

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

Company Petition (IB) No. 250 (KB) of 2023

***Application by Operational Creditor to initiate Corporate
Insolvency Resolution Process under Section 9 of the Insolvency
and Bankruptcy Code read with Rule 6 of the Insolvency and
Bankruptcy (Application to Adjudicating Authority) Rules, 2016.***

IN THE MATTER OF:

Mr. Saroj Kumar Jena

... Operational Creditor/ Petitioner.

Versus

M/s. Simplex Infrastructure Limited

... Corporate Debtor/ Respondent.

Date of Pronouncement: May 09, 2024.

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Operational Creditor: Mr. Akash Sharma, Adv.

For the Corporate Debtor: Mr. Snehasish Sen, Adv.

Mr. Danyal Ahmed, Adv

ORDER

Per: D. Arvind, Member (Technical):

1. The Court congregated through hybrid mode.
2. Heard the Ld. Counsels for both parties.
3. This petition being C.P.(IB) 250 of 2023 has been preferred by one **Mr. Saroj Kumar Jena** (hereinafter referred to as "**Operational Creditor**")/ "**SKJ**")/ "**Petitioner**") against **M/s. Simplex**

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Infrastructure Limited (hereinafter referred to as “**Corporate Debtor**”/ “**Simplex**”/ “**Respondent**”) to initiate the Corporate Insolvency Resolution Process, for brevity “CIRP” under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity “I&B Code”.

Factual Matrix:

4. SKJ (Operational Creditor) is engaged in supplying materials and services for construction to various customers including Corporate Debtor herein.
5. In the year 2019, the operational creditor obtained an acknowledgement for outstanding liability from the Corporate Debtor which was not paid. The Operational Creditor applied for initiation of corporate insolvency resolution proceedings under Section 9 of the I&B Code before this Adjudicating Authority claiming a total outstanding amount of Rs. 2,70,30,800/- which includes both principal as well as interest.
6. During this proceeding, the corporate debtor approached the operational creditor for settlement leading to a settlement agreement which required the corporate debtor to pay a sum of Rs. 1,85,00,0000/- in instalments. The details of the proposed payment schedule are mentioned in the settlement agreement made between the parties to this dispute on 31.08.2021. The said schedule of proposed payment is reproduced from the settlement agreement for the sake of convenience:
 - a) Rs. 10,00,000/- DD No. 723707 date 31.08.2021 drawn on Punjab National Bank.
 - b) Rs. 10,00,000/- vide RTGS on 15.09.2021.
 - c) Rs. 5,00,000/- vide RTGS on 30.09.2021.

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- d)** Rs. 20,00,000/- vide RTGS on 30.10.2021.
- e)** Rs. 20,00,000/- vide RTGS on 30.11.2021.
- f)** Rs. 20,00,000/- vide RTGS on 30.12.2021.
- g)** Rs. 20,00,000/- vide RTGS on 30.01.2022.
- h)** Rs. 20,00,000/- vide RTGS on 30.02.2022.
- i)** Rs. 20,00,000/- vide RTGS on 30.03.2022.
- j)** Rs. 20,00,000/- vide RTGS on 30.04.2022.
- k)** Rs. 20,00,000/- vide RTGS on 30.05.2022.

7. However, it is claimed that the corporate debtor has paid only Rs. 90,00,000/- leaving an outstanding amount of Rs. 1,17,92,920/-.

Ld. Counsel for the Operational Creditor/Petitioner:

8. Ld. Counsel for the petitioner submits that the settlement agreement made between the parties on 31.08.202, has failed and thus a sum of Rs. 1,17,92,920/- as on the date of filing this petition is due and become payable, apart from interest at 18% per annum.

9. It is submitted that since the amount in default is not disputed, this petition may be entertained, and the corporate debtor be admitted to the Corporate Insolvency Resolution Process.

Ld. Counsel for the Corporate Debtor/ Respondent:

10. Ld. Counsel for the corporate debtor submits that talks for settlement between the parties are going on and soon the matter will be settled.

Analysis and Findings:

11. On 19.03.2024, when the matter came up before us for hearing, the Ld. Counsels for both parties were present and agreed to furnish the

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Written Notes of Arguments along with the report of settlement within a period of 10 days. Accordingly, the matter was reserved for Orders.

- 12.** We have noted that till date, no report of settlement has been filed and consequently, we proceed to consider the matter on merits.
- 13.** It is evident that as per the settlement agreement made between the parties on 31.08.2021, a sum of Rs. 1,85,00,000/- was to be paid in instalments starting from August 2021 and ending in May 2022, by which the entire amount of Rs. 1,85,00,000/- was to be paid by the corporate debtor to the operational creditor. According to the submission of the Petitioner, in terms of the settlement agreement, the Respondent has paid Rs. 90,00,000/- only.
- 14.** However, since the corporate debtor has not made payment as per the schedule, the SKJ is entitled to proceed and claim its outstanding along with interest as per Clause 3 of the said settlement agreement, claims the petitioner.
- 15.** Since the settlement failed, the outstanding amount at the time of execution of settlement deed will have to be taken into consideration which is Rs. 2,75,92,920/- without including the interest.
- 16.** We find that the interest rates were not part of any work order/purchase order issued by the corporate debtor on the operational creditor. In fact, there is no agreement on interest either in the invoices or in the work order issued. However, the corporate debtor in the first notice issued under Section 8 dated 02.08.2019, demanded 12% interest per annum and in the second notice issued on 20.09.2019, in Form 3 demanded an interest of 18% per annum.

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17. Be that as it may, we find that Hon'ble NCLAT has held in the case of ***Trafigura India Pvt. Ltd. v. TDT Copper Ltd*** decided on **15.09.2022** reported in **(2022) ibclaw.in 714 NCLAT** that breach of settlement agreement made between the operational creditor and corporate debtor does not amount to a default as operational debt, as such a settlement agreement loses the characteristics of operational debt. The relevant portion of the order is reproduced hereunder:

*“The Adjudicating Authority has considered the Settlement Agreement and rightly come to the conclusion that **default of instalment of Settlement Agreement does not come within the definition of ‘operational debt’ as it does not fall within the definition of additional debt as per Section 5(21) of the IBC** and further prayer made by the Corporate Debtor that the matter be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act, the Adjudicating Authority has also rightly held that the role of National Company Law Tribunal is very limited while exercising its power under Section 7, 9 and 10 of the IBC, 2016, it is beyond the scope of Section 9 of the IBC.”*

(Emphasis Added)

18. Further in ***Malدار Barrels Pvt Ltd v Pearson Drums and Barrels Pvt Ltd***, in **Company Appeal (AT) (Ins) 872 of 2020** the NCLAT affirmed the decision of the NCLT, which held that the NCLT was not

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the forum where parties could seek implementation of the Settlement Agreement and left it open the parties to resort to other legal remedies available for enforcement of the Settlement Agreement.

- 19.** We find that the Operational Creditor has filed a petition, being C.P. (IB) No. 135/KB/2020 previously on 21.12.2019 under Section 9 of the Code, which was dismissed as withdrawn in accordance with the Settlement Agreement dated 31.08.2021. Further, in 2021-2022, the Corporate Debtor made some payments to the Operational Creditor in terms of the Settlement Agreement dated 31.08.2021. Further, failing to pay the rest of the amount due and payable, the Operational Creditor has issued a demand notice on 02.08.2022 and a Form-3 Demand Notice on 03.10.2023, and accordingly, this petition has been preferred on 19.10.2023. We would discern that this instant petition has been preferred to recover the rest of the amount due and payable in terms of the Settlement Agreement dated 31.08.2021. Thus, in light of the judgment rendered in **Trafigura (Supra)** and **Maldar (Supra)**, we are of the view that this Adjudicating Authority is not a forum to recover money arises in default of instalment of a settlement agreement. Breach of the terms and conditions of payment in accordance with a settlement agreement does not constitute an “Operational Debt” as per the definition under Section 5 (21) of the I&B Code and accordingly that cannot be a ground to trigger CIRP against the Corporate Debtor. Thus, the outstanding due claimed herein has lost its substratum or characteristics of being an “Operational Debt” under the I&B Code. While the petitioner has claimed that since the settlement agreement failed, their original due amount is liable to be paid. We find that the entire amount as per the settlement agreement has

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been paid though not as per the time frame provided in the settlement agreement. Thus, what remains to be paid is the interest at a rate which is yet to be finalized between the parties. We would place reliance on the judgment dated 25.11.2019, passed by the Hon'ble NCLAT in ***SBF Pharma Vs. Gujarat Liqui Pharmacaps Pvt. Ltd.*** in Company Appeal (AT) (Insolvency) No. 883 of 2019, wherein the Hon'ble NCLAT laid down that:

*“7. In the present case, we find that the Respondent- ‘Corporate Debtor’ is not insolvent and viable and feasible to pay the claim amount. **Only for recovery of the interest, the Appellant is pursuing the Insolvency Resolution Process which, according to us, is malicious intent for any purpose other than for the resolution of insolvency, or liquidation.**”*

(Emphasis Added)

- 20.** Further, during the course of argument and in the written submissions as well, the Petitioner has asserted that without consulting with the Petitioner, the Respondent transferred an amount of Rs. 95,00,000/- has been paid in two instalments of Rs. 50,00,000/- on 18.02.2024 and Rs. 45,00,000/- on 19.03.2024 respectively. It is evident that the principal amount claimed to be in default is of Rs. 1,17,92,920/- and after deducting Rs. 95,00,000/- which has been transferred by the Petitioner to the Respondent on 18.02.2024 and 19.03.2024 respectively, the amount remaining due and payable is of Rs. 22,92,920/-. However, the Petitioner has claimed an 18% rate of interest on the principal amount, we find no document has been placed which substantiates that such a rate of interest has been agreed upon between the parties. Thus, it would

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be discernible that the amount remaining due and payable is of Rs. 22,92,920/- on account of the principal amount.

- 21.** In terms of foregoing view, we find that this petition being **C.P. (IB) No. 250 of 2023** filed under Section 9 of the I&B Code merits rejection and accordingly, **rejected** and **disposed of**.
- 22.** 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), to whom the company(ies) are registered with, 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.
- 23.** A certified copy of this order, if applied for with the Registry be supplied to the parties in compliance with all requisite formalities.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 09th Day of May, 2024.

Bose, R. K. [LRA]/ PH(PS)