

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

Company Petition (IB) No. 202 (KB) OF 2022

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

IN THE MATTER OF:

M/s. Amrik Cranes and Infrastructure

... Operational Creditor.

Versus

Simplex Infrastructures Limited

... Corporate Debtor.

Date of Pronouncement: May 24, 2024.

CORAM:

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

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

APPEARANCE:

FOR THE PETITIONER:

Mr. Aniruddha Bhattacharya, Adv.

Mr. Arnab Roy, Adv.

FOR THE RESPONDENT:

Mr. Snehashis Sen, Adv.

Mr. Danyal Ahmed, Adv.

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. The court congregated through hybrid mode.
2. We have heard the Learned Counsel for both parties.
3. This petition has been preferred by one M/s. Amrik Cranes and Infrastructure (hereinafter referred to as "Operational Creditor" or "Petitioner") against M/s. Simplex Infrastructure Limited (hereinafter referred to as "Corporate Debtor") 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. The Corporate Debtor approached the Operational Creditor for hiring of crane services and accordingly issued a work order on April 4, 2017. The Operational Creditor duly supplied the hiring services to the Corporate Debtor and despite making part-payments the Corporate Debtor failed to pay the entire amounts payable under the Invoices and an amount of Rs. 3,29,01,959/- became due to the Operational Creditor.

5. Accordingly, the Operational Creditor initiated proceedings under Section 9 of the I&B Code being C.P. (IB) No. 1075 of 2020 before this Adjudicating Authority against the Corporate Debtor as the Corporate Debtor was unable to pay its outstanding operational debt.

6. During the pendency of the proceedings in March 2022 the Corporate Debtor approached the Operational Creditor with a settlement proposal and vide a Settlement Agreement dated April 05, 2022, the Corporate Debtor undertook to pay the settlement amount of Rs. 2,86,27,594/- in 6 equal monthly instalments of Rs. 47,70,000/- payable from April 25, 2022, to September 25, 2022, for satisfaction of the claims of the Operational Creditor arising out of and in relation to the Work Order dated April 10, 2017. Upon recording such settlement, CP (IB) No. 1075 of 2020 was disposed of by the Hon'ble NCLT, Kolkata Bench on April 29, 2022.

7. The Petitioner claimed that subsequent to payment of the first instalment on 25.04.2022, the Corporate Debtor failed to make any

further payments despite reminders thus breaching the Settlement Agreement dated April 5, 2022.

Petitioner's submissions:

8. The Learned Counsel for the Petitioner submits that the Operational Creditor issued a **demand notice dated June 3, 2022**, upon the Corporate Debtor under Section 8 of the Insolvency and Bankruptcy Code, 2016 calling upon the Corporate Debtor to pay the outstanding amount of Rs. 2,81,31,959/- along with interest. The same was delivered by email on June 3, 2022, and by Speed Post on June 6, 2022, and neither has there been any reply to the same nor payment thereof.

Respondent's submissions per contra:

9. The Learned Counsel for respondent submits that the amount claimed to be in default arises from the default of instalment under the settlement agreement which does not come within the definition of operational debt.

10. Further, it is claimed that against the alleged amount claimed to be in default, a sum of Rs.2,29,23,085/- has already been paid by the Corporate Debtor as per the settlement agreement and only a sum of Rs. 57,04,509/- could not be paid by reason of the fact that there is a mismatch on account of GST on the part of the Operational Creditor. As per the terms of the settlement agreement the Operational Creditor was obliged to comply with the GST requirements and all payments to be made by the Corporate Debtor was subject to compliance of GST. there has been a non-compliance on the part of the Operational Creditor. Thus, the payment due is not far less than the threshold

financial limit to apply for an insolvency process against the Corporate Debtor.

In Counter to the Corporate Debtor, the Petitioner would submit:

11. That, the Petitioner has duly filed GSTR 3B returns within the stipulated time period and there no non-compliance on the part of the Petitioner.

12. We have noted that this application has been preferred on 09.07.2022. On 05.08.2022, notice has been issued to the Corporate Debtor, which is delivered on August 08, 2022, through email and on August 11, 2022, through speed post.

13. On 26.09.2022, the Corporate Debtor was set *ex-parte* due to non-representation on behalf of the Corporate Debtor, despite notice services.

14. On 25.11.2022, the Corporate Debtor has appeared and submitted that the entire payment is being made to the Operational Creditor. Further, the Corporate Debtor has preferred an application being I.A. (IB) No. 1151/KB/2022 for seeking setting aside the order of *ex-parte* which was allowed on 25.04.2023.

ANALYSIS AND FINDINGS:

15. It is evident that as per the settlement agreement made between the parties on 05.04.2022, a sum of **Rs. 2,86,27,594/-** was to be paid in 6 monthly instalments of Rs. 47,70,000/- starting from 25.04.2022 and ending on 25.09.2022. According to the submission of the Petitioner that, in terms of the settlement agreement, the Respondent

has only paid the first instalment and thereafter failed to make any further payments.

16. We find that the amount claimed to be in default is the payment of instalments which has not been paid by the Corporate Debtor in terms of the settlement agreement executed between the parties on April 05, 2022.

17. It is a settled position of law that the breach of settlement agreement between the operational creditor and corporate debtor does not fall within the ambit of “Operational Debt” as per Section 5 (21) of the I&B Code. The law laid down in the judgment of the Hon’ble NCLAT 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:

*“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 *Maldar 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 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. 1075 of 2020 under Section 9 of the Code, which was dismissed as withdrawn in accordance with the Settlement Agreement dated 05.04.2022. Further subsequent to the first instalment on April 25, 2022, the Corporate Debtor has failed to make any further payments despite reminders and accordingly the Operational Creditor issued a Demand Notice dated 03.06.2022 upon the Corporate Debtor under Section 8 of the "I&B" Code. Accordingly, this petition has been preferred on 09.07. 2022.

20. 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 05.04.2022. 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 of being an "Operational Debt" under the I&B Code. The similar view we have

already taken in **Company Petition (IB) No. 250 (KB) of 2023** order dated May 09, 2024, in ***Saroj Kumar Jena v. M/s. Simplex Infrastructure Limited.***

21. In terms of foregoing, we **dismiss** this petition.

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 companies 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 24th Day of May, 2024.

Oindrila, K. (LRA)/ Bose, R.K. [LRA]