

**In the National Company Law Tribunal
Single Bench, Chennai**

CP/598/ (IB)/CB/2017

Under Section 9 of the IBC, 2016

In the matter of

M/S. ULTRATECH CEMENT LIMITED

V/s

M/S. GOLDEN PROSPEROUS PROPERTY PRIVATE LIMITED

Order delivered on: 03/11/2017

For the Petitioner/OC : Smt. A. Vidya, Advocate

For M/s. King & Partridge

For the Respondent/CD: Shri. S.M. Moor Mohideen, Advocate

Per: K. ANANTHA PADMANABHA SWAMY, MEMBER (J)

ORDER

Under consideration is a Company petition filed by M/s. Ultratech Cement Limited (in short **Petitioner/Operational Creditor**) against M/s. Golden Prosperous Property Private Limited (in short **Respondent/Corporate Debtor**) under section 9 of the Insolvency and Bankruptcy Code, 2016 (in short **IB Code 2016**) r/w rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, **IB Rules 2016**)

2. Before proceeding with this matter, it would be appropriate to make a note of background facts for the purpose of determination of this petition.

3. The petitioner/OC is a limited Company incorporated under the Companies Act, 1956 and the registered office is situated at Ahura Center, B- wing, 2nd

Floor, Mahakali Caves Road, Andheri (East), Mumbai 400 093 and the branch office is situated at No. 67, Pallikuppam Road, Noombal, Chennai 600 077.

4. The learned Counsel for the Applicant submitted that the Respondent placed orders for Ready Mix Concrete on 26.08.2014 and 27.10.2014 and the Applicant has made the last supply on 18.11.2014. The Respondent never raised any dispute for the supplies made by the Applicant. Ever since the beginning, the Respondent failed to make the payments and the cheques issued by the Respondent were returned dishonoured. The Respondent acknowledged a sum of Rs. 19, 22,452/- by the balance confirmation dated 09.07.2015 and there was a difference of Rs. 5056.20 between the books of the Applicant and the Respondent and that the said difference is due to cheque bounce charges. Subsequently the Respondent issued a two cheques for the entire admitted amount of Rs. 19,22,452/- and both the cheques were returned dishonoured on 26.11.2015 for which the Applicant has filed a criminal case before 3rd Fast Track Court under section 138 read with 141 of the Negotiable Instruments Act, 1881.

5. The learned Counsel for the Applicant further submitted that on failure of making payment by the Respondent, the Applicant initiated action to windup the Respondent under section 433(e) & (f) of the Companies Act, 1956 and a notice was also issued to the Respondent. The Respondent sent an untenable reply on 26.05.2016, however, again vide balance confirmation dated 15.09.2016 admitted the liability. The Applicant proceeded with the winding up petition before the High Court of Madras, however, the same was transferred to this Tribunal on its constitution. The said petition was abated by this Tribunal on 17.08.2017 as per notification No. GSR 732(E) dated 29.06.2017 and therefore the fresh petition under I& B Code, 2016 was filed before this Tribunal on 26.09.2017. The learned Counsel for the Applicant has submitted



that the Respondent has admitted the dues payable to the Applicant and when the Corporate Debtor is unable to pay its operational debt which became due and payable to the petitioner, then the petitioner was left with no other option except approaching this Adjudicating Authority claiming the payment of Rs. 30,30,223.20/- including the interest against the corporate debtor in the capacity of a Operational Creditor under the provisions of the IB Code, 2016. The learned Counsel for the Applicant submitted that the Corporate Debtor has become commercially insolvent due to its inability to pay its debts and thus prayed to initiate Corporate Insolvency Resolution Process against the Respondent/CD.

6. The learned Counsel for the Respondent vehemently opposed the contentions raised by Counsel for the applicant and submitted that the instant petition is not maintainable in law and facts for the reason that the petition is filed against a dead company which was struck off by the Registrar of Companies under section 248 of the Companies Act, 2013. The Respondent is ceased to be a legal entity and this Tribunal would be entirely lacking in jurisdiction to adjudicate upon a claim made against the non-existent Respondent. Further, the Applicant has not complied with the requirement of serving of notice on the Respondent. The demand notice and the petition has been dispatched by the Counsel for the Applicant but not by the Applicant themselves, therefore, the petition is liable to be dismissed. He has further submitted that when the notice under section 433(e) & (f) of the Companies Act, 1956 was issued to the Respondent, the same was disputed by the Respondent on the ground that the materials supplied by the Applicant were of substandard and the test reports were not submitted by the Applicant to the Respondent. The learned Counsel for the Respondent submitted that the Applicant cannot enforce an alleged debt under IB Code when it is disputed. Therefore, there is no default for invocation of the IB Code by the Applicant.



The learned Counsel for the Respondent in support of his submissions relied on the following judgments:

- (a) **(1) Cuttack Municipality Vs Shyamsundar Behera (AIR 1977 ORI 137) (2) Vijaya Bhargavi Chit Fund Limited Vs J. Rama Rao & others (2005 (5) ALD18)** –To show that a suit is not maintainable against a dead person.
- (b) **Macquaire bank Vs Uttam Galva Mettalics Limited (Comp Appeal Insolv No. 96 of 2017) in NCLAT** – To show that if the notice and the petition were issued by Counsel for the Applicant is liable to dismissed.
- (c) **VDS Plastics Private Limited Vs Pal Mohan Electronics Private Limited (Company Appeal Insolv No. 58 of 2017) dated 14.09.2017 NCLAT** – To show that the reply to the notice under section 433 would constitute a dispute.

7. Heard. Perused the pleadings and documents submitted by both the parties.

8. After considering the pleadings and submissions made by both the parties, the issue arises before me is to decide as to whether the Applicant has made out a case to admit the petition or not under the I & B Code, 2016. It is on record that the Applicant had initiated winding up proceedings before the Hon'ble High Court of Madras and subsequently it was transferred to this Tribunal which was abated as per the notification No. GSR 732(E) dated 29.06.2017. The dispute stated by the Respondent in the Proceedings u/s 433 of Companies Act 1956 came to an end when the petition was abated by this Tribunal and it is a well settled principle of law that the abatement of the main action abates the proceeding ancillary or collateral too. Therefore the contention

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raised by the learned Counsel for the Respondent that the claim was disputed by the Respondent in the winding up petition is not sustainable. With regard to the submission that a suit cannot be maintainable against a dead person, in the present case the Respondent Company, it is also on record that the Company is struck off under section 248 of the Companies Act, 2013 for non-compliance of provisions of the said act. If the Respondent Company is honest one, it should have taken immediate steps to restore the Company by filing a petition under section 252 of the Companies Act, 2013 whereas the learned Counsel submits that the proceedings under I & B Code 2016 is not maintainable, which clearly indicates the intention of the Respondent. Instead of taking steps by itself, the Respondent Company wants the Applicant to take sufficient remedies to rectify the Register of Companies and thereafter initiate proceedings under the I & B Code, 2016.

9. In these circumstances, I feel it is proper to see the intention of legislature in making the I & B Code. If the contention of the Respondent is taken in to consideration, no action can be taken against a wilful defaulter who can escape from the clutches of law saying that the Company is dead and any action against a such company is not maintainable. By submitting, no action can be taken against a dead company, on the other hand if it would strip off all the assets of the Company, it will become a shell company. Even if the Company is restored in the Registrar of Companies at a later point of time, there will be no assets in the Company either to settle the creditors of the Company or the employees of the Company. Therefore, in my considered view, the interest of the assets and the employees of the company including general public are to be protected. It is also a fact that in the present case the Respondent is not desirous to restore the Company and it expects the same from the Applicant. If the Interim Resolution Professional is appointed, he will take necessary steps to restore the



company in order to protect the assets and the interest of the employees including the general public.

10. In view of my above observations, I am inclined to admit the petition as the Applicant has made out a case and also satisfied the Adjudicating Authority in admitting the petition. It is also proved that there is a debt due payable by the Respondent/CD and defaulted in making payments. The objections raised by Counsel for the Respondent are not convincing for rejection of the instant petition and case laws are also not applicable to the facts and circumstances of the present case.

11. Therefore, the instant petition is admitted and I order commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed within 180 days, reckoning from the day this order is passed.

12. I direct the Registry to take up the matter with the Board for appointing an Interim Resolution Professional (IRP) as the Applicant has not proposed any name of the IRP to be appointed. On the appointment, the IRP is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the I & B Code, 2016 within three days from the date of the copy of this order is received and call for submissions of claim in the manner as prescribed.

13. I declare the moratorium which shall have effect from the date of this order till the completion of Corporate insolvency resolution process for the purpose referred to in Section 14 of the I & B Code, 2016. I order to prohibit all of the following, namely:

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- (i) 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.
- (ii) Transferring, encumbering, alienating or disposing of by the corporate debtors any of its assets or any legal right or beneficial interest therein;
- (iii) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)
- (iv) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

14. The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 414 shall not apply to such transactions, as notified by the Central Government.

15. The IRP so appointed shall comply with the provisions of sections 13(2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I & B Code.

16. The petitioner/OC as well as the Registry is directed to send the copy of this order to IRP on his appointment so that he could take charge of the

Corporate Debtor's assets etc. and make compliance with this order as per the provisions of the I & B Code, 2016.

17. The Registry is also directed to communicate this order to the Operational Creditor and the Corporate Debtor.

18. With the above directions the petition is disposed of.



K. Anantha Padmanabha Swamy

Member (Judicial)