

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)

CP (IB) No.131/BB/2021
U/s. 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

Mr. Maulik Kiritbhai Shah
Proprietor of MK Enterprises
Address: 401, Aarohi Complex,
Vijay Cross Road, Ahmedabad.

.... Petitioner/Operational Creditor

V/s

United Telecoms Limited
CIN: U32301KA1986PLC007800
Registered Office: 18A/19, Doddanekundi Industrial area,
Mahadevapura Post, Whitefield,
Bangalore, Karnataka 560048

.... Respondent/Corporate Debtor

Order delivered on: 25.05.2023

Coram: 1. Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)
2. Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Shri. Saji P John

For the Respondent : Shri Mahesh Chowdhary

O R D E R

Per: T.Krishnavalli, Member (Judicial)

1. The present petition is filed on 09.11.2021 under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w.

CP (IB) No.131/BB/2021

Rule 6 of the I&B (Application to Adjudicating Authority) Rules 2016, by Mr. Maulik Kiritbhai Shah, Proprietor of MK Enterprises (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process against M/s. United Telecoms Limited (hereinafter referred as 'Corporate Debtor/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. **8,46,32,553/-** (Rupees Eight Crore Forty Six Lac Thirty Two Thousand Five Hundred and Fifty Three) as on 31.01.2021 is remaining due and payable along with the running interest at the rate of 15% per annum on commercial rate of interest.

2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner are as follows:

1. The Operational Creditor was rendering the services of Business development for Goa Broadband Network and SWAN of other states band network project for the Corporate Debtor and rendering business development services. The Corporate Debtor is a company registered under the companies Act, 1956, and is engaged in the business of manufacturing televisions, radio receivers, broadband distribution, sound and video recording or reproducing apparatus and associated goods.

2. It is submitted that on 10.09.2005, Memorandum of Understanding made and entered between Corporate Debtor and Operational Creditor and it was unequivocally agreed that the Operational Creditor shall be entitled for 1% of the Total Project Value in case of successfully getting the SWAN Project. The amount was payable after receipt of the confirmed business.

3. It is further submitted that the said project was duly completed and the Operational Creditor was entitled as per the MOU for its commission at 1% of the Total Project Value. An amount of Rs. **8,46,32,553/-** (Rupees Eight Crore Forty Six Lac Thirty Two Thousand Five Hundred and Fifty Three) is remaining due and

payable along with the running interest at the rate of 15% per annum on commercial rate of interest.

4. It is submitted that the outstanding payment as agreed was Rs. 2,80,00,000/- principal and part payments of Rs. 56,18,000/- was paid to the Operational Creditor by the Corporate Debtor on 31.05.2014 and another part payment of Rs. 15,00,000/- on 19.10.2017, Rs. 25,00,000/- on 10.01.2019, Rs.18,00,000/- on 29.03.2019, Rs. 10,00,000/- on 20.04.2019, Rs. 10,00,000/- on 20.04.2019, Rs. 43,20,000/- on 25.04.2019 and Rs. 23,20,000/- on 07.06.2019 and after giving credit, along with running interest at the rate of 15% per annum being commercial rate of interest an amount of Rs. 7,66,90,553/- become due and payable by the Corporate Debtor to the Operational Creditor as on 31.01.2021.

5. It is submitted that the Operational Creditor made various communication and continuous persuasions for payment but of no avail. The Communication between Operational Creditor and Corporate Debtor via mail and letter are detailed at Para 3-4 of the Petition. The Operational Creditor issued statutory demand notice dated 24.08.2018 claiming an amount of Rs. 7,48,72,688/- wherein it was categorically mentioned that, last payment of Rs. 15,00,000/- came to be received on 19.10.2017 and the MOU as well as correspondence and statement of ledger account was produced with the earlier statutory demand notice. Upon receipt of the Demand Notice the Corporate Debtor approached the Operational Creditor for settlement and made part payments. Accordingly a Settlement Agreement was entered between the parties and Cheques were given to ensure that the entire payment be cleared in installments. Nevertheless, the Corporate Debtor did not honor the Cheques or Settlement Agreement apart from making few part payments.

6. The Operational Creditor was left with no other alternative but to issue the statutory Demand Notice. Thus a Demand Notice dated 12.02.2021 was issued and the same was received by Corporate Debtor on 11.03.2021. The Corporate Debtor has not replied to the same.

7. The financial records of the Corporate Debtor shows that the company is under loss and appears that they are not able to pay their debts in full. As per the search taken from the MCA of the Corporate Debtor, the Corporate Debtor has not filed return after 2016. It is further found that the Corporate Debtor has availed various facilities from the banks and the charges are created on the same. That the Corporate Debtor has committed default in clearing the dues of the Operational Creditor and hence the present Petition.

3. The matter was reserved for orders and both parties were asked to file written submissions. The petitioner filed written submission vide D.No. 1278 dated 06.03.2023 stating that it was agreed unequivocally that the Operational Creditor shall be entitled to receive 1% of the Total Project Value upon getting the "SWAN" project. The Corporate Debtor did not make any payment to the Operational Creditor even after continuous persuasion. Further, after issuing of demand notice, the corporate debtor approached the petitioner and entered into settlement agreement. Later, the corporate debtor issued the cheques which is dishonoured and the actions were taken against section 138 of NI, Act.
4. The respondent filed written submission vide D.No. 1265 dated 03.03.2023 and stated that there existed a dispute between the parties for dishonoring of cheques and the amount claimed. Further an amount of Rs. 2,75,58,000/- has admittedly been paid by the Respondent as against the principal amount of Rs. 2,80,00,000/- leaving an amount of Rs. 4,42,000/- only to be paid; thus the threshold is not met. It is noticed from the petitioner at Para-4 and 5 that the principal was clearly Rs. 2,80,00,000/- to which interest is at 15% amounting to Rs. 7,66,90,553/- was calculated as on 31.01.2021. The same amount of Principal was also mentioned in Form 5, Part – IV also. Thus the threshold requirement is not met. It is further stated that the settlement agreement dated 01.11.2018 is not stamped or authorised, and the applicant does not have the locus standi since the applicant has not provide any goods or service to the respondent.

5. We have considered the pleadings and material available on record. The Primary issue for consideration is whether the minimum threshold for filing Petition under section 9 is met or not. In this connection, it is pertinent to refer to the recent orders of Hon'ble NCLAT Principal Bench, New Delhi in the matter of *"Permal Wallace Pvt. Ltd vs Narbada Forest Industries Pvt. Ltd, in Company Appeal (AT)(Ins) No. 36 of 2023* dated 17.01.2023, in which it is held that *"5. We are of the view that Adjudicating Authority did not commit any error in rejecting Section 9 Application. It has been laid down by the Hon'ble Supreme Court in "Swiss Ribbon Pvt. Ltd. Vs. Union of India" (2019) 4 SCC 17, IBC is not a recovery proceeding and the Application which has been filed by the appellant in the present case is only the application for recovery of balance amount of the interest and application was not filed for resolution of any insolvency of the Corporate Debtor. We are of the view that no error has been committed by the Adjudicating Authority in rejecting Section 9 Application filed by the Appellant. There is no merit in the Appeal, the Appeal is dismissed."* Further, in the matter of *Rohit Motawat v Madhu Sharma, Company Appeal (AT)(Ins) No. 1152 of 2022* dated 03.02.2023 in which it was held that *"the Adjudicating Authority has erred in not looking into the facts that the principal amount has entirely been paid and the issue was only regarding to interest for which the application under section 9 of the code was not maintainable as the spirit of the legislation of the code is for 'resolution of debt' and not for recovery. "*
6. It is observed by this Tribunal that as per Part IV of Form No.5 the Amount in default mentioned was Rs. 8,46,32,553/- as on 31.01.2021 and payable along with running interest at the rate of 15% p.a on commercial rate of interest. It is discussed above that the corporate debtor has paid the amount of Rs. 2,75,58,000/- out of the principal amount of Rs. 2,80,00,000/- which is admitted by the petitioner in their application. The date of default as per Form – V of the application is stated to be the date where the corporate debtor made the last payment i.e., on 07.06.2019. Further, on perusal of the documents produced it is observed that Clause 1 of the MOU dated 10.09.2005,

between the Petitioner and Respondent provides that the first party agrees to pay the second party an amount equivalent to 1% of the Total Project Value in case of successfully getting the SWAN project in the following manner: 0.25% of project value after signing of this agreement, and 0.25% of project value from the 1st, 2nd and 3rd quarterly payment made by the respective Government to the corporate debtor. It is seen from the agreement, the parties signed it without mentioning charging of any interest as it was claimed in the application. Further, the Settlement agreement relied upon by the petitioner, is on a stamp paper dated 26.10.2018 (signed on 01.11.2018) wherein the corporate debtor undertakes to make the residual payment on or before 31st March 2018. It therefore cannot be relied upon; since the dates mentioned for the payment in the agreement is antedated to the date of the stamp paper. The respondent has also contended that the same is unstamped and unregistered.

7. In view of the facts and circumstances and in light of the judgments of Hon'ble NCLAT stated supra this Tribunal is of the considered opinion that the present petition is filed for recovery of interest amount which is not maintainable under section 9 of the code.
8. Accordingly, this Tribunal holds that this Petition is not a fit case for admission. Therefore, the instant petition **CP (IB) No. 131/BB/2021** is hereby dismissed. However, this order shall not preclude the petitioner from pursuing other remedies in accordance with law, if so advised. No order as to costs.

-Sd/-

MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

-Sd/-

T. KRISHNAVALLI
MEMBER (JUDICIAL)