

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**NEW DELHI**

**SPECIAL BENCH**

**CP-IB-237/ND/2017**

**SECTION**

**Under Section 9 of Insolvency and Bankruptcy Code, 2016.**

**IN THE MATTER OF:**

ITD Cementation India Limited,  
National Plastic Building,  
A-Subhash Road,  
Paranjape-B Scheme,  
Vile Parle (East), Mumbai -400057

.....Operational Creditor

Baya Weaver Limited,  
LGF-119(B-7),  
World Trade Center Babar Road,  
Connaught Place,  
New Delhi-110001.

.... Corporate Debtor

**Order delivered on 14 .06.2018**



**Coram:**

R.VARADHARAJAN,  
Hon'ble Member (Judicial)

DEEPA KRISHAN  
Hon'ble Member (Technical)

For the Petitioner/applicant : Mr R.Sudhinder, Ms. Akansha, Advocates

For the Respondent : Mr. K.Dutta, Mr. Shantanu Parashar, Ms.  
Prachi Johri, Advocates

**ORDER**

1) ITD Cementation India Ltd, an Operational Creditor (OC), the petitioner herein has moved this petition against Baya Weaver Limited the Corporate Debtor (CD) being the respondent seeking for unfolding the Corporate Insolvency Resolution Process (CIRP) under the provisions of Insolvency and Bankruptcy Code (IBC), 2016 claiming that a sum of Rs.4,35,36,364/- is due and payable by the Corporate Debtor who it is claimed has willfully neglected to pay the said sum. The amount in default it is claimed has

Q

arisen by virtue of the work order placed by the CD and duly executed by the OC and the details of the work order briefly stated along with the respective amounts being the value of the said orders is given in the application as given hereunder:

(i) Work Order being W.O./P.O.No.BWL.No.2013-2014/047(R1) dated 11.03.2014 for "initial Test Piling work (with material) for OMG Project, Sector 129, Noida" for an amount of Rs.38,07,500.00(Rupees Thirty Eight Lakh Seven Thousand Five Hundred only) and revised Work Order being W.O./P.O.No.BWL.No.2013-2014/047(R2) dated 05.06.2014 for a revised amount of Rs.65,80,000.00(Rupees Sixty Five Lakj Eighty Thousand only) (hereinafter referred as "W.O-1").

(ii) Work Order being W.O./P.O.No.BWL/2014-2015/064 dated 26.08.2014 for "1000 mm dia "Initial test Piling work (with materials) for OMG Project, Sector 129, Noida" for an initial amount of Rs.48,20,668.00(Rupees Forty Eight Lakh Twenty Thousand Six Hundred Sixty Eight only) and revised Work Order being W.O./P.O.No.BWL/2014-2015/064(R1) dated 17.11.2014 for revised amount of Rs.55,16,300.00 (Rupees Fifty Five Lakh Sixteen Thousand Three Hundred only) (hereinafter referred to "w.O-2").

iii. Work Order, W.O./P.O.No.BWL/2014-2015/079 dated 05.11.2014 for "1000 mm dia Secant Piling Work at OMG Project, Sector 129, Noida," UP for a lumpsum amount of Rs.7,25,00,000/- (Rupees Seven Crore Twenty Five Lakh only) (hereinafter referred to "w.O-3").

The payment terms were duly incorporated in the above three Work Orders.

In relation to the 3 work orders as listed above, the OC, it is averred has duly completed the work but, however, payments are due from the CD which is the default amount as claimed in the

application. It is also averred that the CD has specifically admitted to its liability and in fact on 31.5.2016 assured payment in three monthly instalments of Rs.1.50 crores each by June, 2016 as well as July, 2016 and a sum of Rs.1.60 crores payable by August, 2016 and that the CD also offered post dated cheques for the running account bills. Further by e-mail during the said period, the liability of the CD was acknowledged to the OC. However, even after the above acknowledgement and its liability, the payments were not forthcoming and in view of the CD being obligated to pay a sum of Rs.4,35,36,364/- issued a demand notice on 6.4.2017 to CD under Section 8 of IBC,2016 to the registered office of the CD. However, despite service of the same it is averred neither any reply was sent to the notice nor the CD made the payment and in the circumstances this petition before this Tribunal.

2. Based on the opportunities provided by this Tribunal, it is seen that the CD has filed a reply to which a rejoinder has also been filed by the petitioner. Perusal of the reply as filed by the

4 | Page

CP. No.IB-237(PB)/237 -ITD Cementation India Limited vs. Baya Weaver Ltd.



CD discloses that preliminary objections have been raised as to the maintainability of the present petition on the premise that OC has not complied with Rule 5 of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 to the effect that a demand notice in Form 3 has not been served as specified in the Rules. It is further contended that since OC has not issued any demand notice in accordance with Section 8 of IBC, 2016 upon CD, the same being a mandatory requirement, proceedings initiated by OC in the first place could not have been initiated. Further, it is also contended that provisions of Section 9(3)(b) of IBC, 2016 has not been complied with in view of the fact that an affidavit as required to be filed stating full facts in relation to the issue of notice and its service and receipt of notice of dispute has not been filed by the OC and since an affidavit is to be filed under Section 9(3)(b) it goes into the root of the case, the petition should be dismissed on this ground alone by this Tribunal. Further, in compliance with the provisions of Section 9(3)(c), IBC, 2016, in relation to filing of certificate from the

bankers it is contended has not been filed along with the petition and in the circumstances it is contended that the petition is not maintainable for failure on the part of the petitioner to file bank certificate/ statements. Further, objections are also raised in relation to the petition as filed in Form 1 to the effect that authorized representative has not been named and it is also stated and evident that the Board Resolution filed along with the petition specifically authorizes the signatory of the petition in relation to only legal proceedings to be handled before the High Court and that there is no specific authorization given for the initiation of the CIRP before this Tribunal. It is also pointed out that the provisions of Section 65 B under the Indian Evidence Act, 1872 have not been complied with as reliance has been placed upon electronic records, which cannot be admitted as evidence unless a certificate under Section 65 B of the Indian Evidence Act, 1872 is annexed therein and in this connection the decision of Hon'ble Supreme Court rendered in Anvar P.V. vs. P K Basheer and Ors.(2014 SCC Online SC 732) has been cited.

Based on the above contentions raised as preliminary objections by the CD it is contended that the petition is bound to be dismissed.

3. As already stated a rejoinder has also been filed by the petitioner. Perusal of the same discloses that an objection has been taken by the OC to the fact that even though this Tribunal has ordered the CD to file reply, however, CD has chosen to file an affidavit in the nature of an interim reply raising only technical objections in relation to the maintainability of the petition and in the circumstances the order passed by this Tribunal has not been complied with by the CD. It is also pointed out that nowhere in the reply filed by CD it has disputed the liability to pay the debt and in the circumstances the petition is bound to be admitted. In relation to the allegation made in the affidavit by way of an interim reply of the CD, that notice under Section 8 has not been served, the petitioner has reiterated the averments made in the petition that notice under Section 8 in fact has been duly served upon the CD as evident from the proof annexed along with

rejoinder. Hence, it is contended by the OC that the CD cannot claim that no notice has been served as required under Section 8 of IBC, 2016. It is further pointed out that in reply to the demand notice dated 6.4.2017, a response e-mail dated 30.4.2017 was also issued on behalf of CD wherein it is pointed that on behalf of CD it has been acknowledged that it is in receipt of demand notice dated 6.4.2017 and that a suitable response to the same will be issued to the OC and that subsequently on 9.6.2017 an advocate by the name of Mr. Nitish Ranjan contacted the OC seeking for the settlement. It is also pointed out in relation to Form 4 that nowhere in the petition has the OC stated that Form 4 was served on the CD in relation to the invoices and hence the said contention is not to be taken. It is pointed that the OC has stated only a demand notice in Form 3 was duly sent and served on the registered office of the CD. Further, it is also averred that a certificate from the bankers has also been complied with as required under Section 9(3)(c) of IBC, 2016. Further, in relation to non-compliance of Section 9(3)(b) of IBC, 2016, it is stated that,



if an opportunity is given by this Tribunal, the same will be filed and lack of it should not entail dismissal <sup>of the petition</sup> on that ground. In relation to authorization, it is pointed out that one Mr. Kanchan Madhusudhan Ranadive, has been authorized being the Deputy General Manager of the OC by General Power of Attorney dated 25.5.2015 and the said power of attorney vide letter dated 16.3.2017 has authorized Mr.Ranadive to issue demand notice under Section 8 of IBC,2016. ②

4. Taking into consideration all this, it is averred in the rejoinder that since the CD has failed to make out any case for the dismissal of the present petition, the petition in effect is required to be allowed.

5. We have carefully considered the rival pleas as made out in the pleadings by the respective parties. As rightly contended by the petitioner/OC an opportunity was granted to the CD to file reply to the petition and confining to an affidavit raising preliminary objections by the CD is the choice of the CD more

particularly so IBC,2016 being a time bound process<sup>ab.</sup> has been repeatedly held by this Tribunal as well as by the Hon'ble NCLAT in several of its decisions and by now it has become ~~a~~ trite and hence<sup>not.</sup> repeated and further opportunities cannot be afforded to the CD in addition to what has already been filed and under the circumstances the affidavit giving the nomenclature 'Affidavit' on behalf of Baya Weaver Limited filed is considered as the reply of the CD and this Tribunal proceeds accordingly. Perusal of the reply shows that on facts the CD has not taken any plea denying the liability and on the other hand has raised only technical objections. It is seen by the time this order is pronounced the technical objections which have been taken by the CD stands resolved by way of judicial pronouncements either by the judgements delivered by the Hon'ble Supreme Court or by the Hon'ble NCLAT in this regard. For instance, in relation to notice to be issued under Section 8 of IBC, 2016, it has been held by the Hon'ble Supreme Court in Surendra Trading Company -vs- Juggilal Kamalpal Jute Mill Co. in CA No.8400-

2017 that an advocate is competent to issue a notice on behalf of his client, in this case ~~by~~ the Operational Creditor. Further in relation to a certificate from the bankers as required to be produced under Section 9(3)(c) of IBC, 2016, it has been held in the case of Macquaire Bank Ltd.-vs- Shilpi Cable Technologies Ltd., Civil Appeal No.15135/2017 that it is only directory and not mandatory. Hence, persistence with the said objection and consideration of the same by this Tribunal any further is not required. In relation to the delivery of Section 8 notice, it is seen that the OC has annexed at page No.277-286 as Annexure-P, copy of the demand notice dated 6.4.2017 in Form 3. Further, at p. No.285 despatch proof bearing the following consignment Nos. namely, ED182657686IN, ED182657672IN, ED182657690IN has also been annexed to Annexure-P filed along with the petition. In the rejoinder, delivery report in relation to these 3 despatch receipt correlating with the consignment number has also been annexed which discloses that all consignment items had been delivered. However, consignment No. ED182657672IN <sup>even though</sup> is

stated to be delivered closer perusal of the tracking report annexed at page No.19 of the rejoinder typed set discloses that it has been delivered on 10.04.2017 to New Delhi G.P.O.and not to the consignee, namely CD.

6. Further, at page No. 28 it is pointed out by the petitioner that an e-mail is filed as Annexure-2 to the rejoinder to the effect that copy of the legal notice dated 6.4.2017 has been received by the CD and also seeking time for sending a reply and till such time not to proceed with the legal action. However, we are not inclined or in a position to consider this e-mail as it is not supported by any affidavit as required under Section 65B of the Indian Evidence Act. The tracking report in relation to the dispatch of notice and service do not also sufficiently establish that the notice of default has been duly served upon the CD and the CD represents that notice of demand has not been received. Even though a contention is taken that Form 4 Invoice of IBBI(AAA) Rules, 2016 has not been served. Perusal of provisions of IBBI(AAA)Rules, 2016 discloses that service of Form

3 being notice of demand or Form 4 being invoice is in the alternative and not cumulative and in the circumstances the said contention of the CD is not of much force. However, one crucial issue that of compliance under Section 9(3)(b) of IBC,2016 wherein an affidavit is required to be filed by the OC in relation to the notice of dispute has not been filed by the OC. The affidavit under Section 9(3)(b) becomes material as the CD is denying the receipt of notice of default / demand under Section 8 of IBC,2016 and the tracking report in relation to consignment sent to the registered office as stated above not being conclusive. Further, the e-mail which is sought to be relied is also not supported by any affidavit as required to be given and in the absence of affirmation by way of affidavit under Section 9(3)(b) of IBC,2016 of service of notice of demand giving a specified date and when the said ten days period expired giving rise to the cause of action and in addition the notice of dispute from the CD, if any all raises serious issue as to the maintainability of the petition more so in view of Section 9(5)(i)(d) or Section 9(5)(ii)(d) in relation to



admission or rejection as the case may be concerning <sup>the</sup> notice of dispute. This Tribunal has already taken a view in OPGS Power Gujarat Private Limited vs. -R.L.Steel and Energy Limited IB-492(ND)/2017 dated 3.4.2018 stressing upon an affidavit which is required to be filed under Section 9(3)(b) of IBC,2016 and how non-compliance of the same vitiates the maintainability of the petition. From the record of proceedings, it is seen that the petition was first listed before this Tribunal on 1.8.2017 and that a reply has been filed by the CD on 4.9.2017. Ultimately, the matter was reserved after hearing the parties on 17.10.2017. The point of not filing an affidavit under Section 9(3)(b) of IBC,2016 has been taken by the CD in the reply and upon receipt of reply even without the directions of this Tribunal OC could have filed an affidavit under Section 9(3)(b) of IBC,2016 within the period of one week upon knowledge by way of rectification of defects as contemplated under Section 9(5). Having failed to do the same atleast in the rejoinder, it could not be said by the petitioner that the affidavit under Section 9(3)(b) will be filed if suitable



directions are issued by this Tribunal by way of a supplementary affidavit. In this connection, reference to provisions of IBC,2016 read with 'AAA' Rules clearly establishes that in addition to the affidavit which is required to be filed verifying the application as given as an annexure under Form 5 of 'AAA' Rules, 2016, an affidavit under Section 9(3)(b) in addition is <sup>also</sup> required to be filed in relation to notice of dispute and the Section 9(3)(b) reads as follows:

'An affidavit to the effect that there is no notice given by the CD relating to a dispute of the unpaid operational debt'

Whereas under Form 5 annexed it is stated that 'affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating) Rules, 2016 to be attached to the application'. A conjoint reading of the above provisions clearly indicates and establishes that two different affidavits, one in relation to the notice of dispute and another in



relation to the verification of the application is required to be made by the OC. In view of the absence of affidavit filed under Section 9(3)(b) of IBC,2016, we are constrained to dismiss this petition for non compliance of the same. However, this will not prejudice the right of the parties particularly the OC to invoke proceedings before other forums as we have not anything on *Lstated.* merits and as affidavits which have been prescribed under IBC,2016 are unique to IBC and IBC being a self-contained Code in itself, the procedure prescribed may not apply to other statutes.

The petition is dismissed but without cost.

Sd/-

(DEEPA KRISHAN)  
MEMBER (TECHNICAL)

U.D.Mehta.  
14.06.2018

Sd/-  
14/6/18

(R. VARADHARAJAN)  
MEMBER (JUDICIAL)