

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

CP (IB)/1303/MB/2017

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

Mr. Deepak Kumar Dash, age 46 years, having address at Santhasara, PO-Santhapur, PS-Gondia, District-Dhenkanal, Orissa-759016.

..... **Applicant/ Operational
Creditor**

Versus

Gammon India Limited, having its registered office at: - Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai 400025.

.....**Corporate Debtor**

Order Delivered on :- 09.11.2023

Coram:

Mr. Anil Raj Chellan
Member (Technical)

Mr. Kuldip Kumar Kareer
Member (Judicial)

Appearances:

For the Operational Creditor: Adv. Mr. Reshant Shah i/b Lex Conseiller.

For the Corporate Debtor : Adv. P.G. Sabnis a/w Adv. Pradeep Jain.

ORDER

Per: - Coram.

1. This Company petition is filed by **Mr. Deepak Kumar Dash**, an adult Indian Individual (hereinafter referred to as "**Operational Creditor**") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Gammon India Limited** (hereinafter referred to as "**Corporate Debtor**") under Section 9 of the Insolvency and Bankruptcy code, 2016 (hereinafter called "Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The Company Petition was filed on 24.06.2017 claiming an amount to be in **default** of Rs.59,62,507/- (Rupees Fifty-Nine Lakhs, Sixty-Two Thousand, Five Hundred and Seven Only) as on 08/11/2015 and in addition, an interest computed at the rate of 18% p.a. from 08/11/2015 to 07/06/2017 coming to INR 16,99,315/-, thereby aggregating the claim to **INR 76,61,822/-** (Rupees Seventy-Six Lakhs, Sixty One Thousand, Eight Hundred and Eighty Two Only).

3. The details of the transactions leading to the filing of this Application as averred by the Operational Creditor in the application are as follows:
- a) The Operational Creditor is an Individual and a registered Civil Contractor and Labour Supplier. The Corporate Debtor is a Public Limited Company engaged in the business and activities of civil engineering, design and construction. The Operational Creditor was awarded work by the Corporate Debtor of its project of construction of Chennai Metro Rail Project. Accordingly, the Operational Creditor as per the work order, supplied labour/work force to the Corporate Debtor from Orissa. As such, as per the work order, the Operational Creditor became entitled to payment as agreed upon between the parties herein and accordingly, the invoices were raised for the work done.
 - b) The Corporate Debtor retained 5% amount towards retention money as per the work order, which money is also lying with the Corporate Debtor and the same is to be refunded upon the completion of work. Since the Operational Creditor has completed the work as per the requirements, the Corporate Debtor is under obligation to refund the retention money to the Operational Creditor. In admission of its liability, the Corporate Debtor issued a confirmation letter on 29th September, 2015 thereby confirming the amount payable to the Corporate Debtor as under: 1.) INR 38,07,435/- (Rupees Thirty-Eight Lakhs, Seven Thousand, Four Hundred and Thirty-Five Only) towards the Running Account bills; and 2.) INR 25,75,950/- (Rupees Twenty-Five Lakhs, Seventy-Five Thousand, Nine Hundred and Fifty Only) towards the Retention Money. The total principal, thus,

aggregates to INR 63,83,385/- (Rupees Sixty-Three Lakhs, Eighty-Three Thousand, Three Hundred and Eighty-Five Only). The Corporate Debtor made part payment of INR 4,20,878/- towards the amount due thereby leaving a balance of INR 59,62,507/- (Rupees Fifty-Nine Lakhs, Sixty-Two Thousand, Five Hundred and Seven Only) and agreed to pay the balance amount as also refund the retention money to the Operational Creditor.

- c) Despite repeated requests and reminders by the Operational Creditor to clear the dues, the Corporate Debtor only kept on assuring but failed to make payments. Therefore, the Operational Creditor through his Advocate addressed a winding-up Notice dated 16/09/2016 bearing Ref. No. LC/BRF No./2016-2017/1047 and the same was duly received by the Corporate Debtor despite which the Corporate Debtor failed to make the payment. After the Insolvency and Bankruptcy Code, 2016 coming into force, the Operational Creditor sent another notice to the Corporate Debtor being the Notice dated 08/06/2017 bearing Ref. No. LC/BRF No./2017-2018/1188 and the same too was duly received by the Corporate Debtor despite which the Corporate Debtor has yet again failed to make the payment. Hence, this Petition.

4. Reply of the Corporate Debtor in brief:

- a. The Corporate Debtor was awarded contractual work by M/s. Chennai Metro Rail Limited for carrying out construction of three stations on the underground metro being developed for the city of Chennai, being 'Government Estate', 'LIC' and 'Thousand Lights' as well as the construction of twin bored

tunnels between the stations. Unfortunately, the said contract was terminated on 13th July, 2015.

- b. The Operational Creditor had issued a Notice u/s 8 of the Code. The Operational Creditor has not specified in the Notice the Form under which it is being issued. Under Section 8 read with Rule 5(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Demand Notice has to be issued in Form 3 or it is to be attached to the invoice demanding payment in Form 4. However, the Demand Notice issued by the Operational Creditor is non-compliant with Form 4 as no invoices have been attached to it. Also, the Demand Notice issued by the Operational Creditor is non-compliant with the requirements of Form 3 as it has failed to mention the details of transaction on account of which the debt fell due, the date on which the default occurred and the workings for computation of default in tabular form as required under the rules. In view thereof, the pre-requisite for filing the above Application u/s 9 of the Code cannot be said to have been complied with by the Applicant and therefore, the Application is not maintainable in law and deserves to be rejected on this ground alone.
- c. The Operational Creditor has not annexed any invoice issued against the Work Orders to substantiate his claim and also failed to show that the debt is due and subsisting. The Operational Creditor has also not specified in the Application, the date on which the debt fell due. Therefore, no cause of action has arisen to file this application. In the absence of these details, there is nothing on record, save and except the mere

statements in regard to the alleged claim, to substantiate the claim of the Operational Creditor against the Corporate Debtor. Hence, the instant Application deserves to be dismissed with cost.

- d. The Operational Creditor has placed reliance only on undated letter as an alleged proof of admission of liability by the Corporate Debtor. The Corporate Debtor submits that the said undated letter cannot be said to be a conclusive proof of admission of liability as it is undated, unclear and ambiguous since it and also it is subject to the condition that the said letter is subject to the clearance of the Stores, Head Office and Audit Department. The Operational Creditor has failed to show that the aforesaid condition has been fulfilled. Hence, the said undated letter cannot be relied upon. Also, oral evidence needs to be adduced to prove the details of the execution of undated letter. As the proceedings before the Adjudicating Authority are summary in nature, the present application requiring the proof of execution of document by way of oral evidence is not maintainable. The contract of the Corporate Debtor was terminated on 13th July, 2015 and no contractual work was carried out by the Corporate Debtor beyond 13th July, 2015. It is surprising that the undated letter mentions the work done as on 29th September, 2015, which is beyond the date of termination when no contract work was carried out. This, therefore, creates a doubt in respect of the genuineness of the undated letter and requires extraneous evidence to prove the same.
- e. During the course of hearing the above-captioned Application, upon the Tribunal inquiring about the existence of the other

relevant documents i.e. work order, invoices, etc.; the Advocate for the Operational Creditor orally submitted that due to floods in Chennai, the other documents except the undated letter were destroyed. It is pertinent to note that the Operational Creditor has failed to plead the same in its above Application and therefore, the Corporate Debtor submits that the justification now pleaded by the Operational Creditor is an afterthought.

- f. The Corporate Debtor has denied that the alleged undated letter has been issued by it to the Operational Creditor. The Corporate Debtor also denies that it has admitted an amount of INR 38,07,435/- towards running account bill and INR 25,75,950/- towards the retention amount as alleged. Further, the Corporate Debtor also denies that the part payment of INR 4,20,878/- had reduced the amount outstanding to INR 59,62,507/-. There is no specific agreement or a clause in the agreement entered into between the parties with respect to the interest on delayed payment. Therefore, the averment on levying the interest and issuing debit notes is wholly illegal and therefore, the same cannot constitute debt under the Code.

5. Submissions in brief by the Operational Creditor in rejoinder

- a. The Operational Creditor in his rejoinder has stated that the Demand Notice sent to the Corporate Debtor contains all the materials as required in law and form is mere directory. Further, it is well settled that the Courts/Tribunal should be known for doing justice and not for discarding any Application/Proceedings on the grounds of technicality. The Corporate Debtor is merely raising technical objections to avoid

the consequences of CIRP. At no point of time when the notice was sent to and received by the Corporate Debtor, the debt has been denied or disputed.

- b. Since the documents of the Operational Creditor pertaining to the transactions with the Corporate Debtor were washed away in floods in Chennai in the year 2015, the Operational Creditor has relied upon the Balance Confirmation letter issued by the Corporate Debtor admitting its liability.
- c. The contention raised by the Corporate Debtor that the confirmation letter was issued subject to the clearance of the Stores, Head Office and Audit Department of the Corporate Debtor is an afterthought and further, till date, no evidence is produced by the Corporate Debtor to refute the claim of the Operational Creditor, which speaks volume and shows the malafide intent of the Corporate Debtor.

ANALYSIS AND FINDINGS

6. We have heard the learned counsel for both the parties and have perused the material available on record.
7. The Counsel for the Operational Creditor has submitted that the Corporate Debtor has committed a default of INR 76,61,822/- (Rupees Seventy-Six Lakhs, Sixty-One Thousand, Eight Hundred and Eighty-Two Only) in respect of the invoices raised against the Work Orders for the work done by the Operational Creditor of supplying the labour force to the Corporate Debtor for its Chennai Metro Rail Project. In order to

prove the existence of operational debt due and payable by the Corporate Debtor, the Counsel for the Operational Creditor has drawn our attention to the Balance Confirmation (annexed as Annexure 'II' to the Petition) allegedly issued by the Corporate Debtor admitting its liability INR 38,07,435/- (Rupees Thirty-Eight Lakhs, Seven Thousand, Four Hundred and Thirty-Five Only) towards the Running Account bills; and INR 25,75,950/- (Rupees Twenty-Five Lakhs, Seventy-Five Thousand, Nine Hundred and Fifty Only) towards the Retention Money in respect of the work done by the Operational Creditor as on 29.09.2015 at Chennai Metro Rail Project. However, the Corporate Debtor has vehemently denied the above-stated balance confirmation in toto and has doubted its genuineness on two grounds namely:

(i) that the letter showing balance confirmation by the Corporate Debtor is undated; and

(ii) The contract of the Corporate Debtor was terminated on 13th July, 2015 and no contractual work was carried out by the Corporate Debtor beyond 13th July, 2015. It is surprising that the undated letter mentions the work done as on 29th September, 2015, which is beyond the date of termination when no contract work was carried out. This, therefore, in the opinion of Corporate Debtor, creates a doubt as to the genuineness of the undated letter.

8. On perusal of the Balance Confirmation Letter annexed at Annexure 'II' to the Application, we find that it is undated and the said Balance Confirmation is subject to the Stores & HO, CCU clearance. No proof has been furnished by the Operational Creditor to show that the above-referred Balance Confirmation had been cleared/approved by the Stores & HO, CCU. Even if the Balance Confirmation is taken

into consideration, it indicates that the liability of INR 63,83,385/- was acknowledged by the Corporate Debtor as on 29.09.2015. It is well settled that an acknowledgement, as per Sec.18 of the Limitation Act, 1963 has to be made within the prescribed period i.e. before the expiration of the limitation period prescribed under the Schedule to the Limitation Act. However, in this case, since the Operational Creditor has not placed on record any invoice, work order or any contract to prove the terms and conditions of payment and further as to when the operational debt became due, it would be an arduous task to ascertain as to exactly when the claim amount became due. In the absence of documents like invoices, etc., it is not at all established from the record produced by the Operational Creditor that there has been any operational debt becoming due within a period of three years preceding the Balance Confirmation letter as on 29.09.2015.

9. The Counsel for the Applicant/Petitioner has also drawn our attention to the payment of INR 4,20,878/- received by the Operational Creditor from the Corporate Debtor to show that the debt was due and was within limitation. However, even the said payment does not help the cause of the Petitioner. A fresh period of limitation u/s 19 of the Limitation Act, 1963 is to be computed from the time when the payment was made provided that such payment was made before the expiration of the prescribed period (i.e. 3 years) by the person liable to pay the debt. As we are unable to ascertain from the records as to when the debt became due and payable, the acknowledgment by way of part payment of INR 4,20,000/- is hardly of any consequence to establish the existence of debt and further that the Petition is within time.

10. The Counsel for the Corporate Debtor has argued that no work order or invoice has been annexed by the Operational Creditor in his petition. In the rejoinder affidavit, the Operational Creditor had stated that there were heavy floods in Chennai during the year 2015 and almost all documents were washed away. Hence, no invoices or work orders could be brought on record and the Operational Creditor has solely relied upon the Balance Confirmation, as discussed above. In this regard, we find that the fact that the documents and records of the Operational Creditor in respect of the work done for the Corporate Debtor in Chennai were washed away in deluge was neither pleaded in the application except in the rejoinder. Further, the Operational Creditor has not brought any document on record to show that the documents were washed away in the floods. Hence, we are unable to accept this plea and the possibility of it being an afterthought cannot be ruled out.

11. We also find that the Demand Notice dated 08th June, 2017 issued by the Operational Creditor to the Corporate Debtor u/s 8 of the Code is not in the prescribed Form 3 or Form 4. Under Rule 5(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, an Operational Creditor is required to deliver to the Corporate Debtor either a Demand Notice in Form 3 or a Copy of an Invoice demanding payment attached to a notice in Form 4. After perusing the copy of Notice u/s 8 dated 08th June, 2017 (annexed by the Petitioner at Annexure 'IV' to the Petition), we find that the said Notice has failed to substantially comply with the requirements of Form 3/Form 4 under Rule 5(1) of the Insolvency

and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 as that the said Notice does not give the details of transactions on account of which the debt fell due, the date from which such debt fell due and the date of default. Further, as stated above, no invoice or work order has been annexed to the said Notice. The same particulars are missing in the Petition at Part IV also. Therefore, we are of the considered view that the Demand Notice dated 08th June, 2017 issued by the Operational Creditor to the Corporate Debtor u/s 8 of the Code is also defective and invalid and the present Application u/s 9 of the Code is liable to fail for want of a valid demand notice.

13. The Counsel for the Petitioner has relied upon the decision of Hon'ble NCLT Chennai in Order dated 21.04.2017 in the matter of **M/s. Alcon Laboratories (India) Private Limited v/s M/s. Vasan Health Care Private Limited in CA/1/IB/2017**. In the above-referred matter, the Hon'ble NCLT had held, inter-alia, as follows: *“The objection of the corporate debtor is that the statutory notice was to be sent directly by the operational creditor but this objection is not sustainable for the reason that Form 3 itself provides for the signature of the persons authorised to act on behalf of the operational creditor. Therefore, the operational creditor can authorise any person to send the statutory notice on its behalf. As to the objection raised with regard to the application not being in Form prescribed, it is seen that all the information required are contained in the application filed under Section 9 of IBC 2016.”* However, the law laid down in the cited case cannot be applied to the facts and circumstances of the present case. In the above-referred matter, all the information required was contained in the Application, whereas in

the instant case, the Demand Notice fails to give mandatory information such as the details of transactions on account of which the debt fell due, the date from which such debt fell due and the date of default. It is a settled law that the demand notice issued by an Advocate is also valid so long as it meets the requirements of Form 3 and/or Form 4 as prescribed under Section 8 read with Rule 5(1)(a) and (b) respectively of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. However, as stated above, in this case the demand notice falls short of the requirements of law.

14. As a result of above discussions, we hold that the Petitioner has failed to establish the existence of operational debt and its default by the Corporate Debtor and further that the petition is filed within limitation. Therefore, this Petition fails and is hereby **dismissed** with no order as to costs.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)