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17/9/2022

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IN THE NATIONAL COMPANY LAW TRIBUNAL, AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.139
C.P.(IB)/141(AHM)2021

Order under Section 9 IBC

IN THE MATTER OF:

Agarwal Fuel Corporation Pvt Ltd
V/s
Shree Rama Newsprint Ltd

.....Applicant

.....Respondent

Order delivered on ..16/03/2022

Coram:

Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

KS

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

MBG

MADAN B GOSAVI
MEMBER (JUDICIAL)



IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1

C.P. (IB)/141(AHM)2021

[Application by the Operational Creditor to initiate the Corporate Insolvency Resolution Process Section 9 of the Insolvency & Bankruptcy Code, 2016]

In the matter of:

M/s/ Agarwal Fuel Corporation Private Limited,
Having registered office at:
5, Agarwal House,
Yeshwant Colony, Indore,
Madhya Pradesh-452003

....Operational Creditor

Versus

M/s. Shree Rama Newsprint Limited
Having registered office at:
At Village Barbodhanta,
Olpad, Surat, Gujarat-395005

....Corporate Debtor

Order reserved on : 08.03.2022
Order pronounced on:16.03.2022

Coram: MADAN B. GOSAVI, MEMBER (J)
KAUSHALENDRA KUMAR SINGH, MEMBER (T)

Appearance:

For the Operational Creditor : Ld. Sr. Adv. Mr. Saurabh
Soparkar a.w. Ld. Adv. Mr.
Praveen Surange
For Corporate Debtor : Ld. Adv. Mr. Bhargav
Hemmige



JCB

ORDER

[Per: MADAN B. GOSAVI, MEMBER (J)]

1. This application under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the IBC, 2016") has been filed by M/s. Agrawal Fuel Corporation Pvt. Ltd. – the Operational Creditor to start the Corporate Insolvency Resolution Process (hereinafter referred to as the "the CIRP") of M/s. Shree Rama Newsprint Ltd- the Corporate Debtor on the ground that the Corporate Debtor committed the default in paying the operational debt of Rs. 2,55,26,222/- (Rupees Two Crore Fifty-Five Lakhs Twenty Six Thousand Two Hundred Twenty-Two Only). The date of default is stated to be 31.10.2020.

2. The following facts are not in dispute:-

I. One M/s. Agarwal Transport Corporation Pvt. Ltd. had provided transport services to the Corporate Debtor. In between 31.05.2015 to 28.02.2018, the said Agarwal Transport Corporation Pvt. Ltd. raised various invoices against the Corporate Debtor



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claiming transportation charges. Those invoices are on record (at page nos. 44 to 117 of this application). The Operational Creditor-M/s. Agrawal Fuel Corporation Pvt. Ltd. was then the part of M/s. Agarwal Transport Corporation Pvt. Ltd. On 19.03.2020, the National Company Law Tribunal Bench at Ahmedabad allowed and sanctioned the scheme of demerger. Thereby, three separate corporate entities came into existence i.e., Agarwal Transport Corporation Private Limited, Agarwal Real City Private Limited, and Agarwal Fuel Corporation Private Limited i.e., the Operational Creditor in this proceeding.

- II. It is also not in dispute that the Corporate Debtor - Shree Rama Newsprint Ltd. (hereinafter referred to as "SRNL"), was liable to pay a certain sum of money towards transport charges, had entered into Memorandum of Understanding (hereinafter referred to as "MoU") dated 24.07.2017 with all above three companies thereby undertaking to pay a sum of Rs. 7,23,01,248/- in equitable monthly installment of Rs.



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12,00,000/- (Rupees Twelve Lakh) payable from July, 2017. It is further not in dispute that in pursuance of MoU dated 24.07.2017, the Corporate Debtor paid the installment of Rs. 12,00,000/- on 31.10.2020 (at Annexure A-7 of this application). On 13.03.2021, the Corporate Debtor sent an e-mail to the Operational Creditor admitting the debt of Rs. 2,55,26,222/- as overdue since 2020 and requested for time to make payment in view of COVID pandemic (at page 34 of the application).

III. The Operational Creditor stated that in spite of time, the Corporate Debtor failed and neglected to pay the debt. Hence, on 05.04.2021, the Operational Creditor sent the Corporate Debtor Notice of Demand under Section 8 of IBC, 2016 (at Annexure-A-5 of the application).

IV. The notice has been received by the Corporate Debtor. The Corporate Debtor did not reply the notice pointing out that payment is made nor pointed out that there is a pre-existing dispute which is still pending in between them. As the Corporate Debtor committed



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default in paying the debt, this application is filed to initiate the CIRP of the Corporate Debtor.

3. The Corporate Debtor has been served with the notice of this application. It appears through one of its authorized representatives, Mr. Siddharth Choudhary. He filed an affidavit in reply.
4. We have gone through the affidavit in reply. As noted above, most of the facts are not disputed by the Corporate Debtor. In paragraph 3 of the affidavit in reply, the Corporate Debtor has stated its defence that this application is not maintainable because it is solely based on settlement agreement/MoU. It is a settled law that application seeking initiation of CIRP by the Operational Creditor cannot be emanating from the settlement agreement. This view has been consistently taken by the Coordinate Benches. In paragraph 10 of the affidavit in reply, the Corporate Debtor took another defence contending that the invoices are ranging from 31.05.2015 to 28.02.2018. The majority of invoices fall beyond the period of limitation and if they are kept out of consideration then the debt



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amount goes below one crore, and hence, this application is not maintainable as per Section 4 of IBC, 2016.

5. We heard the Learned Senior Counsel Mr. Saurabh Soparkar for the Operational Creditor, Learned Counsel Mr. Bhargav Hemmige for the Corporate Debtor at length. We have gone through the evidence and material on record. In view of the pleadings, evidence, and material on record and submissions of Learned Counsels appearing for the parties, the following points arise for our determination. We record our finding thereon with reasons taken below:

- I. Whether the debt is time-barred?

Finding-No

- II. Whether the debt is the operational debt within the meaning of Section 5(21) of the IBC, 2016?

Finding-Yes.

6. The Corporate Debtor contended that debt, if at all payable, pertains to invoices dated 31.05.2015 to 28.02.2018. The debt became due in February, 2018. This application is filed on 24.08.2021. It is not filed within three years from the date when the debt became due and payable. Hence, it is not maintainable.



J. S. Hemmige

A. S. Soparkar

7. As noted above, it is not in dispute that the transport charges were payable by the Corporate Debtor on the basis of invoices pertain to May, 2015 to February, 2018. But, at the same time, it is also not in dispute that on 24.07.2020 i.e., within the period of three years from the date on which the debt became due and payable, the Corporate Debtor entered into MoU dated 24.07.2020 thereby admitting and acknowledging the debt of Rs. 7,23,01,248/-. Obviously, it has to be held that debt became due and payable in July, 2020 and not in February, 2018 as claimed by the Corporate Debtor.

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8. Not only that, pursuance to the MoU the Corporate Debtor paid to the Operational Creditor a sum of Rs. 12,00,000/- on 11.10.2020 and further acknowledged and admitted the debt by e-mail dated 31.05.2021. This application is filed on 24.08.2021. It is filed within the limitation period. Moreover, in view of the Hon'ble Apex Court Ruling dated 10.01.2020, the period of limitation stands excluded between 15.03.2020 to 28.02.2022 for purpose of limitation as may be prescribed under any general or special laws in respect of judicial or constitutional



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proceeding (in Miscellaneous Application No. 21/2022 in MA 665/2021 in SMW(C) No. 3/2020).

9. Another main defence raised against the maintainability of this application is that this application under Section 9 of IBC, 2016 is not maintainable only on the basis of settlement agreement/MoU. Learned Counsel for the Corporate Debtor relied on orders passed by NCLT, Allahabad Bench in CP No. (IB)343/ALD/2018 and NCLT, Hyderabad Bench in CP (IB) No. 691/9/HBD/2019.
10. As against this, the Learned Senior Counsel for the Operational Creditor submitted that the above orders are based on peculiar facts in those proceedings, hence, observations therein are not applicable. He further submitted that there cannot be a law which declares that the application under IBC, 2016 is not maintainable on the basis of settlement between the debtor and creditor. It will have a disastrous effect. He further submitted that, as against this, NCLT, Kolkata Bench in CP No. 911/KB/2020 has held that application under Section 9 of IBC, 2016 is maintainable on the basis of the settlement agreement. Even, the Hon'ble NCLAT approved the same



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view in *Company Appeal (AT) (Insolvency) No.608 of 2020* in case of *Ashok Agarwal vs. Amitex Polymers Private Limited*.

At the outset, we make it clear that this application is not based only on MoU entered in between the Operational Creditor and the Corporate Debtor. The Operational Creditor has also produced on record all relevant invoices to prove the existence of the debt. The Operational Creditor has thereof complied with the provision of Section 9(3) of IBC, 2016.

11. In the case before NCLT, Allahabad Bench, the facts were that the Operational Creditor had filed an application under Section 9 of IBC, 2016. There was settlement. It withdrew the application and upon breach of terms of settlement and without issuing notice under Section 8 of IBC, 2016, the Operational Creditor filed another application which was held that it was not maintainable.
12. In the case before NCLT, Hyderabad Bench, again there was an application under Section 9 of the IBC, 2016. Parties entered into a settlement. The Corporate Debtor in that case issued post-dated cheques. Some cheques were dishonored. No invoices were produced in that proceeding.



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Moreover, there was a pre-existing dispute pending in between the Operational Creditor and the Corporate Debtor. So, findings and observations in both of the above orders cannot be made applicable in this proceeding.

13. In fact, in the case before NCLT, Kolkata Bench in CP(IB) No. 911/KB/2020, it is seen that the Hon'ble Bench considered the number of rulings and orders of various Benches and even Hon'ble NCLAT and ultimately held that:-

"...36. We are fully satisfied that the Operational Creditor has satisfied this Adjudicating Authority on all the issues raised in opposition by the Corporate Debtor. The failure of the Corporate Debtor to comply with the terms settled between the parties is a proved default on its part and its failure to pay the installments, the right to sue rightly accrued in favour of the Operational Creditor. The agreed debt forming part of the settlement agreement dated 11th October 2018 is an admitted operational debt which had to be paid off within the stipulated time but since the Corporate Debtor has failed to perform its obligation under the aforesaid agreement, it is certainly a default which calls for an immediate action by this Adjudicating Authority. We, therefore, have no option but to admit this petition and order initiation of corporate insolvency resolution process against the Corporate Debtor in the following:"

14. The Hon'ble' NCLT has occasion to consider controversy relating to whether the decree-holder can be said to be a

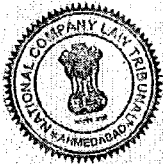


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creditor? In Company Appeal (AT) (Insolvency) No. 608 of 2020 after noting the definition of the "creditor" under Section 3(10) of IBC, 2016, Hon'ble NCLAT held that decree-holder can be a creditor and whether he is an Operational Creditor or Financial Creditor depends on the nature of the transaction in between the parties.

15. Be that as it may, here, in this case, we have to basically consider whether by virtue of the execution of MoU dated 24.07.2017 in between the parties, whether the debt, admittedly payable by the Corporate Debtor to Operational Creditor, changes its character from operational debt to any other debt?
16. In MoU dated 24.07.2017, it has been clearly mentioned that SRNL (Corporate Debtor) has been continuously making cash loss and it was difficult to pay the outstanding of the supplier. This clearly denotes that the Operational Creditor was a supplier of transport services to the Corporate Debtor, this fact is not in dispute at all. Section 5(21) of IBC, 2016 defines the "operational debt" that:-



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"... (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the ³[repayment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority..."

17. This definition makes it clear the amount payable towards the provision of services (herein transport charges) is the operational debt. The transaction in question, herein, certainly relates to the transport service charges payable by the Corporate Debtor to the Operational Creditor. We hold that only because the Operational Creditor and the Corporate Debtor entered into MoU, the debt does not change its character from operational debt to any other debt. We answer in Point No. II in the affirmative.
18. The name of IRP has not been proposed which is not mandatory in case of an application filed under Section 9 of IBC, 2016. Hence, we shall appoint an IRP from the list approved by IBBI.
19. This application, otherwise in time and being defect-free is maintainable and we proceed to pass the following orders:

ORDER

1. The application is admitted and the moratorium is



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declared for prohibiting all of the following in terms of Section 14(1) of the Code.

- (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 Securitisation 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.*
2. The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor Company under Section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.
3. The Operational Creditor has not proposed the name of the Interim Resolution Professional (IRP). Therefore, this Adjudicating Authority hereby appoints **CA Mr.**



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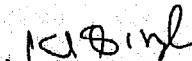
Pradeep Kumar Kabra, having Registration No. IBBI/IPA-001/IP-P-101104/2017-2018/1190 and having e-mail id: ippradeepkabra@gmail.com to act as an IRP under Section 13(1) (c) of the IBC, 2016.

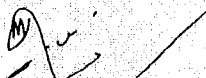
4. The IRP shall perform all his functions as contemplated, *inter-alia*, by Sections 17,18,20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or Co-operate. IRP is at liberty to make the appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.
5. This Adjudicating Authority directs the IRP to make the public announcement of the initiation of the Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1) (b) of the IBC, 2016.
6. It is further directed that the supply of goods/services to the Corporate Debtor Company, it continuing, shall not be terminated or suspended or interrupted during the moratorium period.



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7. The IRP shall be under the duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of an obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016. The Operational Creditor is directed to pay an advance of **Rs.1,00,000/- (Rupees One Lakh Only)** to the IRP within two weeks from the date of receipt of this order for the purpose of smooth conduct of Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority along with First Progress Report.
8. The Registry is directed to communicate a copy of this order to the Operational Creditor, Corporate Debtor, and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on the website immediately after pronouncement of the order.
9. Accordingly, CP (IB)/141(AHM)2021 is allowed.



(KAUSHALEDRA KUMAR SINGH)
MEMBER (TECHNICAL)


(MADAN B. GOSAVI)
MEMBER (JUDICIAL)

Signed on this, the 16th day of March, 2022.

Rajeev Sen, Stenographer



Prepared by 
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Date 17-3-22

