

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

CP (IB) No.99/BB/2023

U/s. 9 of the Insolvency and Bankruptcy Code, 2016
R/w Rule 6 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules 2016

IN THE MATTER OF:

IJM Concrete Products Private Limited,

Registered Office at:

H.No.3-71/NR, Plot No.71,

Kavuri Hills, Phase – II, Madhapur,

Hyderabad – 500 033.

... Petitioner/Operational Creditor

Versus

Expat Engineering India Limited,

Registered Office at:

Carlton Towers, A Wing, 3rd Floor,

Unit No. 301-314, No.1 Old Airport Road,

Bangalore- 560 008.

... Respondent/Corporate Debtor

Order delivered on: 31.01.2024

Coram:

Hon'ble Shri. K.Biswal, Member (Judicial)

Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Ms. S. Manjula Devi

For the Respondent : None

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present petition is filed on 20.02.2023 under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, by M/s **IJM Concrete Products Private Limited** (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process against M/s.

Expat Engineering India Limited (for brevity ‘Corporate Debtor/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. 1,79,76,153/- including principal amount and interest therein. As per Form 5, the Date of Default is Dt.24.08.2022.

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

- a) The Operational Creditor is in the business of supply of ready - mix concrete. The Corporate Debtor purchased the ready-mix concrete from the Operational Creditor. The supplies were made on the basis of running accounts and payments received were properly accounted. However, after giving credit to the payments made by the Corporate Debtor on various dates against the supplies to them, on reconciliation of books of accounts an accumulated amount was outstanding. The debt fell due on account of non-payment of invoices against the supply of ready-mix concrete to the Corporate Debtor.
- b) The Corporate Debtor had acknowledged the payment due as on 12th January, 2022 by giving confirmation of outstanding balances through email for the period 01.04.2021 till 12.01.2022 for a sum of Rs. 1,41,45,775.60/-, but failed to pay the outstanding amount. After several reminders and follow-ups, on 12th February, 2022 the Corporate Debtor paid a sum of Rs.10,00,000/- to the Operational Creditor and on 24th August 2022 a sum of Rs. 5,00,000/- was credited to the account of Operational Creditor.
- c) The Operational Creditor did not receive any amount after the Dt. 24th August 2022. The Operational Creditor continuously followed up for the remaining amount, however, the Corporate Debtor did not pay the remaining due amount. Hence, the Operational Creditor sent a Demand Notice in Form No.3 dated 27th December 2022 for claiming an amount of Rs. 1,79,76,153/- as on dated 27th December 2022. The Demand Notice was duly delivered on the Corporate Debtor on 2nd

January, 2023. Irrespective of the receipt of Demand notice, the Corporate Debtor neither repaid the operational debt as specified in the Demand Notice nor they have issued any notice of dispute within ten days of receipt of demand notice. Hence, this Petition.

3. It is submitted that the Demand Notice dated 27.12.2022 under section 8 of the IBC, which is attached with the Company Petition, was served on the Corporate Debtor on 29.12.2022 and delivered on 02.01.2023 through a registered post. The Demand Notice was sent along with list of 454 invoices dated from 01.12.2020 to 07.05.2021 mentioning the invoices receipt numbers, and the due dates for each invoice was 70 days from the date of invoice. It was for a total amount of Rs. 1,79,76,153/- including interest @ 24% from the due date (copies of invoices were attached to the petition).
4. It was also submitted that the Petitioner has complied with all the mandatory provisions of Section 9 (3) (a), (b), (c) and (d) of IBC. Further, the Respondent has not replied to the Demand Notice dated 27.12.2022 issued under Section 8 of IBC.
5. The information utility record of default obtained from NeSL in Form 'D' mentions the date of default as 24.08.2022.
6. It was noticed by this Tribunal that notice in the present case was issued on 07.08. 2023. No one attended on behalf of the Corporate Debtor on 31.08.2023, 05.10.2023, 06.11.2023 and 14.12.2023. Therefore the matter was decided to be proceeded with on *ex-parte* basis.
7. On 06.11.2023, Petitioner submitted that there are a total of 454 invoices and there is no dispute with regard to the Demand Notice issued to the Respondent. It is further stated that there is interest clause mentioned in the invoice and the due date is 70 days from the date of invoice. Since many of the invoice were noticed to be during the period covered by Section 10A of IBC, this Tribunal directed the Petitioner to file a clarification in a tabular form showing those invoices that are falling after the exclusion period of Section 10A of IBC and to clarify as to whether the threshold is met after such exclusion.

8. In compliance to the order dated 06.11.2023 the Petitioner has filed memo vide diary no:5971 dated 28.11.2023, by stating as follows:

“(i) The application was heard by this Hon’ble Tribunal on 6th November 2023 and the Hon’ble Tribunal has raised an objection after perusal of Pg. No. 977 to Pg. No. 986 in which the Applicant/Operational Creditor has enclosed the list of pending invoices. Objection is that default occurred towards the invoices referred in Sl.No.1 to 166 (invoice due dates from 09.02.2021 to 24.03.2021) are in the exclusion period as stated under Section 10A of the IBC and further directed the Applicant /Operational Creditor to file a clarification in a tabular form showing the threshold is met after such exclusion). The list of invoices from Sl.No. 167 to 454, the total debt due comes to Rs. 1,13,08,060 (Rs. 80,62,544/- towards principal amount and Rs.32,45,516/- towards interest as on 27.12.2022), that the threshold limit stated under section 4 of the IBC is met and the application is liable to be admitted.

E. Dehors the above submissions, we further humbly submit as follows:

(a) In the present case, the total amount of operational debt was Rs. 1,79,76,153/-. The debt fell due on account of non-payment of due amount as against the invoices raised for the supply of ready-mix concrete to the Respondent/Corporate Debtor had stopped payment after 24th August 2022 i.e., the date of default when the Respondent/Corporate Debtor made his last payment. The confirmation of balance by the Respondent/Corporate Debtor was on 12th January, 2022.

(b) Section 10A of the code was included vide notification dated 23rd September 2020 notifying the suspension of CIRP for default occurred during the exclusion period i.e. from 25th March 2020 to 24th March 2021. As account of the Operational Creditor was running account and the date of default was on 24th August 2022 which falls outside the exclusion period specified under section 10A of the IBC. Moreover, the Respondent has duly acknowledged the debt and set the confirmation of balance on 12th January 2022. The Respondent despite receipt of demand notice failed to respond to the same and despite notice failed to appear this Hon’ble Tribunal and there is no plea raised from the Respondent/ Corporate Debtor raising under section 10A of the IBC.

Further, the Petitioner relied on Mobilox Innovations Private Limited vs. Kirusa Software Private Limited (2018) 1 SCC 353 and stated all conditions specified in the judgment are satisfied”.

9. It is noticed from the order dated 14.12.2023, that it is submitted by the Learned Counsel for petitioner that in compliance of the order dated 06.11.2023 memo filed vide Diary No.5971 dated 28.11.2023. It is stated the total amount of the invoices in which due dates are 70 days from the date of invoice, which are after the period subsequent to Section 10A of the Code restriction, which amounted to Rs.80,62,544/- towards Principal amount and Interest @ 24% p.a. was also chargeable from the Due Date, which amounts to Rs.32,45,516/-. It is further stated that the interest chargeability as mentioned in the invoices, is to be taken into consideration for threshold limit; for which she sought liberty to file relevant judicial precedents.
10. The Petitioner filed memo vide diary no: 6433 dated 20.12.2023 in which reliance was placed on *Prashat Agarwal v. Vikash Parasrampuria, (2022) SCC Online NCLAT 3781*, order dated 15.07.2022, in which it was observed as *“Since, interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for “right to payment” (Section 3(6) IBC) and therefore will form part of “debt” (Section 3(11) IBC) (vi) It is, therefore, clear from these facts that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself. It is noted that the total principal debt amount of Rs. 97,87,220/- along with interest the total debt makes total outstanding as Rs. 1,60,87,838/- . Thus, the total debt outstanding of OC is above Rs. 1 crore as per requirement of Section 4 IBC read with notification No. S.O 1205 (E) dated 24.3.2020 (Supra), and meets the criteria of Rs.1 crore as per Section 4 of IBC and Application is therefore maintainable in present case.”*
11. Further, in *Anuj Sharma Vs. Rustagi Projects Pvt. Ltd., (2023) SCC Online NCLAT 310*, order dated 04.07.2023, it was held that *“13. Learned counsel for the Operational Creditor has rightly relied on judgment of this Tribunal in “Company Appeal (AT) (Ins.) No. 690 of*

2022, *Prashant Agarwal vs. Vikash Parasrampuriah & Anr.*”, where three Member Bench of this Tribunal held that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which is stipulated in the invoice has to be added. We may refer to Para 9 (vi) of the judgment, which is to the following effect:

“9(vi) It is, therefore, clear from these facts that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself. It is noted that the total principal debt amount of Rs. 97,87,220/- along with interest the total debt makes total outstanding as Rs. 1,60,87,838/-. Thus, the total debt outstanding of OC is above Rs. 1 crore as per requirement of Section 4 IBC read with notification No. S.O I205 (E) dated 24.3.2020 (Supra), and meets the criteria of Rs. 1 crore as per Section 4 of IBC and Application is therefore maintainable in present case. We concur with the orders of Adjudicating Authority on this issue also.”

14. The above judgment of “Prashant Agarwal” clearly supports the submission of learned counsel for the Respondent that for calculating the amount for maintainability of the claim, for threshold purpose, both Principal Amount and Interest has to be calculated when the interest is stipulated between the parties.”

15. The ground taken in the I.A. under 10A is clearly misconstrued since the default is being claimed by the Operational Creditor w.e.f. 26.07.2018 which was much before the 10A period. The mere fact that the Demand Notice was dated 21.12.2020 shall not have any effect on the maintainability of the application under Section 9 when default is committed on 26.07.2018 and admitted thereafter.

16. In the facts of the present case, we are satisfied that the Adjudicating Authority did not commit any error in admitting Section 9 application which clearly fulfils the threshold. The Corporate Debtor despite having been allowed time, failed to file reply and did not appear on the date when matter was fixed for hearing. The Adjudicating Authority rightly proceeded ex-parte against the Corporate Debtor when he chose not to file reply and failed to appear on the date fixed. No error has been committed by the Adjudicating Authority in admitting Section 9 application. There is no merit in the Appeal. Appeal is dismissed.”

It is further submitted that the interest stated in the invoices which was acknowledged by the Respondent/ Corporate Debtor will form part of the debt under section 3(11) of the Code and thus the total debt outstanding of OC is above Rs.1 Cr as per requirement of Section 4 IBC even if the invoices from Sl.No.1 to 166 are not considered and hence the application is liable to be allowed as against the Respondent /Corporate Debtor.

12. Heard the Learned Counsel for the Petitioner and perused the records available.

13. The Present Petition was filed on 20.02.2023 under section 9 of the Insolvency and Bankruptcy Code, 2016 by M/s **IJM Concrete Products Private Limited**, *inter alia* seeking to initiate Corporate Insolvency Resolution Process against M/s. Expat Engineering India Limited on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. 1,769,76,153/-.
14. In view of the orders of the Hon'ble NCLAT in the matter *Prashat Agarwal v. Vikash Parasrampuria*, (2022) SCC Online NCLAT 3781 and *Anuj Sharma Vs. Rustagi Projects Pvt. Ltd.*, (2023) SCC Online NCLAT 310, and after excluding the invoices in which the due dates were between 09.02.2021 to 24.03.2021 which fall under the period excluded under Section 10 of the IBC; the total debt was Rs.80,62,544/- towards Principal amount and Interest @ 24% p.a. was also chargeable from the Due Date which amounted to Rs. 32,45,516/-; aggregating to Rs.1,13,08,060/-. Therefore the threshold requirement of Rs. 1 Crore at the time of filing of Petition is fulfilled. This Tribunal has perused the invoices, record of default Form 'D' and certificate from the financial institution where the Operational Creditor maintained its account, which stated that after 24th August, 2022 there is no payment made by the Respondent to the Petitioner. The bank account has been attached along with the petition and the debt is established in this regard.
15. The Learned Counsel for the Petitioner has attached Demand Notice dated 27.12.2022 and the copy of email is also attached. Further, no reply to the Demand Notice is received. Moreover, no dispute has been raised by the Respondent nor any appearance was made before this Tribunal. The Petitioner had filed affidavit under section 9(3)(b) of IBC dated 03.02.2023 affirming that that no notice of dispute to the unpaid operational debt has been given by the Corporate Debtor.
16. *Being* the Date of Default as per Form 5 is on 24.08.2022, the debt fell due for payment from 24.08.2022 and the Petition filed on 20.02.2023, hence the Petition is filed well within the period of limitation.

17. Accordingly, considering the facts and circumstances of the cases, this Adjudicating Authority is of the considered opinion that there is no reason to deny the petition filed under section 9 of the IBC by the Operational Creditor to initiate CIRP against M/s Expat Engineering India Limited. Therefore, the instant Company Petition bearing **CP (IB) No. 99/BB/2023 is admitted** against the Corporate Debtor and moratorium is declared in terms of Section 14 of the Code. As a necessary consequences of the moratorium in terms of said Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

- (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 supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period;
- (f) the provisions of Section 14(3) of the Code shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a Corporate Debtor;
- (g) the order of moratorium shall have effect from the date of this order till completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under sub-section (1) of Section 31 of the Code or passed an order for liquidation of Corporate Debtor under Section 33, as the case may be;

18. This Bench appoints **Mr. Ramamoorthi Srinivasan** Registration No. IBBI/IPA-001/IP-P01163/2018-2019/11916 having registered address: E 902, Mantri Tranquil, Off Kananakapura Road,

Gubbalala, Bangalore, Karnataka, 560061, e-mail id usne902@gmail.com Phone Number: 9888004981 Interim Resolution Professional to carry the functions as mentioned under the IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20 and 21 of the IBC. The IRP shall file his written consent within one week from today.

- 19.** The Operational Creditor shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakhs Only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors.
- 20.** The Interim Resolution Professional shall, after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor, constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every fortnight.
- 21.** A copy of the order shall be communicated to both the parties. The learned Counsel for the Petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send the copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

-Sd/-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

-Sd/-

**(K.BISWAL)
MEMBER (JUDICIAL)**