**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**DIVISION BENCH, COURT NO. II**
**KOLKATA**

Company Petition (IB) No. 108/KB/2023

***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:**

**Sanjay Kumar Agarwal, Sole Proprietor of S.K. Earthmovers,** having their office at office 40, Kankulia Road, Ground Floor, Kolkata – 700029, West Bengal.

**… Applicant/ Operational Creditor.**

**Verses**

**Simplex Infrastructures Limited** [CIN: L45209WB1924PLC004969]

**… Respondent/ Corporate Debtor.**

**Date of Hearing: November 20, 2023.**
**Date of Pronouncement: November 30, 2023.**

**CORAM:**
**SMT. BIDISHA BANERJEE, MEMBER (JUDICIAL)**
**SHRI ARVIND DEVANATHAN, MEMBER (TECHNICAL)**

**Appearance:**
**For Operational Creditor: Shri Rishav Banerjee, Advocate.**
**For Corporate Debtor: Shri Snehasish Sen, Advocate.**

**O R D E R**

**Per Arvind Devanathan, Member (Technical):**

**1.** This Court is congregated through hybrid mode.

***Brief facts of the case:***

**2.** This instant application has been filed by one Sanjay Kumar Agarwal, Sole Proprietor of S.K. Earthmovers, hereinafter referred to as the Applicant/ the Operational Creditor (for brevity "OC") against **Simplex Infrastructures Limited** hereinafter referred to as the Respondent/ the Corporate Debtor (for brevity "CD") seeking direction from this Adjudicating Authority for initiating Corporate Insolvency Resolution Process (for brevity "CIR Process") under

Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity "I&B Code").

**3.** The Corporate Debtor had engaged the Operational Creditor for hiring construction machineries and equipment on monthly rent basis and on terms and conditions mutually agreed upon.

**4.** It is the submission of the Operational Creditor that services in the form renting of construction machineries and equipment have been rendered from time to time and invoices have been raised in respect of such services.

**5.** The payment of such invoices had been irregular, erratic and often partly paid after repeated remainders claims the Corporate Debtor.

**6.** As on date of filing the application the principal amount dues according to the Operational Creditor is Rs. 2,27,26,255/- (Rupees Two Crore Twenty-Seven Lakhs Twenty-Six Thousand Two Hundred Fifty-Five only). Since this payment was not forthcoming the Operational Creditor issued a demand notice under Section 8 of the IBC and the same was replied denying the payment on grounds mentioned in the reply. All the reasons mentioned by the Corporate Debtor in response to the Demand Notice under Section 8 of the I&B Code are disputed by the Operational Creditor and hence the Operational Creditor has filed this application seeking admission under Section 9 of I&B Code.

***Submission of the Learned Counsel for the applicant:***

**7.** Ld. Counsel for the applicant submits that the Corporate Debtor and Operational Creditor have been in business relationship from 2011. The Operational Creditor has been rendering pre-dominantly services of renting construction machineries/ equipment have been regularly raising invoices. Apart from renting services they have also rendered transportation services to the Corporate Debtor.

**8.** The Operational Creditor has enclosed copies of invoices in 'Annexure – B' to the Application. The copy of the ledger pertaining to the Corporate Debtor in his books to the reflecting the outstanding amount against the Corporate Debtor, has been attached.

**9.** The Operational Creditor has also enclosed bank statements reflecting of part payment from the Corporate Debtor and has attached the correspondence between the Corporate Debtor and Operational Creditor with regard to the transactions.

**10.** The copy of the statutory notice under Section 8 of the I&B Code along with the track-report for proving service annexed in 'Annexure – F' and a tabular representation showing the current outstanding amount and principal of Rs. 2,27,26,255/- (Rupees Two Crore Twenty-Seven Lakhs Twenty-Six Thousand Two Hundred Fifty-Five only) is annexed as 'Annexure – H' to the application.

**11.** Ld. Counsel for the Applicant submits that there is no correspondence prior to issue of Section 8 notice on any pre-existing dispute. It is contented that the Corporate Debtor has being paid on adhoc basis and, consequently, running account was mentioned in the books of Operational Creditor in respect of account of the Corporate Debtor.

**12.** Further, it is submitted that the invoices on which payment has not been made is beyond Section 10A period of the I&B Code.

**13.** Ld. Counsel for the applicant has referred to the email dated 08.11.2022 and 17.11.2022 indicating the outstanding amount as on that date.

**14.** Further, it is referred to a couple of more emails and the letter dated 04.11.2022 which gives details of invoices pending for payment as on 04.11.2022.

**15.** The Ld. Counsel for the Applicant has taken us through an email from the Corporate Debtor dated 18.10.2014 admitting the debt and agreeing to as per the schedule mentioned in the email.

**16.** Further, it has been taken through the affidavit filed under Section 9(3)(b) of the Insolvency and Bankruptcy Code, to state that there is no notice given by the Corporate Debtor to the Operational Creditor relating to any dispute existing or any suit or arbitration proceedings before the receipt of the notice.

**17.** Therefore, the Ld. Counsel for the Applicant has pleaded that the application may be allowed and admitted CIRP proceedings may be initiated against the Corporate Debtor.

***Submission of Ld. Counsel for the Corporate Debtor, per contra:***

**18.** Ld. Counsel for the Corporate Debtor submitted that the applicant has conveniently not relied on the work order executed between the parties.

**19.** As per the work orders payment will have to be made within 30 days from the date of the receipt of materials at the site of distinction upon submission of bills. It can be shown most of the payments have been made bill-wise not on an adhoc basis as claimed by the applicant and this is evident from the statement annexed to application at Pages 412 to 731 as Annexure "D".

**20.** It is also submitted that certain claims of the Operational Creditor are due during the period covered under Section 10(A) of the I&B Code and details of such invoices are contained at pages 41 and 42 of the reply affidavit to the application and the total amount in relation to those invoices is of Rs. 32,94,484/-.

**21.** He submits that there are pre-existing disputes and the Operational Creditor to overcome the time-barred claims, has claimed that its running account that account of the Corporate Debtor is as adhoc payment are made by the Corporate Debtor.

**22.** He submits that out of Rs. 2,27,26,255/- (Rupees Two Crore Twenty-Seven Lakhs Twenty-Six Thousand Two Hundred Fifty-Five only) a sum of Rs. 1,59,58,698/- is barred by limitation and the details of such invoices which are time barred are in 'Annexure – B' to the reply. If the time barred invoices and the invoices which are covered under Section 10(A) of the IBC are added then the threshold limit prescribed under IBC will not be met and, consequently, this application is not maintainable.

**23.** He further submitted that there is no agreement on the interest between the parties in any of the work orders executed between them and, therefore, the question of paying interest does not arise and, consequently, his entire claim for interest cannot be added to the principal amount.

**24.** It is further submitted that the Operational Creditor has not been able to show any document for legitimate claiming interest as overdue payment. However, he submits that certain bills are payable but those bills if taken into consideration will be far below the threshold limit.

***Analysis and Findings of this Adjudicating Authority:***

**25.** We find that the total amount claimed by the Operational Creditor from the Corporate Debtor is Rs. 5.96 crores out of which the interest amount of Rs. 3.68 crores.

**26.** In the absence of any agreement between the parties on interest we are of the view that the entire interest claim of the applicant cannot be considered for the purpose of calculating the claim amount with reference to the Section 9 application.

**27.** Therefore, we will have to restrict our invoices to the principal amount claimed to have been due from the Corporate Debtor amounting to Rs. 2.27 crore.

**28.** Out of this Rs. 2.27 crore, invoices which are due during the 10(A) period amount to Rs. 32,94,484/- and, therefore, if this amount is deducted from the balance sheet the principal amount due comes to Rs. 19,432,393/-.

**29.** Out of these invoices due starting from 30.06.2011 to 01.03.2018 is of Rs. 1,59,58,698/- the details of which are available in page 40 of the reply to the application and the same is barred by the limitation.

**30.** This time-barred claim raised by the respondent is disputed by the applicant stating that the respondent has been paying their dues on an adhoc basis and, consequently, the applicant has been maintaining a running account of the respondent in their books of account.

**31.** To this reliance was placed on the ledger mentioned by them in respect of the respondent and the same is in page no. 337 to 411 of the application.

**32.** On the other hand, relying on the work orders executed between the parties, the respondent submitted that payments have to be made within 30 days from the date of receipt of equipment, stock, and material at site bill wise and the respondent has been making payment bill-wise.

**33.** Reliance was also placed to 'Annexure – A' to the application made by the Applicant to demonstrate that in almost all the cases the payments have been made invoices-wise.

**34.** If certain invoices have not been paid, it is because of a deficiency in service. However, the respondent has not placed sufficient material to prove deficiency in service.

**35.** In any event, it is the claim of the respondent that invoices pertaining to 2011 to 2018 are clearly time-barred.

**36.** We find considerable force in the argument of the Ld. Counsel for the Respondent, the Applicant has not been able to conclusively prove that the invoices from 2011 to 2018 are not time-barred, maintaining running of the Corporate Debtor's account in its books does not make the claims to be live under the fact and circumstances of this present case.

**37.** The onerous is on the applicant to prove beyond a doubt that the claims made by the applicant are not time-barred. In this case, the same has not been discharged by the applicant, in the current case.

**38.** When that being the case if we deduct the time-barred claim of Rs. 1,59,58,698/-, the balance payable comes to Rs. 67,67,557/- which is not within the threshold limit prescribed under I&B Code. If we further deduct dues falling under the period as prescribed under Section 10A of the I&B Code, the threshold limit comes down even further.

**39.** Hence, we have no alternative but to dismiss the application as the same is not maintainable in view of our finding that the defaulted amount after deducting the time-barred claim and claims due during the Section 10A period is well below the threshold limit, prescribed under Section 4 of the I&B Code.

**40.** In terms of the view above, this application is dismissed.

**41.** No Cost.

**42.** Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

**Arvind Devanathan**
**Member (Technical)**

**Bidisha Banerjee**
**Member (Judicial)**

**This Order is signed on the 29th Day of November, 2023.**

Bose, R. K. [LRA]
AR_Steno