

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 232/KB/2022

*An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read
with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016.*

**IN THE MATTER OF:
GOVIND YADAV**

And

**IN THE MATTER OF:
GOVIND YADAV, PROPRIETOR
GOVIND SCAFFOLDING**

... Applicant/ Operational Creditor.

Verses

**SIMPLEX INFRASTRUCTURE LIMITED
[CIN: L45209WB1924PLC004969]**

... Respondent/ Corporate Debtor.

Date of Hearing: December 12, 2023.

Date of Pronouncement: December 18, 2023.

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

APPEARANCE:

For Applicant: Mr. Gursat Singh, Adv

For Respondent: Mr. S. Sen, Adv. and Mr. D. Ahmed, Adv.

ORDER

Per: D Arvind, Member (Technical)

1. This Court is congregated through hybrid mode,
2. Heard the Learned Counsels for both parties.
3. This is an application filed by one Mr. Govind Yadav, hereinafter referred to as "Operational Creditor" ("Applicant") seeking initiation of the Corporate Insolvency Resolution Process, for brevity "CIR Process" under Section 9 of Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" against Simplex

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Infrastructures Ltd., hereinafter referred to as “Corporate Debtor” (“Respondent”).

Brief facts of the case:

4. The Operational Creditor is in the business of supplying shuttering material on a rent basis. The Operational Creditor has supplied such material to the Corporate Debtor on a rental basis, based on purchase order issued by the Corporate Debtor on 06.04.2018, the copy of which is in page 68 of the application.
5. Invoices were raised upon such supplies from time to time starting from 01.05.2018 to 01.03.2022 under 47 Invoices listed in pages 19-21 of the application, totalling to an amount of Rs.1,36,53,848/-.
6. Against the Invoices raised, the Applicant claims that he has received only Rs. 4,32,456/- leaving Rs. 1,32,21,390/- to be paid, which has not been paid till the date of this application.
7. The Operational Creditor has also claimed interest @24% per annum as per the terms contained in the Invoices raised by him, which comes to Rs. 28,36,000/- and thus, along with the principal amount due, the total due and defaulted amount is Rs. 1,60,57,390/- and hence this application under Section 9 of the I&B Code.

Applicant's submissions:

8. The Ld. Counsel for the Applicant submits that Invoices raised and account statements to prove the default are part of the application. It is submitted that Notice under Section 8 of the I&B Code issued by him is in page 134 of his application which details the nature and extent of default. He submits that no reply has been made by the Corporate Debtor to the said Notice.
9. In the absence of reply to the Section 8 notice, the Ld. Counsel claims that there is no pre-existing dispute. He also submits that there are several judgments of the Hon'ble NCLAT to say that interest clause mentioned only in Invoices, would be sufficient to invoke Interest on late payments.

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10. It is further submitted that the total amount claimed to be in default is Rs. 1,60,57,390.00/- and the date of default is 17.03.2022, as the last bill bearing no. HB1105 was raised on 01.03.2022 and the payment term of 15 days ended on 16.03.2022.
11. The Ld. Counsel for the Applicant submits that the application meets all criteria such as default crossing the threshold financial limit of Rs. one crore, the application within the time limit prescribed, no pre-existing disputes and thus the same may be admitted under Section 9 of the I&B Code, 2016.

Respondent's submissions per contra:

12. The Ld. Counsel for the Respondent alleged that Invoices that are due for payment during the period prescribed under Section 10A of the I&B Code, 2016, cannot be included. Hence, the amount due from 01.04.2020 to 01.03.2021 amounting to Rs.19,01,297/- will have to be excluded.
13. It is further submitted that an amount of Rs.65,20,090/- which has been claimed from the Corporate Debtor is on not on account of any goods supplied by the Operational Creditor to the Corporate Debtor, but based on an entry mentioned in the Issue (Delivery) challan issued by Operational Creditor and not arising out of any work order or invoice. As per the Issue Challan issued by the Operational Creditor, the cost of materials supplied by him on a rental basis will be recovered if not returned by the Corporate Debtor after the rental period. In any event, the said amount of Rs.65,20,090/- cannot be treated as "operational debt". He took us through Invoice No. HB 1105 dated 01.03.2022 which is annexed at page 115 of the application shows that what has been claimed in the invoice is "**Loss Charges**" and not on account of sale of any of goods or services.
14. It is claimed that if the amount pertaining to the period prescribed under Section 10A period and the amount pertaining to the invoice on account of "Loss Charges" mentioned above are excluded, then the amount in default would be Rs.75,36,003/- which is well below the threshold limit of Rs.1 crore. The Ld. Counsel for the Respondent further claims that the Corporate Debtor is willing

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to return the materials rented to it and has sent mail to the Operational Creditor on this and reiterated the same during the course of hearing.

- 15.** It is further alleged that there does not have any agreement and/or written contract between the Operational Creditor and Corporate Debtor regarding the interest payment and claiming the interest amount is merely based on a clause mentioned in Invoices. It is prayed that sans prejudice, even with the inclusion of interest the default is well below Rs. one crore, less than the threshold limits, thus, the application may be dismissed.

Analysis and findings:

- 16.** We find that there is no dispute between the parties with reference to the arguments made on Invoices due for payment during the period prescribed under Section 10A of the I&B Code and accordingly Rs. 19,01,297/- will have to be excluded from the threshold limit, leaving the balance principal amount and Interest to Rs. 1,41,56,093/-.
- 17.** The Claim of Interest arising out of an entry mentioned in the Invoice is vehemently and passionately contested by both parties by relying on case laws in their favour. The interest amount claimed is Rs. 28,36,000/-. We will deal with this issue later if required.
- 18.** We find that the claim of the Operational Creditor includes Invoice No. HB1105 dated 01.03.2022 which is for an amount of Rs.65,20,090/-. This invoice is not for the supply of any goods or services, but for the recovery of “Loss Charges” i.e., to recover the cost of materials supplied by the Operational Creditor to the Corporate Debtor on a retail basis, but not returned by the Corporate Debtor.
- 19.** This claim for “Loss Charges” has not come out of any contract or work order, not even out of Invoices raised by the Operational Creditor to Corporate Debtor, but from delivery challan issued by the Operational Creditor while supplying materials on a rental basis. Thus, we find that this recovery has not been agreed by the Corporate Debtor and consequently the very recovery itself is questionable in the absence of a valid contract or work order. In any case, the Learned Counsel

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for the Corporate Debtor, at the hearing submits that the Corporate Debtor is ready to return the said materials to the Operational Creditor.

20. Be that as it may, in any case, the “Loss Charges” are in the nature of “compensation/damage charges” and not on account of the supply of any goods/services. Even the Operational Creditor has raised the relevant invoice to recover this amount not as “supply of goods” but only as “loss chares”.
21. At this juncture, it would be appropriate to go through the definition of “Operational Debt” catered to under Section 5(21) of the I&B Code, reproduce verbatim that:

“Operational Debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

22. Further, we are supported by the decision passed by the Hon’ble NCLAT in *Chandrashekhhar Exports Pvt. Ltd. v. Babanraoji Shinde Sugar & Allied Industries Ltd* Company Appeal (AT) (Ins) No. 1032 of 2023 that:

“3. The Adjudicating Authority in Para 19 and 20 has observed that the amount now claimed by the Appellant is Rs.1.70 Crore, which was claimed as compensation. The Adjudicating Authority took the view that the claim of compensation cannot be said to be amount on basis of which application under Section 9 can be admitted. It has been held that the Operational Debt claimed by the petitioner must be crystallized, undisputed and not something which requires adjudication by competent authority. We are of the view that the Adjudicating Authority has not committed error in rejecting Section 9 application.”

(Emphasis Added)

23. Hence, we would infer that the loss charges or any other charges that are in the nature of compensation and/or recovery for damages, cannot be treated as “Operational Debt” as contemplated in the I&B Code, 2016.
24. In terms of the foregoing discussion and findings, we need to exclude the amount of Rs. 65,20,090/- also apart from the amount that became due during Section

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10A of the I&B Code period and if we do that then the due including the interest amount comes to only Rs. 75,36,003/- which is well below threshold limit and therefore we find no necessity to deal with interest, for the purpose dealing with this application under Section 9 of the I&B Code.

25. Accordingly, we find no merit in this application being **C.P. (IB) No. 232/KB/2022** and are accordingly **dismissed** with no costs.
26. **The Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Operational Creditor and the Corporate Debtor by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.
27. Additionally, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), West Bengal, Kolkata by all available means. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
28. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 18th Day of December, 2023.

Sayon [Steno]/ Bose, R. K. [LRA]