ED066717692IN Current Status : Item Delivered

Date	Time	Office	Event
24/08/2018	19:15:27	Krishna Nagar HO	Item Delivered
24/08/2018	08:01:24	Krishna Nagar HO	Out for Delivery
23/08/2018	13:35:15	Krishna Nagar HO	Item Received
21/08/2018	11:43:50	A F Rajokari SO	Item Booked

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Track Consignment

* Indicates a required field.

* Consignment Number

Booked At	Booked On	Destination Pincode	Tariff	Article Type	Delivery Location	Delivered On
A F Rajokani SO	21/08/2018 11:43:50	110005	29.50	Speed Post	Karol Bagh SO	24/08/2018 20:28:41

Event Details For : ED066717715IN Current Status : Item Delivered

Date	Time	Office	Event
24/08/2018	20:28:41	Karol Bagh SO	Item Delivered
24/08/2018	12:55:53	Karol Bagh SO	Out for Delivery
24/08/2018	08:15:56	Karol Bagh SO	Item Received
21/08/2018	11:43:50	A F Rajokani SO	Item Booked

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17. Therefore, in view of proof of delivery of section 8(1) notice in the form of the India post tracking report, the first issue is answered in favour of the Applicant.

18. It is also observed that the date of default is to be taken as 23.12.2016, that is, the date of the last cheque issued which was dishonoured, and the present application is filed on 20.12.2019. Hence the, instant application is not time barred and filed within the period of limitation. The second issue is, therefore, decided in favor of Applicant and against the Corporate Debtor

19. As to the third issue in hand with respect to pre-existence of dispute as alleged by the Corporate Debtor in the reply that the Applicant has instituted recovery suit under the provision of the Commercial Court, 2015, we would like to refer to the judgment of the **Hon`ble NCLAT in Sudhi Sachdeva Vs. APPL Industries Ltd. Company Appeal (AT) (Insolvency) No. 623 of 2018 dated 13.11.2018** wherein it was held that

“In the present case, it is not in dispute that there is a debt payable to the Operational Creditor and default on the part of the Corporate Debtor. The pendency of the case under Section 138/441 of the Negotiable Instruments Act, 1881, even if accepted as recovery proceeding, it cannot be held to be a dispute pending before a court of law. Thereby we hold that the pendency of the case under Section 138/441 of Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute.”

20. The very fact that the recovery proceedings were initiated by the Applicant, does not signify a dispute about existence of ‘debt’ or ‘default’. A dispute has to be raised by the Corporate Debtor to be considered as such. No such dispute has been

initiated by the Corporate Debtor prior to the issue of notice under section 8 of the Code.

21. Further, NCLT Ahmedabad Bench (Court 1) in **Raghuvir Buildcon Private Limited Vs. Ketan Construction Limited [2020]**, defined the dispute that it can be said that a threshold or stage is to be crossed to convert a difference/disagreement into dispute. In other words, normally commercial/ legal differences per se are not dispute unless such differences are ascertained into a claim on which both the parties have opposite /different views and want to settle the same through some legal process or otherwise. Thus, in our view, routine correspondence in commercial relationship cannot automatically or necessarily be considered and admitted as dispute unless such stage is reached.

22. Having regard to the conspectus of facts of the present case and the judgments cited (supra), this Adjudicating Authority is of the considered view that the Corporate Debtor is in default of payment of the outstanding operational debt owed to the applicant and the mandatory requirements as prescribed under Section 9(5) of the Code, 2016 are satisfied.

23. In view of the above, the present company application (C.P. No. (IB)- 46 (ND)/2020) stands admitted and the CIRP is hereby initiated against Soni Commercial Enterprises Private Limited.

24. The Operational Creditor has not proposed any name of resolution professional. Therefore, this Adjudicating Authority appoints Kapil Aggarwal as the Insolvency Resolution Professional (IRP) of the Corporate Debtor from the available list of panel of resolution professionals as maintained by IBBI and communicated to NCLT vide its letter No IP-12011/1/2020-IBBI dated 04.07.2023. The registration number of the IRP being IBBI/IPA-001/IPP-02297/2020-2021/13440 and email id kapil_gsp@yahoo.com

25. We direct the applicant to deposit with IRP a sum of Rs.2 lacs to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor.

26. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(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;

(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.”

(e)The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.”

27. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations.

28. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under section 19 of the IBC to extend every assistance and cooperation to the Interim Resolution Professional

as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'.

29. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Let copy of the order be served to the parties.

Sd/-

(DR. BINOD KUMAR SINHA)

MEMBER (TECHNICAL)

Sd/-

(SHRI P.S.N. PRASAD)

MEMBER (JUDICIAL)