

In the National Company Law Tribunal
Mumbai Bench, Mumbai

TCP No.1142/I&BC/NCLT/MB/MAH/2017
Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of

LIFT & SHIFT INDIA PRIVATE LIMITED

: Applicant Company

Versus

DBM GEOTECHNICS AND CONSTRUCTIONS LIMITED : Corporate Debtor

Judgment/Order delivered on: 26.07.2017 *mes*

Coram:

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

Present on behalf of the Parties

Mr.Jhangiani Advocate for the Petitioner present.

Mr. Cyrus Ardeshir Advocate for Respondent.

Mr. Romil Parikh Director present.

Mr.Alok Saxena IRP present.

Mr. Sachi Mahajan Director (DBM) present.

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

ORDER

1. Learned Representatives of both the sides are present and placed on record consent terms dated 19th July, 2017 duly signed from the side of the Applicant and Respondent.
2. In this case an Order was passed on 05th July, 2017 by invoking the jurisdiction under section 9 of the IB Code and held as under:-

"7. Having considered the totality of the circumstances and the Application/Petition for initiation of Insolvency Resolution Process under the I&BP Code, 2016 and having considered the default of the Corporate Debtor in making the payment as discussed supra, it is hereby pronounced that the "Moratorium" as prescribed under Section 14 of the Code 2016 shall come into operation. As a result, institution of any suit or parallel Proceedings before any Court of Law are prohibited. The assets of the Debtor must not be liquidated until the Insolvency Process is completed. However, the supply of essential goods or services to the Corporate Debtor shall not be suspended or interrupted during "Moratorium Period". This direction shall have effect from the date of this Order till the completion of Insolvency Resolution process.

8. The Petitioner has proposed the name of Mr. Alok Saxena, C/o. Desai Saxena & Associates, Chartered Accountants, 1st Floor, Laxmi Building, Sir P.M. Road, Fort, Mumbai - 400 001, having Registration No. IBBI/IPA-001/IP-P00056/2017-18/10134 to act as the Interim Resolution Professional. The so appointed Insolvency Professional has furnished the requisite Certificate that no Disciplinary Proceedings is pending against him. Upon Admission of the Application and Declaration of "Moratorium" the Insolvency Process such as Public Announcement etc. shall be made immediately as prescribed under section 13 read with section 15 of The Code. He shall perform the duties as an Interim Resolution professional defined under section 18 of The Code. The IRP shall submit the Resolution Plan for approval as prescribed under section 31 of The Code.

9. The commencement of the Corporate Insolvency Resolution Process is hereby declared subject to the above conditions."

3. Relevant portion of the settlement terms dated 19.07.2017 are reproduced below:-

mes

- "1. *M/s. Lift and Shift India Private Limited, the Applicant abovenamed filed an application for initiating the Corporate Insolvency Resolution Process against **DBM Geotechnics and Constructions Private Limited**, the Respondent abovenamed.*
2. *Parties have agreed to settle all disputes, differences and claims between them arising out of the Work Order dated 7 March 2016, entered into between the Applicant and Respondent abovenamed for the hiring of a Spud Barge (AF-180) for Marine Geotechnical work for the Mumbai Trans Harbour Link, also known as the Sewri-Nhava Sheva Trans Harbour Link ("Work"), on the following terms and conditions:*
- Simultaneous to the signing of these Consent Terms, the Respondent shall pay the agreed settlement amount to Applicant of ₹35,00,000 (Indian Rupees Thirty Five Lakhs) ("**Agreed Settlement Amount**") by way of a Demand Draft drawn on Kotak Mahindra Bank, Kalina Branch, Mumbai bearing No. 23414 dated 18 July 2017 ("**Demand Draft**") against full and final settlement of all dues claimed by Applicant in the captioned application. Annexed and marked as Annexure-2 is a copy of the Demand Draft.*
 - Within 2 (two) days of signing of these Consent Terms, the Respondent shall pay the fees, costs and expenses of the Interim Resolution Professional ("**IRP Fees**") appointed by the Hon'ble National Company Law Tribunal by the Order.*
 - Upon receipt of the Demand Draft stated above, the Applicant agrees and undertakes to withdraw the captioned Insolvency Application."*
4. As noted above, it was agreed that the Respondent is to pay to the Applicant an amount of ₹35 lakhs, stated to be "agreed settlement amount". A legal question has been raised that after the commencement of the Insolvency Resolution Process whether a Petitioner can be allowed to withdraw the Petition? In this case, IRP has also been appointed who has taken certain steps as prescribed under section 17(1) of The Code and demanded cooperation from the Debtor as prescribed under section 19(1) of The Code. Hence the admitted factual position is that the proceedings under the Code have been commenced.
5. In one case in identical situation, this controversy had reached to the Hon'ble Supreme Court that in a situation when the Insolvency Proceedings have been commenced in compliance of the order of the NCLT pronounced while admitting the Petition, then whether the Petitioner can be allowed to withdraw the Petition? In the case of **Lokhandwala Kataria Construction Pvt Ltd.**, (Corporate Debtor) Vs. **Nisus Finance and Investment Manager** (Corporate Creditor) (Civil Appeal No. 9279 of 2017) this question was addressed by invoking the provisions of Article 142 of Indian Constitution and held that the settlement between the parties is to be considered by invoking Article 142 to pass such order as is necessary for doing complete justice. The Hon'ble Court has held that even after a Petition has been filed and admitted in NCLT it is worthy to allow out-of-court bilateral settlement between the Borrower and the Creditor.

ms

6. Respectfully following the above decision of the Hon'ble Court, once a Settlement Deed is on record wherein the Debtor has agreed to make the impugned payment of ₹35 lakhs, it is hereby decided to allow the Petitioner to withdraw the Petition. Side-by-side it is hereby directed to the Respondent to make the payment of the professional charges of the IRP as already decided in clause (b) of the Settlement Deed that within two days of signing of the Consent Terms, the Respondent shall pay the fees, cost and expenses of IRP appointed by NCLT.
7. Finally it is also directed that the directions given vide order dated 05th July, 2017 shall cease to operate henceforth from the date of this order.

Date : 24.07.2017

Sd/-
M.K. SHRAWAT
Member (Judicial)

ug