BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
C.P 40/I & BP/NCLT/MAH/2017

Coram: B. S.V. Prakash Kumar, Member (Judicial) &
V. Nallasenapathy, Member (Technical).

In the matter of Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016.

1. International Road Dynamics South Asia Pvt. Ltd.
E-8/1, Near GeetaBhawan
Mandir, Malviya Nagar,
New Delhi- 110017. ... Applicant/Operational Creditor

2. Reliance Infrastructure Ltd.
H-Block, 1st Floor, Dhrirubhai
Ambani Knowledge City,
Navi Mumbai, Maharashtra ... Corporate Debtor

Counsel for the Operational Creditor: Mr. Joyodip Bhattacharya a/w. Mr. Surendra Kumar, Mr. Anoop Patil, Advocates.
Counsel for the Corporate Debtor: Mr. D. J. Kalia a/w. Anwar H. Patel advocates.

ORDER
(Heard and pronounced on 29-03-2017)

Per B.S.V. Prakash Kumar, Member (Judicial)

The Operational Creditor (creditor) filed this CP u/s 9 of I&B Code 2016 stating that this creditor supplied goods and services to the Corporate Debtor company (debtor), in consideration, raised invoices for goods and services supplied to the debtor for its GF Toll Project, DS Toll and NK Toll Project raising invoices and debit notes to an amount of Rs8,33,80,343 towards GF Toll Project and for Rs 27,31.430 towards DS Toll Projects. Out of which, the debtor has made total payment of Rs5,41,07,993 till date on a running account basis with respect to GF Toll Project by deducting Rs6,23,146 and Rs1,96,876 towards TDS leaving outstanding of Rs2,84,52,328 pertaining GF Toll Project, as to other two projects, no payment has been

made. The Creditor says that the Debtor made last payment on 17.05.2013 ever since the debtor has not made any payment till date towards invoice amounts outstanding as on 17.5.2013, resulting into default in making repayment of balance of ₹3,12,83,758 to the creditor. In this claim, the debtor defaulted in making payment of Rs2,84,52,328 in relation to GF Toll Project, and Rs28,31,430 towards DS & NK Toll Projects. Despite the debtor has not paid the money against the invoices raised on the debtor, the creditor, by virtue of the Purchase Order between the creditor and the debtor, kept on rendering services in terms of the purchase order and raised invoices against the services until 31.5.2015. After much persistence from the creditor, two separate reconciliation statements were jointly prepared on 12.8.2015 by the creditor and the debtor admitting that the balance payable to the creditor in respect to GF Toll Project is ₹2,74,92,594, the difference in reconciliation statement is only Rs 9,59,734. As to DS Toll & NK Toll Projects, it has been admitted the balance to come to the creditor is mentioned as Rs1,00,000. To which, the creditor counsel submits that difference between the amount claimed by the creditor and the amount due as per books of the debtor is on account of non-updation of two bills pertaining to DS & NK Toll Projects in debtor Books, which are reflecting as accepted by the debtor site officials.

2. In respect to this difference, the debtor counsel categorically stated that payments made to the creditor not being updated in the accounts, the difference of payment already made to the creditor is still not showing in the accounts of the debtor despite some of the payments already made, the counsel says, the creditor has, without computing the payments made by the debtor, filed this CP to initiate Insolvency Resolution Process against the debtor basing on a claim of ₹3,12,83,758/- purportedly payable by the debtor to the creditor company.

3. Since the debtor company failed to make any payments, despite reconciliation statements have been jointly prepared by the creditor as well

as debtor, the Creditor, on 21.01.2017, issued notice u/s 8 of I&B Code stating that the debtor failed to repay the claim aforementioned, thereby made a demand for payment of ₹3,12,83,758. The Creditor counsel says that no reply was given within 10 days of receipt of notice u/s 8 of I&B Code, but subsequent to completion of 10 days reply period, the debtor gave three replies on 14.2.2017, 15.2.2017 and on 16.2.2017 stating that for the creditor failed to perform the contract as agreed between the creditor and the debtor, the debtor is under no obligation to repay the same saying that the debtor indeed has suffered loss by non-performance of the Contract as agreed between them.

4. Today, the debtor Counsel, without prejudice to the contentions raised by the debtor, submits that even if the claim raised by the creditor is assumed as true and correct, the Creditor, basing on this claim, cannot initiate the insolvency proceedings labelling this Company as unable to pay this money to the creditor. The debtor Counsel submits that there is an Arbitration Clause in the work order between them, therefore there being Arbitration clause, the creditor ought to have initiated Arbitration proceedings against this claim instead of initiating this Insolvency Resolution process against this Company that has net worth of ₹24,000crore approximately with a Paid up Capital of ₹263 crore. The debtor Counsel also submits that it has liability of ₹29,000crore and assets of ₹51,000crore. The debtor Counsel further submits that since this Company has huge business supplying LP Gas to some parts of Mumbai and also having infrastructure projects, in case moratorium is declared in this company just on a claim of ₹3crores, it will make the debtor company upside down causing adverse effect to the public as well as Corporate functioning of this company. In view of the same, the debtor Counsel states that this creditor, in case has any grievance against the debtor, it should have initiated proceedings for recovery of the claim, but not to resort to Insolvency Resolution process against the solvent company. It is no-where mentioned that this company is

unable to make payment nor it has been said that the debtor refused to make payment to the Creditor, it is only said that the services provided by the creditor are not in accordance with the Agreement and claim is in variation to the figures of the company books, therefore, the Petition is liable to be dismissed.

5. Looking at the narration and the Code, two aspects are clear, one – the amount claimed is not supported by the record available, some variation appearing even in the reconciliation statements, therefore the amount crystallised as defaulted is not in sync with the record available, two – in this background, we believe that it is also necessary to look into what is the intention and purpose of this Insolvency and Bankruptcy Code, how this Code has been evolved to find out as to whether the relief claimed by the creditor under IB Code can be allowed or not.

6. By looking at winding up sections of Companies Act, 1956 or 2013, inability of payment is one among the situations, but when it has come to I&B Code, the title itself has changed into Insolvency. Everybody knows Insolvency means "inability to make payment", therefore the purpose of initiation of insolvency proceedings will arise when Debtor Company is unable to make payment or refused to make payment or when facts disclose the grounds falling under any of the two grounds mentioned above. To effectuate the Code in that line, Section 271 (1) (e) has been repealed while bringing I&B Code into force so as to bring cases within the ambit of sections 7,8,9 and 10 of I&B Code. This Code has been divided corporate insolvency into two stages, — one, for approval of insolvency resolution plan, two, if the resolution plan failed, then to initiate liquidation so as to liquidate the assets of the company and distribute the same among the creditors. By reading this Code, it makes it clear it is not meant for recovery.

7. To defeat this argument, the creditor counsel has placed a citation ***Ashoka Industries v. Tobu Enterprises Ltd. (2003 (65) DRJ 281)*** to say that when debt is admitted, Court should not countenance a defence articulated for dismissal of winding-up petition. When the Debtor Company admitted its debt and requested for further supplies, the defence taken is to be considered as sham and dishonest. The Creditor Counsel submits that the debtor in the case supra despite having put up similar defence stating that supply of goods is not in accordance with the arrangement the court has not considered it. Therefore, this Bench, considering the ground of refusal as malafide, may admit this Application u/s9 of I&B Code.

8. The Hon'ble Delhi High Court mentioned in para 5 of it as follows:

"i) If there is a bona fide dispute and the defense is a substantial one, the Court will not wind-up the company.

(ii) ***Where the debt is undisputed, the Court will not act upon a defense that the company has the ability to pay the debt but the company chooses not to pay it.***

(iii) Where the defense of the company is in good faith and one of substance and the defense is likely to succeed in point of law, and the company adduces prima facie proof of the facts on which the defense depends, the petition should be rejected.

(iv) The Court may consider the wishes of creditors so long as these appear to be justified.

(v) The machinery of winding-up should not be allowed to be utilised merely as a means of realizing its debts.

[For the above propositions see Pradeshiya Industrial & Investment Corporation of Uttar Pradesh v. North India Petro-Chemical Ltd. [1994] 2 Comp. LJ 50 (SC) in which the observations in Amalgamated Commercial Traders (P.) Ltd. v. Krishnaswami [1965] 35 Comp. Cas. 456 (SC) and Madhusudan Gordhandas & Co. v. Madhu Woollen Industries (P.) Ltd. [1972] 42 Comp. Cas. 125 (SC) have been paraphrased].

(vi) If the stance of the adversaries hangs in balance, it is always open to the company court to order the respondent-company to deposit the disputed amount. This amount may be retained by the Court and be held to the credit of the suit, if

any. See Nishal Enterprises v. Apte Amalgamations Ltd. [Civil Appeal No. 720 of 1999 arising out of SLP (C) No. 14096 of 1998 dated 5-2-1999].

It appears to me that the following point may be added to the foregoing considerations.

(vii) Generally speaking, an admission of debt should be available and/or the defense that has been adopted should appear to the Court not to be dishonest and/or moonshine, for proceedings to continue. If there is insufficient material in favor of the petitioners, such disputes can be properly adjudicated in a regular civil suit. It is extremely helpful to draw upon the analogy of a summary suit under Order XXXVII of the Code of Civil Procedure. If the Company Court reaches the conclusion that had it been exercising ordinary original civil jurisdiction it would have granted unconditional leave to defend, it must dismiss the winding-up petition."

9. By reading all these rationale, it appears that winding-up order could be passed not only in a case where the company is unable to pay its debt but also in many other situations which are covered under winding up proceedings under Companies Act, 1956, therefore, the ratio held in winding-up proceedings cannot be equated to the cases falling within I&B Code because the insolvency proceedings could be initiated only on two grounds mentioned above.

10. It is not out of context to mention what is meant by insolvency and how many kinds of insolvencies are there.

11. Insolvency means inability to make payment of owed money on time by a person or a company. In companies, there are two forms of insolvencies — one is cash flow insolvency and another is Balance Sheet insolvency.

12. Cash Flow insolvency is when a person or a company has enough assets to pay what is owed, but does not have the appropriate form of payment. For example, a person may own a large house and valuable car, but not have enough liquid assets to pay a debt when it falls due. The better off in this situation is it can usually be resolved by negotiation.

13. Balance Sheet insolvency is when a person or company does not have enough assets to pay all of its debts, and then such company might enter into bankruptcy directly. It need not be said separately that refusal to pay amounts to deemed insolvency; the logic behind it is inability to repay as well as refusal to repay leads to non-payment to the creditors.

14. In the present case, the debtor is neither a Cash Flow Insolvent nor otherwise Insolvent. The Company's assets are double to the liabilities of the company. Its net worth is admittedly ₹24,000crores. Therefore, by any stretch of imagination, it cannot be said that the company is unable to clear 3crores of rupees to this creditor company. Normally insolvency proceedings will be initiated against the person or a company when the pleading party apprehends that the insolvency is the only recourse to recover its dues to the extent possible. But here, it is a clear case once the decree is passed against this company, there won't be difficulty for the pleading party to realize such debt from the company. It is no-where said in this Code that the proceedings under Insolvency & Bankruptcy Code are meant for recovery of debts, it has been time and again mentioned that in first stage, resolution for restructuring the company, if not possible, liquidate the company so that the creditors who invested their money in the company would realize their dues from the proceeds of the company. If this procedure is deployed in a healthy company like this which is doing very well and running with huge profits, it is nothing but killing a company running sound in all respects.

15. The creditor company has also brought to the attention of this Bench an order passed by this Bench in between ***Essar Projects India Ltd. v/s. MCL Global Steel Pvt. Ltd.(CP20/2017 dated 6.3.2017)*** stating that when dispute is not in existence as defined u/s 8 of sub-section (2) of I&B Code, this Bench has to invariably pass an order declaring Moratorium with

consequential directions. But the creditor Company has not looked into the fact that the corporate debtor in the case supra has not come out saying that the company is able to repay its debt to the party or saying that its Balance Sheet is positive, here this company has assets double to its liability, therefore, the ratio taken into consideration in that case cannot be applied to the present case.

16. It is pertinent to mention that Notification given by the Govt. of India on 7.12.2016 stating that all Petitions relating to winding-up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before the High Court are transferred to NCLT, thereby the creditors falling under clause (e) of Sub-section (1) of Section 433 alone will fall u/s. 7, 9, and 10 of the I&B Code and no other case. The common right under I&B Code is that there must be either insolvency or bankruptcy. If it is a company, there shall be insolvency situation, if it is individual person there shall be bankruptcy situation. So the sections of law governed by I&B Code could not be taken out of context to apply to initiate insolvency process unless the company is unable to pay or refused to pay, because initiating this process is held out to the public at large with moratorium on its head and management is given to Insolvency Resolution Professional suspending the powers of Board of Directors. Moreover, no debt of this company has become NPA.

17. It goes without saying refusal of remedy under this Code, will not make the creditor remediless, it is always open to it to proceed before Civil Court for realization of its debt, on the top of it, this Operational Creditor has another advantage to initiate Arbitration proceeding that has not been availed.

18. The objective and the reliefs envisaged in this Code are for different purposes, not for recovery of claims. Of course, ultimate object is to ensure that creditors' interest is not evaporated by letting the company become

insolvent; no doubt creditors have every right to take swift action if the company is insensitive to make payments to the creditors or when it is unable to make payments. Therefore, since claim is in variation to the computation, we make it clear that this creditor is at liberty to seek other remedies which are available to it under Law.

19. This Corporate debtor Company has Reserves and Surplus of ₹21,477crores, but whereas the creditor Counsel vehemently argued that it need not be seen whether Debtor is able or not able to pay, the only criteria that has to be considered is whether default occurred or not. In this case, default occurrence is clear therefore, since the cause of action is arising u/s.9, the creditor is entitled to file u/s 9 of I&B Code. He has also submitted that, according to the Code provisions, default occurrence has to be taken as benchmark to grant relief under 13, 14 and 15 not by saying whether Corporate Debtor is insolvent or is likely to be insolvent or not.

20. Our answer to this argument is the Code itself is meant for the cases falling within the realm of Insolvency and Bankruptcy. It need not be mentioned any further in the sections that the purpose and object of the Code is to empower the creditors to initiate insolvency proceedings before company quietly slid into insolvency or bankruptcy keeping the creditors at bay, therefore no section could be taken out of context and read separately so as to interpret that any person, who has claim against any and every company, can invoke provisions under I & B Code. The duty is cast upon NCLT to apply these provisions in the context the statute warranting, and it is the bounden duty of NCLT to see the object of the Code is implemented.

21. In view of these reasons, though no dispute is in existence as mentioned under definition of Section 5(20) and Section 8 of I&B Code, we are of the view that the facts of the case do not warrant to invoke section 9 to declare moratorium and consequential directions.

22. Therefore, this Company Petition is hereby dismissed giving liberty to the operational creditor to proceed in accordance with law.

Sd/-
V. NALLASENAPATHY
Member(Technical)

Sd/-
B. S. V. PRAKASH KUMAR
Member (Judicial)