

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, MUMBAI
C.P. NO. 41/I&BP/NCLT/MAH/2017**

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

In the matter of under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules 2016.

Between

M/s. International Road Dynamics South Asia Pvt. Ltd. ... Applicant/
Operational Creditor

V/s.

M/s. P. S. Toll Road Pvt. Ltd. ... Corporate Debtor

For Applicants: Mr. Joydip Bhattacharya, a/w. Mr. Surender Kumar, Mr. Anoop Patil, Advocates for the Applicant. Mr. Pramod Radha Krishna, General Manaeger-in-person

For Corporate Debtor: Mr. D. J. Kakalia, a/w. Mr. Anwar H. Patil, Advocates for the Corporate Debtor.

ORDER

(Heard and pronounced on 31.03.2017)

It is an application u/s 9 of Insolvency and Bankruptcy Code (herein after referred as "Code") filed by an operational creditor for initiation of corporate insolvency resolution process in respect of corporate debtor in the manner provided under this Code.

2. The Operational Creditor Company, namely International Road Dynamics South Asia Pvt. Ltd.(referred as IRDSA), filed this CP u/s.9 of Code (I&BC) stating that IRDSA supplied goods and services to the Corporate Debtor, namely PS Toll Road Pvt. Ltd. on the purchase/work orders given by the Corporate Debtor in between 1.3.2011 and 25.7.2014, in pursuance of it, IRDSA raised a total of 15 invoices against the corporate debtor over a period from 15.12.2011 to 24.6.2015 totalling to ₹ 2,91,70,750 in respect to goods and services rendered by it to the debtor company towards Pune - Satara projects taken up by the debtor. IRDSA was maintaining the account of the transactions as a running account for all the

transactions pertaining to PS Toll and the debt fell due on 24.6.2015, i.e., the last invoice raised by IRDSA regarding the aforesaid transactions. IRDSA further submits that it kept on discharging its obligations under work/purchase orders and raising invoices collectively amounting to ₹2,91,70,750. Against the aforesaid total amount, the corporate debtor made payments on different dates amounting to ₹1,40,14,023 till the last payment of 13,73,406 made on 22.11.2013, besides that, the corporate debtor has also deducted TDS amounting to ₹6,43,514 and has also made deductions amounting to ₹22,87,273 against certain invoices, thus leaving outstanding of ₹1,22,25,940 still payable to IRDSA. After much persistence, the Corporate Debtor confirms the Balance payable to the Operational Creditor as only ₹11,79,000/- despite the fact that the invoices amounting to ₹1,13,87,070/- out of the amount claimed by the Operational Creditor were duly accepted by its officials; on top of those, the Petitioner gave a notice dated 4.2.2017 u/s.8 of the I&B Code stating that the Petitioner had raised invoices collectively amounting to ₹2,91,71,076/- out of which balance still to be payable by the Corporate Debtor to the Petitioner amounts to ₹1,22,25,940. At last, the corporate debtor on 21.6.2014 and in May 2016 provided balance confirmation to IRDSA stating that only ₹11,79,000 is due and payable till said date despite the fact that site officials of the debtor company duly accepted the invoices amounting to ₹1,13,87, 070. This difference has occurred on account of non-updating of certain bills raised by IRDSA into the books of Debtor Company.

3. When the debtor company failed to make balance payment to IRDSA, on 4.2.2017, it issued a statutory notice u/s 8 (1) of the Code to the debtor demanding payment of ₹1, 22, 25,940. Having the debtor company neither paid off the debt owed to IRDSA, nor replied within 10 days from the date of receipt (7.2.2017) of the statutory notice u/s 8 of the Code by the corporate debtor, IRDSA filed this CP u/s 9 of the Code for initiating the Insolvency Resolution process against the Corporate Debtor Company.

4. Over which, the counsel appearing on the debtor behalf argued that the debtor has only confirmed the debt repayable is only ₹11,79,000, therefore to that extent, the debt has been confirmed in the year 2014 and 2016, hence the corporate

debtor is today under no obligation to pay against the invoices held out by IRDSA. Another argument raised by the counsel of the corporate debtor is that jurisdiction vested to NCLT under this Code is not for recovery of debt but for initiating insolvency resolution process provided the company is unable to repay the debt, here the company is solvent and making profits, and hence this petition is not maintainable. He further says if at all any order is passed under this section, then it will cause impediment to the functioning of the company.

5. On hearing the submissions of either side, this Bench, before coming into facts of the case, if the section 8 is looked into, it is clear that when Operational Creditor issues notice demanding payment basing on the invoices raised by the creditor against the debtor, it is the bounden duty of the Corporate Debtor to reply within 10 days after receipt of notice, stating that dispute is already in existence in relation to the claim raised by Operational Creditor.

6. Here, in this case, the Corporate Debtor has not replied to the notice of IRDSA within 10 days from the date of receipt of the notice, had it been proved confirmation is only for ₹11.79 lakhs, what prevented the Corporate Debtor to give a reply to the statutory notice stating that the claim made by IRDSA is disputed, but that has also not been done by the Corporate Debtor.

7. The obligation upon the Operational Creditor to initiate Resolution process u/s 9 is that the creditor shall file invoices demanding repayment or demand notice delivered by the operational creditor, affidavit disclosing that no reply notice has not been given within 10 days after receipt of the notice u/s 8 and a certificate from the financial institution maintaining accounts of the operational creditor; to prove the same, the creditor filed invoices for ₹1,22,25,940 along with the purchase orders issued by the Corporate Debtor by showing concurrence of default by filing statement of accounts of the Operational Creditor and also a Certificate from the Bank showing occurrence of default as mentioned under section 9 of I&B Code. Here, the Petitioner places the Purchase Order, invoice notice dated 4.2.2017 and receipt of notice dated 7.2.2017, Bank account statement disclosing the payment claim made by the Corporate Debtor and also the last payment dated 22.11.2013 and also an Affidavit disclosing no notice has been issued by the Corporate Debtor

disputing the claim raised by the Petitioner in respect to the claim mentioned in this Petition.

8. As to the defence of the Corporate Debtor, the Corporate Debtor has to give atleast reply notice stating that the claim raised by the Petitioner is in dispute for any suit or arbitration pending to prove that the dispute is in existence as on the date of receipt of the notice given u/s.8 of I&B Code or at least mentioning that the debt claimed by the creditor is already in dispute, neither of it happened.

9. When the corporate debtor failed to give reply as contemplated u/s.8 of Code, all these defence that the company is sound, Balance Sheet is sound will not have any merit, because the claim raised by the creditor has not been disputed by the Corporate Debtor within the time stipulated. It need not be said separately that insolvency means not only the inability of Debtor in making repayment to the Creditor but also refusal to make repayment of debts. Ability means ability to pay debts but not an ability to have sound balance sheet. Here, the Corporate Debtor has not shown any reason why this payment should not be made to the Petitioner on the notice given u/s. 8 of the Code.

10. If we look into liquidation matters in India and England, it is evident that inability to pay debts is not only the ground for initiation of Insolvency Resolution process, but also the refusal to repay undoubted debts amounts to insolvency. In English case namely *Cornhill Insurance Plc v Improvement Services Ltd (1986) BCAC 26*, it has been held that if the defence of the corporate debtor is not in good faith and refusal to repay is without any good reason, the ground that the company is healthy will not become a ground for dismissal of I & B petition. Moreover, this claim again will come for verification before liquidator u/s 39 of the Code and open for further scrutiny under sections 41 and 42 of the Code.

11. Since it is evident that no reply has come to the notice given u/s.8 of the I&B Code, this Bench has no other go except to admit this Company Petition and declare Moratorium with consequential directions as mentioned under the I&B Code.

12. Accordingly, for the reasons above stated, this Company Petition is admitted.

13. Since the Petitioner has not proposed the name of the Insolvency Resolution Professional, this Bench hereby admits this Company Petition and refers it to the Board for appointment of Insolvency Resolution Professional who can act as Insolvency Resolution Professional as mentioned u/s.16 of the I&B Code, 2016.

14. List this matter on 07.04.2017.

Sd/-

V. NALLASENAPATHY

Member(Technical)

Sd/-

B. S. V. PRAKASH KUMAR

Member (Judicial)