

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT-1

ITEM NO. 302
C.P.(IB) No. 131(AHM)2022

Order under section 9 IBC

IN THE MATTER OF :

HCC Infrastructure Company Limited
(Formerly, HCC Concessions Ltd.)

....Applicant

V/s.

Sadbhav Infrastructure Project Limited

....Respondent

Order delivered on: 25.09.2023

Coram:

Mr. Shammi Khan, Hon'ble Member (J)
Mr. Sameer Kakar, Hon'ble Member (T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of order. The order is pronounced in the open court, vide separate sheet.

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
(COURT-I)**

CP (IB) No.131/AHM/2022

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

IN THE MATTER OF:

**HCC Infrastructure Company
Limited**

(Formerly, HCC Concessions Ltd.)
Registered office at:
Hinco House, Lal bhadur Shastri
Marg, Vikhroli (West),
Mumbai-400083, Maharashtra.
CIN:U45400MH2010PLC210944

**Applicant/
Operational Creditor**

VERSUS

**Sadbhav Infrastructure
Project Limited**

Registered office at:
Sadbhav House, Opposite
Law Garden Police
Chowki, Ellisbridge,
Ahmedabad,
Gujarat-380006
CIN:L45202GJ2007PLC04
9808

**Respondent/
Corporate Debtor**

Order pronounced on: 25.09.2023

CORAM:

MR, SHAMMI KHAN (MEMBER JUDICIAL)

MR. SAMEER KAKAR (MEMBER TECHNICAL)

APPEARANCE:

For the Operational Creditor: Mr.Salil Thakore, Adv.

For the Corporate Debtor: Mr.Naveen Pahwa, Sr. Adv

a/w Ms. Pragati Bansal, Adv.

O R D E R

1. This petition was originally filed on 27.05.2022 by **HCC Concessions Limited** (hereinafter referred to as “**the Applicant/Operational Creditor**”) against **Sadbhav Infrastructure Project Limited** (hereinafter referred to as “**the Respondent/Corporate Debtor**”) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to initiate the Corporate Insolvency Resolution Process (in short “**CIRP**”) against the Corporate Debtor for having defaulted in payment of its outstanding dues of **Rs.21,64,59,327/-**. The date of default is stated to be **14.11.2021**.
2. Thereafter, HCC Concession Ltd. got merged into **HCC Infrastructure Company Limited** accordingly; HCC Infrastructure Company Limited filed an application bearing I.A. No. 623 of 2023 seeking substitution

in the place of HCC Concessions Ltd. The said application was allowed by this Tribunal vide order dated 18.07.2023.

3. The Operational Creditor i.e. HCC Infrastructure Company Limited is a limited company incorporated under the provisions of the Companies Act, 2013 with CIN No. U45400MH2010PLC210944. The registered office of the Operational Creditor is situated at Hinco House, Lal Bahadur Shastri Marg, Vikhroli (West), Mumbai-400083, Maharashtra.
4. The Corporate Debtor i.e., Sadbhav Infrastructure Project Limited is a listed company incorporated under the provisions of the Companies Act, 1956 with CIN No. L45202GJ2007PLC049808. The registered office of the Company is situated at Sadbhav House, Opposite Law Garden Police Chowki, Ellisbridge, Ahmedabad, Gujarat-380006.
5. The averments made by the operational creditor in its petition and presented/argued by the learned counsel for the operational creditor are summarized hereunder:-
 - a) The Operational Creditor and Corporate Debtor entered into a Restated Share Purchase Agreement ("**RSPA**") dated 28.10.2015 (amended on 07.10.2019) through which the control and ownership of Dhule Palesner Tollway Limited ("**DPTL**") was to be transferred from the Operational Creditor to Corporate

Debtor. The Operational Creditor held 60% of issued and paid up capital in DPTL.

- b) The shares held by Operational Creditor were purchased by Corporate Debtor for which Corporate Debtor paid part consideration amounting to Rs.28 Crores and the remaining consideration was payable in future as per clause 7.1 of the RSPA i.e. 60% of the amount which may be received by DPTL from National Highways Authority of India (“NHAI”) in relation to an ongoing dispute between the DPTL and NHAI. The clause 7.1 is reproduced below:-

“7. CLAIMS IN RELATION TO NHAI

*7.1 If, after the First Completion Date, the Company receives any amounts (whether in the form of cash or non-cash consideration), arising from or in connection with NHAI Delay Claim (“NHAI Claim”), then (a) **in the event the said NHAI Claim is received by the Company in the form of cash consideration, then 60% (Sixty per cent) of the amount which is received by the Company shall, subject to deduction of (i) applicable withholding Taxes and (ii) outstanding monies payable by the Seller pursuant to clause 6.5 above, if any, be paid by SIPL to the Sellers within a period of 7 days (“NHAI Claim Amounts”); and (b) if settlement of NHAI Claim is by way of***

extended concession period or any other form of non-cash consideration, then the Acquirer shall pay to the Seller 60% (Sixty per cent) of the Net Present Value after the deductions mentioned in (a) above..”

- c) In view of RSPA, the shares representing 60% of the issued and paid-up capital of DPTL were duly transferred by the Operational Creditor to Corporate Debtor.
- d) Subsequently, NHAI and DPTL entered into settlement agreement dated 27.10.2020, wherein NHAI agreed to pay 43,95,14,565/- to DPTL towards the NHAI claim.
- e) An amount of Rs.43,95,14,565/- was received by DPTL from NHAI accordingly, as per clause 7.1 an amount of Rs.22,81,82,869/- being 60% of the said amount was to be paid by the Corporate Debtor to the Operational Creditor.
- f) The said fact of settlement came to the knowledge of the Operational Creditor in December 2020. Thereafter, Operational Creditor called upon the Corporate Debtor to make payment as per Clause 7.1 of the RSPA.

- g) The Operational Creditor on 26.02.2021 received an amount of Rs.6,00,00,000/- out of the total outstanding of Rs.22,81,28,869/-. This amount was paid by Corporate Debtor to HCC Operations & Maintenance Ltd. a group company of Operational Creditor.
- h) Thereafter, Operational Creditor called upon Corporate Debtor to make payment of outstanding amount and also sent an email dated 26.03.2021 and 30.03.2021 enquiring about the amount received by DPTL and details thereof.
- i) Despite of follow-ups no payments were paid by Corporate Debtor. Therefore, Operational Creditor issued demand notice dated 27.10.2021 and 08.11.2021. However, no reply of Corporate Debtor was received.
- j) Thereafter, the Operational Creditor issued a Form 3 demand notice dated 27.04.2022, calling upon the Corporate Debtor to pay a sum of Rs.21,64,59,327/-. The Corporate Debtor neither replied to the demand notice nor made any payment.

- k) The Corporate Debtor failed to abide by clause 7.1 of RSPA and has defaulted in making payment of Rs.21,64,59,327/- therefore, the present petition seeking initiation of CIRP against the Corporate Debtor.
- l) The Corporate Debtor has also acknowledged the debt vide letter dated 02.11.2022, 10.02.2023 and 05.05.2023.
6. The Corporate Debtor has filed its reply on 15.09.2023 the averments of the Corporate Debtor in the reply are stated below:
- a) The present petition is not maintainable as the alleged debt cannot be construed as an “operational debt” as defined under Sec. 5(21) of the Act. There are no goods or services provided by the Petitioner to the respondent and therefore, there cannot be any claim arising out of the alleged transaction.
- b) As per Clause 20.1 of the Restated Share Purchase Agreement, in case of dispute between the parties, the parties have a right to initiate arbitration as per the

Arbitration and Conciliation Act therefore, Arbitral Tribunal have all powers and jurisdiction to entertain such claims. Hence, the present petition deserves to be rejected.

c) As per clause 7.1 of Restated Share Purchase Agreement, 60% of the amount received from the NHAH would have to be remitted to the Petitioner by the Respondent within 7 days of receipt of such amount. In the present case the amount was received by Respondent on 23.02.2021 and 25.02.2021 therefore, 60% of the amount received by the Respondent was to be paid within 7 days from 23.02.2021 and 25.02.2021. Thus, the date of default is 02.03.2021 and 04.03.2021. The said date of default falls within the ambit of Sec.10A. Therefore, the petition is not maintainable as at the relevant point of time, the insolvency resolution process was suspended. Further, the date of default stated in Part-IV of the Petition is 14.11.2021 whereas, the actual date of default is 02.03.2021 and 04.03.2021 therefore, on this ground alone the petition is liable to be dismissed.

7. We have heard the Ld. Counsel for both the parties and perused the material available on record. The two main contentions raised by Corporate Debtor are that the debt is not an operational debt in terms of Sec 5(21) of the IB Code and the date of default falls within the definition of Sec 10A.
8. In the present matter there has been transfer of shares from Operational Creditor to Corporate Debtor. The Corporate Debtor states that there are no goods or services provided by Operational Creditor therefore, the same is not an Operational Debt as per Sec. 5(21). The definition of operational debt is reproduced below:

“Operational Debt” means a claim in respect of the provisions of goods and services including employment or a debt in respect of the payment 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”

It is also relevant to examine the definition of “goods” under Sale of Goods Act, 1930 the same is reproduced below:

*“goods” mean every kind of movable property other than actionable claims and money; and includes stock and **shares**, growing crops, grass and things attached to or forming part of*

the land which are agreed to be severed before sale or under the contract of sale.

On a bare reading of definitions of Operational Debt and Goods it becomes clear that shares are considered to be goods. Further, the Operational Creditor has placed reliance on ***Samskar Financial Services Private Limited Vs. Votary Trading Private Limited (2019 SCC Online NCLT 15615)***, wherein it is held that shares are goods. In view of the aforesaid we are satisfied that the debt in the present matter is an Operational Debt.

9. The date of default stated in the Petition is 14.11.2021 and the date of default as per the Corporate Debtor is 02.03.2021 and 04.03.2021 i.e. 7 days after the receipt of amount from NHAI as per clause 7.1 of RSPA.
10. The clause 7.1 of RSPA states that 60% of the amount received from NHAI would have to be paid to Operational Creditor within 7 days of receipt of such amount. The Corporate Debtor has received the amount from NHAI in two tranches i.e. on 23.02.2021 and 25.02.2021 and the period of 7 days from said date arrives at 02.03.2021 and 04.03.2021. The said dates fall within the period prescribed under section 10A of IBC which reads as follows:-

“Section 10A: *Notwithstanding anything contained in sections 7, 9 and 10, no application for Initiation of Corporate Insolvency Resolution Process of a Corporate Debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:*

Provided that no application shall ever be filed for Initiation of Corporate Insolvency Resolution Process of a Corporate Debtor for the said default occurring during the said period.

Explanation: For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.”

11. In pursuant to the above section, the Central Government issued two notifications. They are as follows:-

45a. *Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 w.e.f. 5-6-2020.*

45b. Notification No. S.O. 3265(E), dated 24-9-2020: *In exercise of the powers conferred by section 10A of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) [as inserted by section 2 of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 (17 of 2020)], the Central Government hereby notifies further period of three months from the 25th September, 2020 for the purposes of the said section.*

Notification No. S.O. 4638(E), dated 22-12-2020: *In exercise of the powers conferred by section 10A of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies further period of three months from the 25th December, 2020, for the purposes of the said section.*

12. It is noted that Operational Creditor became aware about the settlement between NHAI and DPT in December, 2020. Further, the Operational Creditor has also received an amount of Rs.6,00,00,000/- on 26.02.2021, Therefore, the contention of the Operational Creditor that they became aware about the receipt of money by DPTL in October, 2021 is not justifiable. The Corporate Debtor has stated that payment has been made by NHAI on 23.02.2021 and 25.02.2021 and therefore, the date of default is 02.03.2021 and 04.03.2021. In both the cases the date of default falls within the period specified under section 10A and the date of default stated in the petition as 14.11.2022 is only to avoid the applicability of section 10A. The instant application is clearly hit by provisions of section 10A and hence deserves to be dismissed.

13. In the present matter it appears that the application is filed only for the purpose of recovery. We rely upon the judgment

of Hon'ble Principal Bench in the matter of **Ms. Rita Malhotra and Ors. Vs. M/s. Orris Infrastructure Pvt. Ltd. (CP (IB) -234 (PB)/2019)** wherein it is said that IBC cannot be used as a tool of recovery.

14. In view of the above observations, the present application filed under section 9 of the IBC, 2016 is not maintainable. Hence, this application stands rejected accordingly.

15. Urgent certified copy of this order, if applied for, to be issued to all concerned parties upon compliance with all requisite formalities

-SD-
SAMEER KAKAR
MEMBER (TECHNICAL)

-SD-
SHAMMI KHAN
MEMBER (JUDICIAL)

Arati-LRA