

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

C.P.(IB)/1393/MB-IV/2020

**Under section 8 & 9 of the Insolvency
and Bankruptcy Code, 2016**

In the matter of

**Global Advertisers
6th Floor, Shree Ram Trade Centre
SVP Road, Borivali West Mumbai-
400092**

.... Petitioner

V/s.

Sai Estate Consultants Chembur Pvt. Ltd.

**Office No.9, Neelkanth Commercials Co-Op
Society Limited, Plot No.40, Chembur Govandi
Road, Chembur, Mumbai-400071**

.... Respondent

Order delivered on 02.08.2021

**Mr. Rajesh Sharma
Hon'ble Member (Technical)**

**Mrs. Suchitra Kanuparthi
Hon'ble Member (Judicial)**

Appearances (via videoconferencing):

For the Petitioner : Mr. Amir Arsiwala, Advocate

For the Respondent : Mr.J.P. Sen, Ld. Senior Advocate

ORDER

Per: Rajesh Sharma, Member (Technical)

1. This Company Petition is filed by Mr. Sanjiv Gupta carrying on business as Sole Proprietor under the name

and style of M/s. Global Advertisers (hereinafter called “Petitioner”) seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Sai Estate Consultants Chembur Pvt. Ltd. (hereinafter called “Corporate Debtor”) alleging that Corporate Debtor failed to make an outstanding payment to the extent of Rs.1,98,47,220/- (Rupees One Crore Ninety Eight Lakh Forty Seven Thousand Two Hundred and Twenty only) along with interest @18% p.a. and thus the provisions of Sections 8 & 9 of I & B Code (hereinafter called “Code”) have been invoked.

2. The brief facts of the case are that the Operational Creditor is engaged in putting up Billboards and Hoardings. The Corporate Debtor is a Real Estate Agent Company which requires to advertise the projects developed by them.
3. The Counsel for the Petitioner submits that in pursuance of an oral agreement between the Corporate Debtor and the Operational Creditor regarding carrying out Display and Mounting of advertisements for the projects developed by the Corporate Debtor, various Confirmation Letters came to be issued by the Operational Creditor and were countersigned by the Corporate Debtor. Accordingly, the Petitioner/Creditor submitted detailed charts showcasing the completion of the display, advertising and mounting carried out at various places, which were countersigned by the Corporate Debtor.
4. The Counsel for the Petitioner submits that the Operational Creditor raised 30 invoices from 10.03.2017 to 29.06.2019 aggregating to a sum of Rs.4,74,55,683/- out of which on account part payment of Rs.2,72,02,520/- was made and TDS of Rs.3,96,540/- was also

deducted in respect of all invoices including the outstanding invoices except for the last three invoices raised but for which the payment had already been made.

5. The Counsel for the Petitioner submits that the Corporate Debtor has failed to discharge its liability due on the outstanding invoices from 28.02.2018 to 29.06.2019 aggregating to a principal amount of Rs.1,98,47,220/- along with interest @18% per annum.
6. The Counsel for the Petitioner submits that the Operational Creditor sent a letter dated 02.08.2019 to the Corporate Debtor demanding the payment of the operational debt amounting to Rs.2,54,40,604/- plus Rs.5,16,027/- in Cash and overdue interest @18% p.a. of Rs.1,09,52,670/- till 02.08.2019.
7. The Counsel for the Petitioner submits that the Operational Creditor sent another letter dated 06.02.2020 to the Corporate Debtor demanding the payment of the operational debt amounting to Rs.2,54,40,604/- plus Rs.5,16,027/- in Cash and overdue interest of Rs.53,59,186/- plus further interest from 03.08.2019 to 31.01.2020 of Rs.27,56,595/-.
8. The Counsel for the Petitioner submits that the Corporate Debtor issued 20 Post-dated cheques of Rs.5,00,000/- each in favour of the Operational Creditor in pursuance of interest overdues as mentioned in the Debit Notes. The details of the said Cheques of Rs.5,00,000/- each are as follows:-

S.No.	No. of Cheques	Status
1.	10	Honoured
2.	2	Dishnonoured (Fund Insufficient)
3.	8	Not Deposited; Returned back to the Corporate Debtor

9. The Counsel for the Petitioner submits that the remaining 8 cheques out of 20 cheques were not deposited and returned to the Corporate Debtor on the assurance that the remaining payments will be made through RTGS and/or Pay Order.
10. The Counsel for the Petitioner submits that the Corporate Debtor replied to the Letters sent by the Petitioner/Creditor stating that the payment for the work carried was to be made on “payable when able” basis and asked for reconciliation of the accounts.
11. The Counsel for the Petitioner submits that the Creditor sent a reply, re-affirming the outstanding payments mentioned in its earlier Letters and fixed an appointment on 14.03.2020 to discuss the reconciliation of the accounts.
12. The Counsel for the Petitioner submits that the Corporate Debtor sent a Letter on 14.03.2020 to the Petitioner/Creditor asking the Petitioner to provide certain documents like details of ledger of Petitioner, copies of all hoardings, copies of creative used; for corroboration.
13. The Counsel for the Petitioner submits that the Demand Notice on 12.06.2020 under section 8 of the IBC was issued by the Creditor to the Corporate Debtor disclosing the liability of the Corporate Debtor to pay an outstanding total amount of Rs.2,95,29,298/- including the

interest.

14. The Counsel for the Petitioner submits that the Reply to the Demand Notice was sent by the Corporate Debtor on 23.06.2020 but to no avail of the clearance of the liability of the said outstanding dues.

The Contentions of the Corporate Debtor/ Respondent:

15. The Counsel for the Corporate Debtor/ Respondent submits that due to the kind of services provided by the Operational Creditor, prior to payment being made under an invoice raised by the Operational Creditor, the Corporate Debtor would require appropriate documentary proofs demonstrating the actual provision of the hoarding advertisement services and justifying its billing. This is the nature of the accounts reconciliation and verification exercise that would be required to be carried out.
16. The Counsel for the Corporate Debtor/ Respondent submits that due to the nature of the services being provided, merely based on receiving invoices, the Corporate Debtor could not be expected to make payment under the invoices. A reconciliation exercise would be necessary. In fact, all the invoices bear an endorsement that they had been received without being checked and/or bear an endorsement that they had been received for verification which further substantiates the stand of the Corporate Debtor that verification was mandatory and, in the absence, thereof, the Operational Creditor cannot claim monies to be due or the Corporate Debtor to be in default.
17. The Counsel for the Corporate Debtor/ Respondent submits that Corporate Debtor has also always maintained that it's the arrangement with the Operational Creditor that the payment would be made on a "*payable when able*" basis; meaning thereby that the Corporate Debtor would be liable to pay when it was able to pay. Even the

correspondence between the Parties bears out that both understood that “payable when able” was intrinsically linked with the necessity to complete a proper reconciliation and verification exercise.

18. The Counsel for the Corporate Debtor/ Respondent submits that Demand Notice under Section 8 of the Code was issued on 12th June 2020. The conduct of the Parties and stand taken in correspondence exchanged prior to 12th June 2020 plainly and indisputably demonstrates the existence of a pre-existing dispute.
19. The Counsel for the Corporate Debtor/ Respondent submits that the Corporate Debtor specifically took the stand in its letter dated 20th February 2020 that the alleged liability was not admitted/disputed and that the supporting documents had not been provided despite repeated requests and reminders. Hence, it had not been able to verify whether the services had been provided or not; and there was a need for reconciliation/verification.
20. The Counsel for the Corporate Debtor/ Respondent submits that the Corporate Debtor has specifically contended that the understanding between the Parties had always been one of “payable when able” and demanded a reconciliation exercise.
21. The Counsel for the Corporate Debtor/ Respondent submits that in the Operational Creditor’s response letter dated 11th March 2020, it was mentioned that there is no denial of the assertion of the understanding of “payable when able”. Hence, the Operational Creditor also understood the arrangement to be intrinsically with the exercise of reconciliation of accounts. The Operational Creditor fixed an appointment on 14th March 2020 for reconciliation of accounts.
22. The Counsel for the Corporate Debtor/ Respondent submits that in the

letter dated 14th March 2020 (**p.15 of Reply**), the Corporate Debtor specifically took the stand that the Operational Creditor had excessively billed the Corporate Debtor and specifically listed out the documents/ information that was required for the reconciliation / verification exercise.

23. The Counsel for the Corporate Debtor/ Respondent submits that there was no response to the 14th March 2020 letter from the Operational Creditor. No supporting documents were provided pursuant thereto till date. The meeting fixed for reconciliation on 14th March 2020 could not be held in view of the COVID 19 pandemic which had started and because the Corporate Debtor first asked for the documentary material to verify the provision of services prior to meeting physically.
24. The Counsel for the Corporate Debtor/ Respondent submits that the aforesaid correspondence dated 20th February 2020, 11th March 2020 and 14th March 2020 (all much prior to the Demand Notice under Section 8 of IBC dated 12th June 2020) clearly reflect the existence of a pre-existing dispute vis-à-vis the Operational Creditor's claim. This pre-existing dispute is in relation to both the quantum of services provided as well as quality.
25. The Counsel for the Corporate Debtor/ Respondent submits that due to the pre-existing dispute, the Operational Creditor sent Demand Notice Section 8 Notice of IBC in June 2020 in haste; without providing the documents or carrying out the reconciliation. No documents or materials are submitted by the Operational Creditor to show that the hoarding advertisement services were provided by the Operational Creditor.
26. The Counsel for the Corporate Debtor/ Respondent submits that it is necessary for the Operational Creditor to submit documents and materials

on record as evidence to show the actual provision of the hoarding advertisement services, in view of the dispute / denial raised by the Corporate Debtor in its letters prior to the Demand Notice under Section 8 of IBC.

27. The Counsel for the Corporate Debtor/ Respondent submits that the Operational Creditor cannot seek initiation of the CIRP without placing on record documents to prima facie demonstrate the actual provision of services, especially when a dispute was raised in relation thereto prior to invocation of the provisions of the Code.
27. The Counsel for the Corporate Debtor/ Respondent submits that given the nature of the advertisement services, reconciliation of accounts and more particularly verification of documentary materials evidencing the actual provision of services was a pre-requisite prior to making of payments. This was also necessitated in view of the fact that the invoices were vague and devoid of basic particulars.
28. The Counsel for the Corporate Debtor/ Respondent submits that the correspondence exchanged between the parties prior to the issuance of Demand Notice under Section 8 of IBC clearly reflects a plausible dispute between the Operational Creditor and the Corporate Debtor vis-à-vis both quantum and quality of services provided. An exercise of reconciliation of accounts and verification is always to ascertain this position and until it is completed, the Parties have all along agreed that there is no liability which can be stated to be due and payable from the Corporate Debtor to the Operational Creditor.
29. The Counsel for the Corporate Debtor/ Respondent submits that the Operational Creditor can place no reliance on the post- dated cheques since these have been returned.

30. The Counsel for the Corporate Debtor/ Respondent submits that the cheques were returned because the Corporate Debtor had declined to make any further payment to the Operational Creditor unless proper reconciliation of accounts had taken place. There is no denial of this position since no rejoinder has been filed. Moreover, the Corporate Debtor's stand *vis-à-vis* the cheques is also contained in paragraph 6 of its letter dated 20th February 2020.
31. The Counsel for the Corporate Debtor/ Respondent submits that in any event, it is inconceivable commercial conduct that the Operational Creditor would return post-dated cheques if it truly believed the Corporate Debtor owed its monies.
32. The Counsel for the Corporate Debtor/ Respondent submits that written confirmation / purchase orders were necessarily issued prior to the provision of the services and hence are of no assistance to the Operational Creditor to prove whether services were provided or not.
33. The Counsel for the Corporate Debtor/ Respondent submits that the invoices raised were vague and devoid of basic of the services provided such as period, specifications, locations, rates etc. Some of the invoices were raised several months after the alleged provision of services. Hence, the issuance of the invoices by itself does not demonstrate that the services were provided. In any case, all the invoices in fact bear an endorsement that they had been received without being checked and / or bear an endorsement that they had been received for verification. This further substantiates the stand of the Corporate Debtor that verification was mandatory and, in the absence, thereof, the Operational Creditor cannot claim monies to be due or the Corporate Debtor to be in default.
34. The Counsel for the Corporate Debtor/ Respondent submits that the

Petitioner claims that the invoices were issued pursuant to certain written confirmations (which are annexed after each invoice in the Petition), factually the invoices do not even refer to the date or number of the written confirmation.

- 35.** The Counsel for the Corporate Debtor/ Respondent submits that the Petitioner has sought to rely upon certain tabulated statements in the Petition and an impression is portrayed as if the same were part of the invoices / written confirmations. The said statements were not provided with the invoices / written confirmations and most of them do not even correlate to the invoices. There is/are no tabulated statements in support of some of the invoices/written confirmations. There is no acceptance shown of the details shown in the tabulated statements. Some of the tabulated statements do not even bear acknowledgement of receipt by the Corporate Debtor and have not been provided to it prior to the filing of the Petition. As for the others, they merely bear an acknowledgement of receipt and most of them bear an endorsement that they are received for verification.
- 36.** The Counsel for the Corporate Debtor/ Respondent submits that pursuant to the receipt of some of the tabulated statements at different/random points in time, the Corporate Debtor vide correspondence issued by it on 20th February, 2020 and 14th March, 2020 (i.e. much prior to the issuance of Demand Notice under the Section 8 of the IBC in June 2020) sought reconciliation of accounts and verification of material evidencing the actual provision of the services, the specifications thereof, locations, etc. and listed out the specific information and documents that were needed for the same. The Petitioner however avoided the same by not providing the specific information/documents sought and rather issued Demand Notice Under Section 8 of the Code.

37. The Counsel for the Corporate Debtor/ Respondent submits that the purported work completion reports are irrelevant. This is because: (a) these work completion certificates by themselves do not indicate the value of the services which they claim to have been provided; (b) these have also been only received by the Corporate Debtor subject to verification and do not constitute an acceptance of liability; and (c) in any event, it is post these purported certificates that parties agreed to carry out the exercise of accounts reconciliation and verification.
38. The Counsel for the Corporate Debtor/ Respondent submits that the Operational Creditor has sought to contend that the Corporate Debtor has deposited TDS amounting to Rs.3,96,540/- in respect of the Operational Creditor. According to the Operational Creditor, this constitutes an acknowledgment of liability; it is neither in fact nor in law can be stated to be an acknowledgement of liability in favour of the Operational Creditor.
39. The Counsel for the Corporate Debtor/ Respondent submits that the aforesaid chain of correspondence and stand taken therein clearly reflects that the Corporate Debtor had denied its liability towards the Operational Creditor, whilst seeking an accounts reconciliation and verification exercise. Moreover, no TDS certificates or any other documentary material on record as evidence to show the deposit of TDS has been produced by the Operational Creditor; there is no document on record which indicates the payment of the TDS.
40. The Counsel for the Corporate Debtor/ Respondent submits that the deposit of TDS is at best an acknowledgment of an expected liability and by itself, it does not give any basis for claiming recovery of dues/ monies; established via judicial precedents in the past.

41. The Counsel for the Corporate Debtor/ Respondent submits that the Operational Creditor has sought to compute the date of default to be 60 days from the date of each of the invoices on which the Petition is filed. None of the invoices provide that the payment was to be made within 60 days of the date of the invoice or that interest was to be computed on payments not made within 60 days of the date of the invoice. Even the written confirmation letters/ purchase orders do not contain any such stipulation.
42. The Counsel for the Corporate Debtor/ Respondent submits that it was required to make payments (subject to reconciliation of accounts and verification of supporting material) on a payable when able basis, and thus there is no default on the part of the Corporate Debtor and the present Petition is premature in nature.
43. The Counsel for the Corporate Debtor/ Respondent submits that the Claim in question is based on hoarding advertisement services provided by the Operational Creditor for the Corporate Debtor over a period of 1.5 years from February 2018 to June 2019.
44. The Counsel for the Corporate Debtor/ Respondent submits that the Operational Creditor's claim is based upon 11 distinct written confirmations / purchase and 14 invoices in a single Petition.
45. The Counsel for the Corporate Debtor/ Respondent submits that each written confirmation was issued on a different date and hence pertains to different periods of time and locations for the hoarding advertisement services. Pursuant thereto, the hoarding advertisement services were also required to be provided at different locations across Mumbai, Thane and Rest of Maharashtra as averred by the Operational Creditor himself.

46. The Counsel for the Corporate Debtor/ Respondent submits that the separate invoices were then required to be raised in pursuance of each written confirmation. Each written confirmation and/or invoice therefore represents independent transactions/ PO's / contracts.
47. The Counsel for the Corporate Debtor/ Respondent submits that under the Code (law), one cannot combine independent claims arising out of different transactions and having separate dates of default. Clubbing of such separate and distinct causes of action is not permitted under the IBC.

Heard both sides and perused the records. The given below are the findings :-

48. It is evident from the conduct of the Corporate Debtor that twenty (20) cheques of Rs.5,00,000/- (Rupees Five Lakh only) each were given to the Operational Creditor by the Corporate Debtor. Ten (10) cheques were cleared by the Corporate Debtor. Two (2) cheques were dishonoured and Eight (8) cheques were returned by the Operational Creditor to the Corporate Debtor in good faith that the payment will be made by the Corporate Debtor to the Operational Creditor through RTGS.
49. Further deducting TDS on all the invoices raised by the Operational Creditor on Corporate Debtor including unpaid invoices proves that the debt is due and payable by the Corporate Debtor to the Operational Creditor [**Ref. Exhibit 3, Pg.18**]. As per provisions of the Income Tax Act, TDS is to be deducted on payment to the payee or crediting the amount, whichever is earlier. Here, TDS has been deducted on all invoices including unpaid invoices.

Further, Section 194 C of the Income Tax Act provides as follows :

“**194 C.** (1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to—

(i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,

of such sum as income-tax on income comprised therein.”

50. The issue of reconciliation as raised by the Corporate Debtor is a lame excuse and cannot be termed as pre-existing dispute particularly when Corporate Debtor handed over twenty (20) cheques to Operational Creditor of the value of Rs.1,00,00,000/- (Rupees One Crore only) and cleared cheques worth Rs.50,00,000/- (Rupees Fifty Lakh only) out of it.

51. The plea taken by Corporate Debtor that mere receipt of invoices under acknowledgement does not constitute liability of the Corporate Debtor is invalid. The Apex Court in **Mobilox Innovation Pvt. Ltd. vs. Kirusa Software Pvt. Ltd (Civil Appeal No. 9405 of 2017)** has clearly elaborated the definition and constituents of “pre-existing dispute” over quality, quantity or deficiency in services provided by the Operational Creditor to the Corporate Debtor.

Similarly, in the present case, the existence of pre-existing dispute by the Corporate Debtor is not tenable as there is no correspondence on

record where any dispute with respect to quantity or quality was raised by the Corporate Debtor on receipt of even a single unpaid invoice by the Corporate Debtor. The Corporate Debtor has not raised any occurrence of “pre-existing dispute” even in the reply of Demand Notice dated 12.06.2021 [Ref. Exhibit 11].

Further by writing the term “Payable when able” clearly shows the inability of Corporate debtor to discharge its legally payable payment obligations.

52. The Corporate Debtor has admitted the existence of debt and default through various confirmation letters sent by the Operational Creditor and countersigned by the Corporate Debtor. In view of the above correspondences, the debt and default in this case is established and the above company petition is liable to be admitted. We have also perused various Letters sent by the Corporate Debtor submitted before this tribunal; the debt and default stands proved in this case and all the pleas raised by the Respondent in the reply to the company petition are not legally sustainable and liable to be rejected.

53. Under these circumstances, this tribunal is of the considered opinion that the above company petition is liable to be admitted and accordingly the same is admitted by passing the following:

ORDER

54. The above **C.P. (IB) -1393/MB-IV/2020** is hereby allowed and initiation of Corporate Insolvency Resolution Process

(CIRP) is ordered against Sai Estate Consultants Chembur Private Limited.

- a. This Bench hereby appoints **Mr. Vasudev Ganesh Nayak Udupi** Insolvency Professional, Registration No: IBBI/IPA-001/IP-P00019/2016-17/10043 having Email : uvnayak2004@yahoo.co.in and Contact No. 9869637407; as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
- b. The Operational Creditor shall deposit an amount of Rs.5,00,000/- (Rupees Five Lakh only) towards the initial CIRP cost by way of a Demand Draft drawn in favor of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- c. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- d. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
 - e. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - f. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
55. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
56. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
57. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

- i. Accordingly, this Petition is allowed.
- ii. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-

Rajesh Sharma
Member (Technical)
02.08.2021

Sd/-

Suchitra Kanuparthi
Member (Judicial)