

**In the National Company Law Tribunal,
Mumbai Bench**

CP No. 224/I&BC/NCLT/MB/MAH/2017

Under Section 8 of the Insolvency & Bankruptcy Code 2016

In the matter of
Gammon India Limited
V/s
Housing Development & Infrastructure Ltd.

Order delivered on: 23.08.2017

Coram :

Hon'ble M.K. SHRAWAT, Member (J)

Hon'ble BHASKARA PANTULA MOHAN, Member (Judicial)

For the Petitioner : 1. Mr. S. Kapadia, Partner
 2. Mr. P.N. Mehta, Advocate.

For the Respondent : 1. Mr. Subir Kumar, Advocate
 2. Ms. Nidhi Chheda, Advocate.

Per Shri M.K. Shrawat, Member (Judicial)

Order

1. This is the case wherein the Operational Creditor has submitted Form No.5 under the I&B Code on 22.03.2017 for a total Debt amount of ₹5,86,16,284 as mentioned under the head "Particulars of Operational Debt".
2. At the outset, a preliminary objection has been raised from the side of the Respondent Debtor raising the question of "Maintainability" of the Petition under consideration.
3. Before we proceed to decide the preliminary legal question, few basic requirements for entertaining a Petition under the Code are to be examined. In this regard the Petitioner has stated that the Debt in question had never been objected by the Operational Debtor. There was a letter of intent dated 18-10-2010 for the civil structural work assigned to the Respondent viz. Housing Development and Infrastructure Limited (in short HDIL). The price schedule was detailed therein and the total project OF Civil and Structural work for "Whispering Towers Residential Building" was priced for ₹310,32,40,565/-. However, thereafter, a **"closure of the contract"** which was executed on 25.08.2013. Certain reasons have been assigned and it was decided that the work could not be proceeded in accordance of the terms of the "work order". As per one of the terms the parties have agreed upon according to which HDIL (Respondent) to pay a sum of ₹3,94,30,357 towards full and final balance amount of the work done for final settlement as well as for closure of the contract. The amount was agreed to be paid on 09-10-2013. There is a schedule of work done and the description of the

value of the material supplied and other expenditure incurred to arrive at the figure of the settlement.

3.1 Thereafter, a letter was issued by the Petitioner "Gammon India Limited" dated 17-02-2014 wherein it was called upon to immediately pay the aforementioned outstanding amount and in case of default interest at the rate of 18% was also demanded.

3.2 Consequence thereupon a foreclosure agreement was executed on 30-09-2014 wherein it was mutually agreed upon as under:-

"1. In continuation of the Contract Closure Agreement dated 25th August 2013, HDIL shall, in (sic) of making payment of the amount of Rs.3,94,30,357/- (Rupees Three Crores Ninety Four Lakhs Thirty Thousand Three Hundred and Fifty Seven Only) to GIL as and by way of set (hereinafter referred to as the said Set Off Amount):

- a. HDIL, has agreed vide letter ref NIL dated 25th May 2014, to allot (sell, convey and transfer (sic) in favour of Gammon India Limited and/or to any nominee/assignee of Gammon India Limited a Flat measuring 1284.31 sqft (Carpet Area + Utility Area) No. 2902 on 29th Floor in "B" Wing in "Metropolis Residences" situated at C.T.S. No. 866/B, Village Ambivali, Andheri (West), Mumbai for an aggregate value of ₹3,10,00,000/- (Rs. Three Crores Ten Lacs only) (sic) the aforesaid Set off Amount. The said value includes allotment of two parking lots. HDIL hereby permits and agrees that GIL shall be at liberty to nominate and/or assign the rig (sic) and obligations under this Agreement to any person that Gammon India Limited may de (sic) appropriate.*
- b. In addition to the above, HDIL shall on or before the dt. 31/10/14 pay to Gammon India Limited the balance amount of Rs.84,30,357/- (Rs. Eighty Four Lacs Thirty Thousand Three Hundred Fifty Seven only) by way of a Demand Draft/Pay Order at Mumbai.*

3.3 As per the Learned Counsel, there was an agreement of payment of interest of balance amount of ₹84,30,357 after the settlement of the adjusted amount of ₹3,10,000 being the aggregate value of a flat in "Metropolis Residences", Andheri (West). Our attention has been on one of the condition that the HDIL shall make the payment of ₹84,30,357 within a period of 7 days. In case of default by HDIL, it was agreed upon that on the original amount of ₹3,94,30,357 interest at the rate of 18% to be paid till the realization of the said amount.

3.4 To finalize the transfer of the earmarked flat in favour of the Petitioner a reminder was issued on 11-12-2015 demanding the execution of Transfer Deed of the flat in favour of the Petitioner and to make the payment of the balance amount of ₹84,30.357.

3.5 The Learned Counsel has stated that in the light of the above evidences and discussion, the requisite condition of the provisions of the Code have been satisfied viz. the existence of the "Operational Debt" and the

"Default of payment" by the Debtor. It is pleaded that in a situation when rest of the compliances such as delivery of the form, Notice of Demand and name of the IRP is proposed hence the Petition deserves to be admitted for commencement of Insolvency Process.

4. Apropos, the preliminary objection of "Maintainability" submissions are on record. However, the Learned Counsel has pressed on the question of non-compliance of Section 8 of The Code. He had pleaded that the Petition in question was submitted on 22-03-2017. However, the "Notice of Demand" was served upon the Respondent on 25-03-2017. The service of Notice of Demand after the filing of Form No.5 was against the provisions of Section 8 of the IB Code. He has further argued that Section 9(3) of The Code prescribes that an Operational Creditor shall, along with the application, furnish a copy of the Notice of Demand delivered upon the Corporate Debtor. This condition was infringed in this case. Reliance was placed on the decision of Respectable NCLAT in the case of Smart Timing Steel Limited Vs. National Steel and Agro Industries (Company Appeal AT Insolvency No.28 of 2017 Order dated 19-05-2017). His second objection is that the Demand Notice should have been issued by the Operational Creditor and not by a Lawyer. According to him the admitted factual position is that the Operational Creditor has not signed the impugned Notice of Demand. Reliance was placed on the decision of Hon'ble NCLAT in the case of Uttam Galva Steel Limited Vs. DF Deutsche Forfait AG & Anr. wherein a view has been expressed that Clause (a) and (b) of sub-rule (1) of Rule 5 of the Adjudicating Authority Rules has prescribed a format of "Demand Notice" and the notice is to be issued accordingly. On perusal it was noticed that signature of person authorised to act on behalf of the Operational Creditor has also been prescribed. Hence a conclusion was drawn that the person who is authorized to act on behalf of the Operational Creditor is therefore required to state his capacity under which he is signing a Petition. The Learned Counsel has concluded his argument by making a Statement that following the judgments of the NCLAT, the requirement and the conditions laid down under section 9(3) are the mandatory requirements. Since prima facie the Petitioner has defaulted, hence it is pleaded that the Petition may not be admitted. At the end of the argument Learned Counsel has informed that he has an instruction of settling the "Dispute" by offering an amount of ₹5,86,16,284/- and a cheque is also in his possession.

FINDINGS

5. Heard both the sides at some length. Case records perused in the light of the precedence cited. As far as the first objection of Service of Notice of Demand after the filing of Form No.5 is concerned, it is noticed that the Petitioner has revised the Form No.5 on 07.07.2017 hence the objection of delivery of Demand Notice prior to the furnishing of the requisite form can be said to be cured. There is no objection from the

my

side of the Respondent that the revised Form No.5 was either defective or not maintainable. Once the Form No.5 has been subsequently filed and therein the disclosure of Demand Notice has been made, it is justifiable to hold that merely on this technical reason the Petition in question must not be thrown out of the litigation at the very threshold. Likewise, the second objection pertaining to the signature of an authorized person appears to be a technical objection that too not supported by any corroborative that the person who has signed was not the authorized person of the Petitioner. The argument of the Respondent that only the Operational Creditor must sign the Petition or the requisite Form is not in line with the format prescribed, as also duly noted by the Hon'ble NCLAT (supra), that the authorized person on behalf of the Petitioner can sign the Petition. There is no controversy about the mandatory compliance of the provisions of section 9(3) of The Code as held by the Hon'ble NCLAT. Nevertheless, in this case we are of the view that the prescribed compliances have duly been made by the Petitioner. Merely a hyper-technical objection must not debar a bona fide litigant to pursue a litigation. As a result, the Petition deserves Admission.

6. On the conclusion of the hearing and after expressing a prima facie view a proposal has been made by the Respondent that in case the Petition is admitted then the Respondent Debtor is willing to settle the dispute before initiation of commencement of the Insolvency Proceedings by making the payment of the amount as claimed in the Petition. Learned Counsel of the Respondent Debtor has placed a cheque of ₹5,86,16,284 bearing No. 000062 dated 23.08.2017 signed by the Director/Authorised Signatory favouring Gammon India Ltd. of Punjab & Maharashtra Co-operative Bank Limited. The Petitioner insisted upon a further payment of interest and also placed reliance on a decision of Vijay Industries Vs. Natl Technologies Ltd. dated 17-12-2008 (AIR 2009 s.c. 1695)[147 Company cases 490(SC)].

6.1 After due deliberation, and considering the totality of the circumstances that the Petitioner once upon a time had agreed to settle the dispute by getting possession of a flat, the value of which at present was not ascertainable, this Bench is of the conscientious opinion that the amount so offered is reasonable and directly matching with the claim as made by the Petitioner under the column "Part-IV – PARTICULARS OF OPERATIONAL DEBT" of Form No.5. Apparently, there is no occasion on the part of the Petitioner to object the offer so made in a bona fide manner by the Respondent. This Bench, therefore, settle this dispute by directing the respondent to hand over the cheque in person to one of the Representative of the Petitioner Company. A photo copy of the cheque is also placed on record with the direction to the Respondent Debtor to ensure the clearance of the Cheque without fail. On the other hand, the Petitioner is directed to perform his part of obligation by not claiming any right over the flat at "Metropolis Residence", Andheri (West). We are also of the view that each and every Petition submitted under I & B Code, although fit for Admission, must not be necessarily be approved for CIRP, especially when restructuring of the finances as a whole are not required and the Corporate Debtor is

ready to settle the claim of outstanding Debt by repayment. Over and above, if the Corporate Creditor is also ready; considering the priorities prescribed under section 53 of the Code or considering the uncertainty of 'hair-cuts' may take place on the occasion of final distribution of assets, to resolve the claim of Debt, ~~No~~ prejudice is going to be caused ~~mes~~ to the Petitioner, hence the request of granting any liberty to rake up the issue of interest in future is hereby overruled.

3. Although the Petition deserves "Admission" but in a situation when the outstanding amount has already been paid hence there is no requirement for appointment of any Interim Resolution Professional and there is no requirement of commencement of Corporate Insolvency Resolution Process (CIRP). The Petition is disposed of accordingly. To be consigned to records.

Sd/-

BHASKARA RANTULA MOHAN

Member (Judicial)

Date :23.08.2017

ug

Sd/-

M.K. SHRAWAT

Member (Judicial)