

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

TC.P. NO. 183/I&BP/NCLT/MAH/2017

Under Section 9 of the I&B Code, 2016

In the matter of
Multi Trade Petitioner

v.

Transparent Technologies Pvt. Ltd.
.... Respondent

Order delivered on: 17.08.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner: Mr. Prashant Chandhe, Advocate

For the Respondent: Mr. None present.

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

ORDER

It is a Company Petition filed u/s.433 & 434 of the Companies Act, 1956 against this Corporate Debtor before the Hon'ble High Court of Bombay on 12.4.2016, thereafter owing to jurisdictional transfer after the introduction of Insolvency & Bankruptcy Code, 2016, this matter has been transferred from Hon'ble High Court of Bombay to this NCLT Bench, in pursuance of transfer Notification, this Petitioner filed Form 5

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u/s.9 of the Insolvency & Bankruptcy Code, 2016, classifying itself as Operational Creditor for initiation of Insolvency Resolution process against this Corporate Debtor, hence this Petition.

2. The case of the Petitioner is the Petitioner is a Proprietary Concern supplying Stainless Steel raw materials, in pursuance of it business, when Corporate Debtor approached this Creditor for supply of raw materials as mentioned above, by carrying out the order of the debtor, the Creditor raised 13 invoices vide SAL/143 on 4.8.2012; SAL/144 on 4.8.2012, SAL/145 on 6.8.2012; SAL/155 on 16.8.2012, SAL/164 dated 24.8.2012; SAL/165 dated 25.8.2012; SAL/172 dated 30.8.2012; SAL/181 dated 4.9.2012; SAL/192 dated 11.9.2012; SAL/201 dated 17.9.2012; SAL/215 dated 3.10.2012; SAL/217 dated 4.10.2012 and SAL/251 dated 29.10.2012 for a total amount of ₹22,28,678.

3. On perusal of the invoices raised by the Petitioner, it appears that there is a clause indicating the interest amount at the rate of 24% per annum from the respective due date of invoices, there is a clause reflecting the period of 30 days in some invoices and 90 days in some other invoices as credit period, since the credit period is variant from one invoice to another invoice, when this Petition has been filed, the Petitioner has taken uniform credit period of 90 days in respect to all the invoices against which claim has been made by the Petitioner herein. The

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Corporate Debtor made part payments on various dates, that is ₹1,00,000 on 29.4.2013, ₹1,00,000 on 1.7.2013, ₹2,00,000 in 17.7.2013, ₹1,27,249 on 1.11.2013, ₹1,72,751 on 1.11.2013, ₹95,600 on 2.4.2014, ₹1,00,000 on 30.4.2014, ₹99,930 on 24.6.2014, ₹1,00,070 on 24.6.2014, ₹75,000 on 31.7.2014, ₹1,00,000 on 5.9.2014, ₹7,093 on 17.02.2015 and ₹92,907/- on 17.2.2015.

4. Whenever the debtor made part payments to the creditor, the operational creditor kept on adjusting each of the above said part payment against each of the invoices outstanding dues raised from 4.8.2012 to 29.10.2012, so as to save limitation to all these debts. When no payment has been made by this Corporate Debtor after 17.2.2015, the Petitioner issued notice u/s.434 of Companies Act, 1956. The Corporate Debtor made part payments from time to time aggregating to ₹13,70,600 against all the invoices raised as mentioned above, leaving a principal sum of ₹8,57,678 outstanding and the interest of ₹9,70,670.78 accrued at the rate of 24% p.a. remained due and payable by the Corporate Debtor. The Petitioner further stated that this Corporate Debtor kept pleading extension of time for payment owing to its financial difficulty. Since no payment in respect to the outstanding dues have come from the Corporate Debtor, this Petitioner finally gave notice to the Corporate Debtor to pay the Petitioner a sum of ₹18,28,348.78 as on 25.10.2015, failing which this Petitioner would initiate winding-up proceedings

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against the Corporate Debtor u/s.433(e) and 434 of the Companies Act, 1956. The Corporate Debtor herein also gave a reply on 10.12.2015 to this statutory notice stating that the Debtor had already made payment of ₹22,05,392 in respect to the transactions in question and would like to assure the petitioner that the debtor had no intention to dis-own the payment that might be contractually and lawfully payable to the Operational Creditor after reconciliation of the accounts. The company further says in its reply notice that they could not make payments on time owing to the delay happening in realizing monies from the ongoing projects as well as due to severe recession happening to Indian Companies.

5. However, there being no payments from this Corporate Debtor, this Petitioner finally filed winding-up Petition before the Hon'ble High Court of Bombay on 12.4.2016. As we said earlier, for there being jurisdictional transfer in respect to this subject matter, this Petition has come before this Bench. Form-5 has been filed giving all details as required under Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

6. The Corporate Debtor filed reply admitting all the invoice amount and part payments made by the Corporate Debtor saying that part payments made amounting to ₹13,70,600, but there being an

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understanding between the Petitioner and the Corporate Debtor that the Debtor would make the payments to clear up the payments of invoices in chronological order of date of invoices raised by the Petitioner, if adjustments made according to the understanding between them, these payments should have been made against the invoices raised from 4.8.2012 to 16. 8.2012. The debtor says that if at all the adjustments have been made as mentioned in the Exhibit – A annexed to the reply filed by the Corporate Debtor, these part payments of ₹13,70,600 should have been made against other invoices raised from 4.8.2012 to 16.8.2012 leaving balance of ₹96,915 payable to the Petitioner, but not to the invoices raised from 20.4.2008 to 12.10.2012, this comes to ₹7,60,763. The defense setup by the Corporate Debtor is had the part payments been adjusted to the invoices first in point of time, then the debtor would be liable to pay ₹96,915 but not ₹19,44,270. (₹8,57,679 towards principal amount plus ₹10,86,592 towards interest accrued). The Corporate Debtor submits that this Petitioner having adjusted the amount in defiant to the understanding, this application is liable to be dismissed.

7. Though the Corporate Debtor is not present today, since reply from their side is present, taking limitation point for dismissal of this case, let us see as to whether the defense of the debtor is tenable or not.

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8. The Petitioner Counsel has made submission that, in accordance with section 60 of the Contract Act, *where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment to be applied, the Creditor has every right to apply and adjust the part payments at his discretion to any lawful debt actually due and payable to the Creditor from the Debtor, whether the recovery is or is not barred by time of law in force for the time as to the Limitation to suits.* Since the Corporate Debtor has made part payments through Bank transactions on various dates up to 17.2.2015, without any explicit direction to adjust the part payments against the particular invoice, the creditor has adjusted these part payments in such a way that such part payments can save limitation to all the outstanding dues payable by the Corporate Debtor.

9. The Creditor Counsel says section 60 of the Contract Act and Section 19 of Limitation Act are read together, it is evident the Creditor is at liberty to adjust the part payments in the way it suits to the Creditor against the debts payable by the Corporate Debtor unless and until an indication to which the payments is to be applied. The Corporate Debtor had occasion to have this say in respect to this liability — at the time reply notice was given u/s.434 of the Companies Act, 1956. In the notice u/s.434 of the Companies Act, 1956 itself, the Petitioner has categorically mentioned how much amount was to be paid by the Corporate Debtor,

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but at the point of time, this Corporate Debtor did not raise any objection saying that since there was an understanding between the Petitioner and the Debtor to adjust part payments against the invoices raised first in point of time. The debtor has not even initiated any legal proceedings against this Petitioner disputing the claim made by the Petitioner until before filing reply before this Bench to the Form filed u/s.9 of the Insolvency & Bankruptcy Code, 2016.

10. Nonetheless, this Corporate Debtor has not filed by material paper showing that there was an understanding between the Petitioner and the Corporate Debtor to adjust part payments against the invoices first in point of time, it was not even stuck to the debtor mind until before filing reply before this Bench.

11. According to Section 60 of the Contract Act, 1872, there must be an indication from the Debtor side saying that the part payments should be adjusted to a particular debt owed to the Creditor. Here, no such intimation or indication existing to say that part payments should be adjusted to the invoices first in point of time, therefore, this Bench has not found any merit in the defense setup by this Corporate Debtor.

12. Since the Petitioner has filed the invoices with their Bank account statement reflecting part payments made by the Corporate Debtor up to 17.2.2015 and having filed Bank Certificate reflecting the payments come

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from the Corporate Debtor up to 17.2.2015, and the liability not being denied, the Petitioner having filed all the records required to show that this Corporate Debtor availed goods supplied by the Petitioner and thereafter defaulted in making full payments towards invoices raised by the Petitioner, this Bench of the view that the material available on record is enough to believe that debt is in existence and the debtor defaulted in making payment. To justify the payments adjusted against each of the invoices, the Petitioner has filed particulars of claim as on 18.3.2016 and computation thereof disclosing no debt is barred by Limitation and showed that the claim made by the Petitioner is inconsonance with the computation filed by the Petitioner herein. As to the principal amount shown as ₹22,32,678 in respect of the invoice amount in the notice given u/s.434 of the Companies Act, 1956, the Petitioner says that calculation inadvertently has come to ₹22,32,678 without deduction of ₹4,400 gone towards transport charges on behalf of the Debtor Company which subsequently the Debtor paid to the Petitioner, that amount has been deducted when the Company Petition was filed u/s.433 and 434 of the Companies Act, 1956. Since this variation has been explained in Company Petition, we are of the view that defense taken in respect to variation of the amount, have no sense after taking the explanation given by the Petitioner in the Company Petition into consideration.

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13. For having the Corporate Debtor admitted the liability except saying adjustments should have been made against the invoices first in point of time, this Bench hereby holds that it is a fit case for admission. Accordingly, this Petition is admitted declaring Moratorium with directions as mentioned below:

- i) That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- ii) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- iii) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

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- iv) That the order of moratorium shall have effect from 17.08.2017 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- v) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

14. This Bench makes a reference to the Insolvency and Bankruptcy Board of India (IBBI) for the recommendation of Insolvency Professional for appointment as Interim Resolution Professional.

15. The Registry is directed to forward a copy of this order to IBBI and post this matter after receipt of reply from IBBI for the appointment of IRP.

16. The Registry is hereby directed to communicate this order to both the parties.

Order pronounced on 26.7.2017 and delivered on 17.8.2017.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B.S.V. PRAKASH KUMAR
Member (Judicial)