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**In the National Company Law Tribunal
Kolkata Bench
Kolkata**

Coram : 1. **Shri Madan B. Gosavi,**
Member (Judicial)
&
2. **Shri Virendra Kumar**
Gupta, Member (Technical)

CP(IB)No.1106/KB/2019

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process 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;

-And-

In the Matter of:

M/s. Nuetech Solar Systems Private Limited, having its registered office at Sunkandakatte, Magadi Road, Viswaneedam Post, Bangalore-560091.

.....Operational Creditor

In the Matter of:

M/s. Environ Energy Corporation India Private Limited, having its registered office at 60A, Diamond Harbour Road, Thakurpukur, Kolkata-700063, West Bengal.

..... Corporate Debtor

Counsels appeared:

For Operational Creditor

1. Mr. A.K. Shrivastava, Advocate
2. Mr. Akash Sharma, Advocate

For the Corporate Debtor

1. Mr. Rishav Banerjee, Advocate
2. Mr. Aishwarya Awasthi, Advocate
3. Mr. Rajarshi Banerjee, Advocate

Date of hearing: 2nd March, 2020.

Date of pronouncement of Order : 16th March, 2020

ORDER

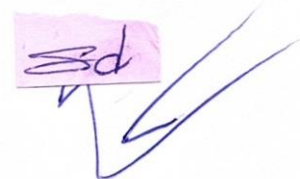
Per Shri M.B. Gosavi, Member (J):

1. **M/s. Nuetech Solar Systems Pvt. Ltd.,** the Operational Creditor filed this application under Section 9 of Insolvency and Bankruptcy Code, 2016 against **M/s Environ Energy Corporation India Private Limited** (Corporate Debtor) to start Corporate Insolvency Resolution Process (in short "CIRP") of the Corporate Debtor on the ground that the Corporate Debtor committed default in paying operational debt of Rs. 78,25,990/- (Rupees Seventy-Eight Lakh Twenty Five Thousand Nine Hundred Ninety Only) {inclusive of interest}.

2. The following facts are not in dispute.

2.1. As per purchase order dated 13.07.2010 to 16.09.2010 (page no. 115 to 124 of the application) the Operational Creditor had supplied the Corporate Debtor solar water heater equipment by invoices dated 18.08.2010 to 15.10.2010 (page 123 to 163 of the application). As the

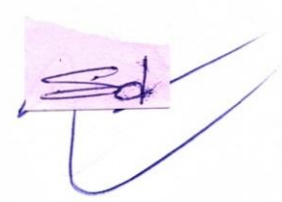




Corporate Debtor did not pay the amount, notice dated 21.09.2011 under Section 434 of the Companies Act, 1956 was served on the Corporate Debtor. The Operational Creditor filed winding up proceeding against the Corporate Debtor before Hon'ble Karnataka High Court bearing CP No. 225 of 2011. On 24.07.2011, Hon'ble Karnataka High Court passed order of winding up of the Corporate Debtor. However, again on 04.09.2015, Hon'ble Karnataka High Court held that it has no territorial jurisdiction of passing order of winding up of the Corporate Debtor and thereby dismissed the Petition with liberty to the Operational Creditor to file such Petition before the High Court having jurisdiction. Accordingly, in the year 2016 the Operational Creditor filed winding up Petition against the Corporate Debtor afresh before Hon'ble Calcutta High Court which is still pending.

2.2. It is also not in dispute that the Operational Creditor has filed number of criminal proceedings under Section 138 of NI Act against the Corporate Debtor. Almost all are disposed of in favour of the Corporate Debtor and Appeal against such orders are being filed and pending. However, in one of such criminal proceedings bearing no. CC 33894 of 2011 the Operational Creditor and the Corporate Debtor arrived at settlement before Lok Adalat. Pursuant to that settlement, the Corporate Debtor paid sum of Rs. 2,11,575/- (Rupees Two Lakh Eleven Thousand Five Hundred and Seventy Five Only) by demand draft dated 17.12.2015.

2.3. The Operational Creditor filed this application to start CIRP of the Corporate Debtor as the Corporate Debtor committed default in paying the operational debt of Rs. 78,25,990/- (Rupees Seventy-Eight Lakh Twenty-Five Thousand Nine Hundred Ninety Only) {as mentioned above}. Before filing this application, the Operational Creditor served the Corporate Debtor demand notice dated 12.04.2019 (page no. 191 of the application). According to the Operational Creditor, in spite of



receipt of demand notice the Corporate Debtor did not pay the debt, hence this application is filed to start CIRP of the Corporate Debtor.

3. Notice of this application is duly served to the Corporate Debtor. It appeared through one of its Senior Executive Legal and Industrial Relations Mr. Sukalyan Bhowmick. He filed affidavit in reply. We have gone through the contents of the affidavit-in-reply. It appears that the Corporate Debtor raised three defenses to contest this application: -

- (i) It has paid sum of Rs. 2,11,575/- (Rupees Two Lakh Eleven Thousand Five Hundred and Seventy Five Only) by demand draft no. 00251 dated 17.12.2015 towards full and final settlement and now nothing is due and payable to the Operational Creditor.
- (ii) There is a dispute pending in form of winding up petition before Hon'ble Calcutta High Court about the operational debt. Hence, this application is not maintainable.
- (iii) It is time barred claim filed by the Operational Creditor.

4. We heard Ld. Counsel Mr. A.K. Shrivastava for the Operational Creditor and Ld. Counsel Mr. Rishav Banerjee for the Corporate Debtor at length. We have gone through the evidence and material on record. The following points arise for our consideration. We record our findings with reasons stated below: -

Points	Findings
(i) Whether demand draft dated 17.12.2015 given by the Corporate Debtor to the Operational Creditor was towards full and final settlement and now no debt is due and payable.	No
(ii) Whether there exist dispute about the debt.	No
(iii) Whether the debt is time barred.	No

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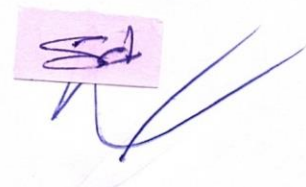
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Reasons for above findings

- 4.1. It is contention of the Corporate Debtor that on 17.12.2015 they gave the Operational Creditor demand draft of Rs. 2,11,575/- (Rupees Two Lakh Eleven Thousand Five Hundred and Seventy Five Only) towards full and final settlement. It is not in dispute that the Operational Creditor received that demand draft but question is whether it was towards full and final settlement?

It is not in dispute that the said demand draft was handed over by the Corporate Debtor as per settlement arrived in between them in Hon'ble Lok Adalat pertaining to CC No. 3389/2011. The Corporate Debtor produced on record copy of settlement precipice (page no. 206 of the affidavit in reply). We have perused that precipice. It has been clearly mentioned therein that, "complainant has agreed to received the sum as full and final settlement in the above said case. This clears doubt that said sum of money was paid to the Operational Creditor as a settlement amount relating to that particular case only. Moreover, it is beyond ones logic that the Operational Creditor settled the claim for amount more than Rs. 29 Lakhs just for Rs. 2,11,575/- (Rupees Two Lakh Eleven Thousand Five Hundred and Seventy Five Only) as contended by the Corporate Debtor. We do not believe such defense. In view of evidence on record, we hold that Demand Draft dated 17.12.2015 given by the Corporate Debtor to the Operational Creditor was not towards full and final settlement of entire claim herein. We answer point no. (i) in the negative.

- 4.2. The Corporate Debtor contended that there exists a dispute relating to the claim amount by the Operational Creditor. It refers dispute as the winding up proceeding filed by the Operational Creditor against it is still pending. We hold that, such cannot be pre-existing dispute relating to operational debt. Winding up Petition filed on the



ground that Corporate Debtor was unable to pay the debt. This proceeding is also filed because the Corporate Debtor committed default in paying the debt. Both the proceedings are similar in nature. Rather winding up of the corporate debtor will be end result if its insolvency cannot be resolved by way of this proceeding. On facts, we hold that there is no pre-existing dispute. We answer point no. (ii) in negative.

- 4.3. It is not in dispute that the debt in this case became due in the year 2010-2011. Immediately thereafter the Operational Creditor filed winding up proceeding against the Corporate Debtor before Hon'ble Karnataka High Court. It was pending till 2015. In the year 2015, Hon'ble Karnataka High Court held that it does not have territorial jurisdiction to entertain Petition under Section 434 of the Companies Act 1956 against the Corporate Debtor because the registered office of the Corporate Debtor was then situated in Kolkata. Hon'ble Karnataka High Court dismissed that Petition granting liberty to the Operational Creditor to file such Petition in proper Court/forum. Accordingly, in the year 2016 the Operational Creditor filed Petition of winding up of the Corporate Debtor before Hon'ble Calcutta High Court. It is pending. However, Hon'ble High Court has not passed any final order.

Ld. Counsel for the Corporate Debtor submitted that debt became due and payable in the year 2010-11. In the year 2015, Hon'ble Karnataka High Court dismissed the Operational Creditor's Petition on the ground of territorial jurisdiction. On 17.12.2015, the Corporate Debtor paid the Operational Creditor sum of Rs. 2,11,575/- (Rupees Two Lakh Eleven Thousand Five Hundred and Seventy-Five Only) by way of Demand Draft. This application is filed in the year 2019. If all facts are taken into consideration, they show that it is a time barred debt.

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As against this, Ld. Counsel for the Operational Creditor submitted that the Operational Creditor had approached the then proper forum for recovery of its debt immediately upon the debt became due and payable by the Corporate Debtor. It was latter on found that Hon'ble Karnataka High Court does not have territorial jurisdiction. It was wrong forum as far as territorial jurisdiction is concerned. But that application of the Operational Creditor against the Corporate Debtor was bonafide proceeding to recover the debt. In the year 2015, Hon'ble Karnataka High Court granted liberty to the Operational Creditor to move before Hon'ble Calcutta High Court. Accordingly, in the year 2016, the Operational Creditor approached Hon'ble Calcutta High Court. While counting period of limitation, the Operational Creditor gets benefit of Section 14 of Law of Limitation, obviously, on the ground that it has filed the required proceedings before Hon'ble Karnataka High Court with genuine mistake that the Court might be having jurisdiction. To explain the provision of Section 14 of Law of Limitation, Ld. Counsel relied on case of M.P. Steel Corporation Vs. Commissioner of Central Excise {(2015) 7 Supreme Court Cases 58}. As against this, Ld. Counsel for the Corporate Debtor submitted that provision of Section 14 will have no application herein as it relates to civil suit only.

We have considered the submissions of both Ld. Counsels. At the outset, we make it clear that Section 14(2) of Law of Limitation saves period of limitation, if any application of civil nature is being filed in wrong Court with bonafide assumption that the Court having jurisdiction. In case of M/s. M.P. Steel Corporation Vs. Commissioner of Central Excise {(2015) 7 Supreme Court Cases 58}, Hon'ble Apex Court explains applicability of Section 14 of Law of Limitation in following words: -

"The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a



proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance and the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the 1996 Act. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded."

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Coming back to factual aspect of this case, we find that Operational Creditor immediately upon the debt become due and payable, had filed winding up proceeding before Hon'ble High Court. It was a proper forum but having no territorial jurisdiction. Later on, Hon'ble Karnataka High Court dismissed the Petition granting liberty to the Operational Creditor to file such Petition before Court/Forum. In view of above facts, we hold that as soon as Operational Creditor filed a proceeding of recovery of operational debt against the Corporate Debtor before the then available Forum, the time stop running against the Operational Creditor for purpose of filing the proceeding relating to that debt for computing period of limitation. The proceeding of winding up filed against the Corporate Debtor is still pending. It was filed within period of limitation. In view of above facts, we hold that this application is not barred by limitation. We answer point no. (iii) in negative.

5. In this case, it is not in dispute that the Corporate Debtor has committed default in paying the operational debt. Before filing this application, the Operational Creditor has served notice under Section 8 IBC to the Corporate Debtor. Operational Creditor has filed on record affidavit complying provisions of Section 9(3)(b) and 9(3)(c) of IBC. It has not proposed name of resolution professional for appointment as Interim Resolution Professional (in short "IRP") and left the matter at the discretion of this Authority. In short, application is defect free. Hence, we admit the Corporate Debtor in CIRP by following orders.

ORDER

- i) The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, **M/s**

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Environ Energy Corporation India Private Limited is hereby admitted.

- ii) We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
- a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Operational Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

- v) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any Operational sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x) Pankaj Kumar Tibrewal having registration no. IBBI/IPA-001/IP-P01577/2018-19/12410, email id. tibrewalpankaj@yahoo.com, contact no. 9836929297 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.
- xi) The Applicant/ Operational Creditor to pay sum of Rs. 1,00,000/- (Rupees One Lakh Only) in the ESCROW Account in SBI to be operated through the Registrar, NCLT, Kolkata bench, for the purpose of meeting the preliminary expenses for initiating the CIRP by the IRP, as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016..

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xii) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

xiii) Registry is hereby directed under section 9(5) of the I.B. Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

List the matter on **30.04.2020** for the filing of the progress report.
Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Sd
16/3/2020

(Virendra Kumar Gupta)
Member(T)

Sd
16/3/2020

(Madan.B. Gosavi)
Member(J)

Signed on this, the 16th day of March, 2020.

Deeksha(steno)