

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH
KOLKATA**

**I.A (IBC) No.1056/KB/2021
IN
C.P.(IB)No.834/2018**

In the matter of:

HYTERA COMMUNICATIONS CORPORATION LIMITED.

... Operational Creditor

Versus

In the matter of:

**SIMOCO TELECOMMUNICATIONS (SOUTH ASIA) LIMITED, CIN:
U32109WB1979PLC031942**

...Corporate Debtor

Date of hearing :16/06/2022

Order Pronounced on : 12/07/2022

Coram:

***Mr. Rohit Kapoor, Member (Judicial)*
*Mr. Harish Chander Suri, Member (Technical)***

Counsels appeared through Video Conference

- | | |
|------------------------------------|----------------------------|
| 1. Mr. Rahul Auddy, Adv. |] For Operational Creditor |
| 1. Mr. Joy Saha, Sr. Adv. |] For Corporate Debtor |
| 2. Mr. Siddhartha Chatterjee, Adv. |] |
| 3. Mr. Abir Lal Ghosh, Adv. |] |

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This application has been filed on behalf of the Corporate Debtor praying for recalling of order dated 30th August, 2021, which is reproduced as under:-

“ Ld. Counsel on both sides present.

It has been submitted across the Bar that the Corporate Debtor is ready and willing to make payment of USD 621348.05 which is due and payable to the Operational Creditor, subject to clearance from Reserve Bank of India which is being pursued by all available legal means. We record these submissions made by the Ld. Counsel for the Corporate Debtor, which is made upon specific instructions to this effect.

We feel that the interest of justice would be served if we direct the Corporate Debtor to keep Indian rupee equivalent to this amount in fixed deposit and receipt in this regard to be handed over to the Registry of this Tribunal to establish bona fides of the Corporate Debtor. The tenure of the Fixed Deposit shall be for a period of six months in the first instance.

Ld. Counsel for the Corporate Debtor seeks three weeks to make deposit. At request and considering the circumstances and also the fact that the Corporate Debtor is stated to be an MSME, three weeks' time is granted. FDRs in this regard to be submitted to the Joint Registrar of this Tribunal on or before 30.09.2021.

This arrangement is acceptable to the Operational Creditor as submitted by the Ld. Counsel appearing on its behalf.

List the matter on 05.10.2021.”

3. It is submitted that on August 30, 2021, when the matter was taken up for hearing by this Adjudicating Authority, it was submitted on behalf of the corporate debtor that it was ready and willing to make payment of a sum of USD 621348.05 subject to clearance from RBI which was being pursued by all available legal means. This Adjudicating Authority directed the corporate

debtor to keep the Indian equivalent of USD 621348.05 in a fixed deposit for a period of 6 months and handover the receipt to the registry of this Adjudicating Authority to establish its bona fides. It is submitted by the corporate debtor that the aforesaid order was **not** made with the consent of the Corporate Debtor. It is stated that provisions of the 2016 Code does not authorize or empower this Adjudicating Authority to direct the corporate debtor to deposit any money with its Registry or otherwise to establish bona fides or for any other purpose. This Adjudicating Authority being a creature of statute derives its power from the statute and cannot act contrary thereto. The order dated August 30,2021, has been passed in excess of the jurisdiction vested in this Adjudicating Authority and is therefore, illegal and a nullity and is accordingly liable to be recalled and /or set aside.

4. It is submitted in this application that the aforesaid order impugned in this application was passed without taking into consideration the provisions of the Code, 2016 and without considering the principles embodied therein .

5. It is submitted that the mistake is self-evident and the Adjudicating Authority should correct the same and to pass such consequential orders so as to negate its effect. It is submitted that the Corporate Debtor has at all times been interested in making payment to the Operational Creditor. However, unless necessary approval is granted by the RBI, such payment in law cannot be made. It is stated that a sum of about Rs.10,75,85,808/- is receivable by the Corporate Debtor from various Government Agencies and /or instrumentalities like West Bengal Electronics Industry Development Corporation Limited, Kolkata Municipal Corporation, Guwahati Municipal Corporation and Karnataka State Electronics Development Corporation .

6. It is submitted by the Corporate Debtor /applicant that the said order may be recorded to prevent abuse of process of this Court.

7. It would be seen from the aforesaid order, that the said order was passed only on the submissions made by the Corporate Debtor that the

Corporate Debtor is ready and willing to make the payment of USD 621348.05 which is due and payable to the Operational Creditor subject to clearance from the RBI.

8. The next para *“We feel that the interest of justice would be served if we direct the Corporate Debtor to keep Indian rupee equivalent to this amount in fixed deposit and receipt in this regard to be handed over to the Registry of this Tribunal to establish bona fides of the Corporate Debtor. The tenure of the Fixed Deposit shall be for a period of six months in the first instance”* and the further order *“Ld. Counsel for the Corporate Debtor seeks three weeks to make deposit. At request and considering the circumstances and also the fact that the Corporate Debtor is stated to be an MSME, three weeks’ time is granted. FDRs in this regard to be submitted to the Joint Registrar of this Tribunal on or before 30.09.2021.*

This arrangement is acceptable to the Operational Creditor as submitted by the Ld. Counsel appearing on its behalf”.

9. The aforesaid order was passed in the very presence of both the counsel and on the joint submissions of the parties and this FDR was agreed to be made as temporary arrangement till the RBI granted its permission to the foreign remittance against the import dues, invoices, for which representations had been made by the Corporate Debtor.

10. There is hardly any change in the circumstances, no such permission has till now been granted by the Reserve Bank of India, Kolkata. A writ petition in this regard being WPA /13585/2021 was also filed by the Corporate Debtor/ Applicant before the Hon’ble Calcutta High Court and the Hon’ble High Court passed the following orders:-

“ The petitioner is aggrieved that the Reserve Bank of India is not considering its representation for permission for delayed foreign remittance against the import dues, invoices. The last of such representation was made on August 5,2021.

Despite service of notice, the Reserve Bank of India is not represented.

In that view of the matter, the Manager, Reserve Bank of India, Kolkata shall consider the representation of the petitioner dated August 5, 2021, in accordance with law within a period of

one month from date.

It is made absolutely clear that this Court has not, in any way, interfered with the proceedings before the National Company Law Tribunal where the petitioner is a party.

With the aforesaid observations, the writ petition is disposed of.

There shall be no order as to costs.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court”.

11. A peculiar situation has arisen in this matter when in a petition under section 9 of the Code, the Corporate Debtor had to make payment to the Operational Creditor for supply of the goods subject matter of this case, which was to be made in USD.

12. From the very beginning, the Corporate Debtor has admitted the receipt of goods and acknowledges the liability towards the Operational Creditor but due to the fact that based on the said settlement/consent terms, the corporate debtor through its letters March 13, 2019, and March 14, 2019, instructed its banker, Indian Overseas Bank having its branch office at Shreemani Market Branch, 204/1, Bidhan Sarani, Kolkata-700006, to remit a sum of USD 60000.00 and USD 43588.05 in favour of the operational creditor. Indian Overseas Bank through its letter dated March 15, 2019 bearing reference no. 275/2018-2019 informed that it has been advised by its Central Foreign Exchange Department that since the Bill of Entry relates to 2012, approval of the Reserve Bank of India is required for making the payments and such payment can only be made once approval of the Regional Office of the Reserve Bank of India is obtained. (Annexure-D).

13. It is submitted that on or about March 19, 2019, the Corporate Debtor made an application before the General Manager, Reserve Bank of India, Foreign Exchange Department, 15, Netaji Subhas Road, B.B.D Bagh, Kolkata -700001, seeking Reserve Bank of India's approval for delayed remittance against import invoices as had been advised by its Banker. (Annexure-E).

14. It is submitted that the Reserve Bank of India by its letter dated April

02, 2019, a Photostat copy whereof is enclosed as Annexure-F, responded to the aforesaid letter advising the Corporate Debtor to route its request through its banker and returned the said application. Based thereon, the Corporate Debtor by its letter dated April 09, 2014, instructed its banker to pursue the issue with the Reserve Bank of India for obtaining necessary approvals to make the foreign remittances. All relevant documents as had been requested by Indian Overseas Bank over telephonic discussions as well as in its letter dated May 31, 2019, were duly handed over, which has been recorded in the letters dated February 14, 2020, and March 16, 2020. (Annexure-G).

15. It is submitted that even after a lapse of a considerable period of time, approval from the Reserve Bank of India remained pending. Under such circumstances, on or about April 07, 2021, the CD once again wrote a letter to its banker requesting it to expedite the process of approval with the Reserve Bank of India. On the same day, another letter was addressed to the Reserve Bank of India requesting it to accord its approval to the delayed foreign remittance against import invoices. The aforesaid letters remain unanswered both by the banker and the Reserve Bank of India to this day. (Annexure-H).

16. It is submitted that in the meantime, owing to the non-adherence of the payment schedule agreed upon by the parties, the operational creditor filed an application being M.A. No. 48/KB/2020 before this Adjudicating Authority seeking revival of the company petition. This Adjudicating Authority hearing the parties was pleased to restore the said company petition upon recording that there were certain technical reasons which had prompted the filing of the miscellaneous application by its Order dated February 15, 2020.

17. It is submitted that since the Reserve Bank of India did not respond to the letters written by the corporate debtor nor did it accede to its request to grant necessary approval for the remittance of money in favour of the operational Creditor, the corporate debtor on or about August 05, 2021, has made a demand for justice before it. In the said letter the corporate debtor has elaborately explained the predicament faced by it at the hands of the

operational creditor before this Adjudicating Authority. In addition, thereto, the corporate debtor has once again supplied all the relevant documents to the Reserve Bank of India and has undertaken to render necessary assistance to expedite the process of grant of approval. On the self-same day, the corporate debtor has sent another letter to its banker requesting it to simultaneously pursue the matter with the Reserve Bank of India.

18. It is stated that the implications of a proceeding initiated within the meaning of Section 9 of the Insolvency and Bankruptcy Code, 2016 and an Order of admission passed thereon has serious and adverse implications on the business of the corporate debtor. Once an order of admission is passed, the existing management will be ousted and replaced by an Interim Resolution profession who will initiate the corporate insolvency resolution process. The corporate debtor is financially capable of making the payments contemplated under the consent terms dated February 02, 2019, and has at all relevant times been ready and willing to perform its obligations thereunder. However, owing to the pendency of the approval from the Reserve Bank of India, Indian Overseas Bank has not made the requisite payments. Under such circumstances, the corporate debtor for no fault of its own and for reasons which are beyond its control and in no manner attributable to it is in breach of the said consent terms, which has not only resulted in the restoration of the company petition but has prompted the operational creditor to seek an order of admission against it.

19. It is further stated that the breach of the settlement agreement is unintentional and entirely beyond the control of the corporate debtor. The corporate debtor has at all times diligently pursued the matter with its banker as the Reserve Bank of India has refused to entertain the application made by it directly and had advised it to route its request through Indian Overseas Bank. The corporate debtor has been advised by its advocates to approach the Hon'ble High Court at Calcutta under Article 226 of the Constitution of India seeking appropriate directions.

20. In view of the aforesaid circumstances explained by the Corporate Debtor, since it appears to be beyond the control of the Corporate Debtor to make the payment to the Operational Creditor in US Dollar, in spite of the fact that the Corporate Debtor approached the Hon'ble High Court and the Hon'ble High Court issued certain directions to the Reserve Bank of India, this appears to be a case which has to be considered by the Reserve Bank of India, following the directions of the Hon'ble High Court.

21. We, therefore, direct that the amount of interest bearing FDR as proposed by the Corporate Debtor itself through their counsel will be deposited and shall remain deposited in FDR because if and when the Reserve Bank of India grants necessary permission to remit the said foreign currency to the Operational Creditor, the said amount would immediately be utilized for the said purpose because it is an admitted liability which has to be liquidated as soon as the permission of Reserve Bank of India is granted. A consent order once passed cannot be recalled or rebutted by this Adjudicating Authority looking at the helplessness of the Corporate Debtor who is trying hard to get the requisite permission from the Reserve Bank of India and the genuine claim of the Operational Creditor who had supplied the goods and has a valid legal right to recover the said amount from the Corporate Debtor.

22. We direct the Corporate Debtor to make a deposit of the approximate conversion of USD in Indian Rupees and place the same with the Registry of this Court, within 60 days from this order.

23. This unusual situation that has arisen in this matter makes us wiser and prevents us from making any order of Corporate Insolvency Resolution Process against the Corporate Debtor because default has taken place but not due to the fault of the Corporate Debtor. The Corporate Debtor accepts and acknowledges the liability and is ready to make the payment but the only hurdle is the permission that has not been granted by the RBI for whatever reasons or formalities that are yet to be completed by the Corporate Debtor.

24. In view of the aforesaid directions, the orders passed on 30th August, 2021 sought to be recalled, cannot be recalled, and would stand modified as directed above.

25. I.A (IBC) No.1056/KB/2021, is disposed of.

26. 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 (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on this, the 12th day of July, 2022

PJ