

**IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"**

(Exercising the powers of Adjudicating Authority
under the Insolvency and Bankruptcy Code, 2016)

CP(IB)No.75/Chd/Hry/2018

Under Section 9 of IBC, 2016.

In the matter of:

Gupta Power Infrastructure Limited
having its registered office
at EN-62, Sector V, 7th Floor,
Salt Lake City,
Kolkata-700091.

...Petitioner-Operational Creditor.

Vs.

Sravanthi Infratech Pvt. Ltd.,
Having its registered office
at 3rd Floor, Rider House,
136, Sector 44,
Gurgaon-122002, Haryana.

...Respondent-Corporate Debtor.

Judgement delivered on 31.05.2018.

**Coram: Hon'ble Mr.Justice R.P.Nagrath, Member (Judicial)
Hon'ble Mr.Pradeep R.Sethi, Member (Technical)**

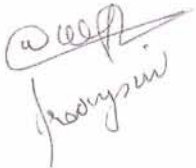
For the Petitioner : Mr. Anand Chandra Swain, Advocate.

For the Respondent : Mr. Sachit Sahijpal, Advocate.

Per: Pradeep R. Sethi, Member(Technical)

JUDGEMENT

The application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority)



Rules, 2016 (hereinafter referred to as the Rules) by M/s Gupta Power Infrastructure Ltd. (hereinafter referred to as the petitioner). The affidavit verifying the application is signed by Shri Sujit Pattanaik, Senior Manager, Legal of the petitioner (pages 67 & 68 of the petition). The certified true copy of the resolution passed at the meeting of the Board of Directors of the petitioner for initiation of corporate insolvency resolution process (CIRP) against Sravanthi Infratech Pvt. Ltd. (hereinafter referred to as respondent) and authorisation in favour Shri Sujit Pattanaik is at Annexure-1 of the petition.

2. The respondent was incorporated on 26.03.2009. Its CIN is U45206HR2009PTC038922 (Annexure-2 of the petition). The authorised and paid up share capital of the respondent is ₹250000000/- and ₹100700000/- respectively as per company Master Data available at Annexure-2 of the petition. The company Master Data shows the registered office as LG Floor, Rider House, 136, Sector 44, Gurgaon. Therefore, the petition lies within the territorial jurisdiction of this Bench of the Tribunal.

3. The petition is filed in prescribed Form 5 and in Part IV thereof the total amount of debt is stated to be ₹1,65,16,349.55 including ₹37,68,496.35 as principal amount due in terms of the award dated 20.06.2015 plus ₹1,27,47,853.20 as interest at three times bank rate with monthly compounding on the aforesaid debt amount for the period starting from the date on which it fell due till 28.02.2018. It is stated that the petitioner deals in manufacturing and trading of aluminium conductors, wires, cable, PVC insulated wires etc. and that during the course of business, the respondent in the year 2011-12 issued three purchase orders dated

W. S. J. Patil
for petitioner

23.12.2011 and 07.02.2012 to the petitioner for supply of LT Power and Control Cables and MV Power Cables for a total amount of ₹47,86,667/-. The copies of the purchase orders are stated to be enclosed as Annexure-3 (colly) to the petition. It is further stated that after receipt of the purchase orders, the petitioner despatched the entire materials to the respondent from its factory from Khurda, Odisha vide delivery/excise invoices and tax invoices dated 27.01.2012, 22.02.2012, 28.02.2012, 06.03.2012 and 27.03.2012 for a total amount of ₹52,81,203.35 and copies thereof are stated to be annexed as Annexure-4 (colly) of the petition. It is stated that the materials/goods were received by the respondent at the shipping destination mentioned in the purchase orders. It is further stated that though the due date for payment from the petitioner starts from 20.03.2012, 13.04.2012, 20.04.2012, 27.04.2012 and 18.05.2012, the respondent made only part payment of ₹15,12,707/- on various dates and despite repeated requests/follow up by the petitioner through its personnel, the respondent did not make payment of the balance dues. A copy of the ledger maintained by the petitioner is stated to be annexed as Annexure-5 of the petition.

4. It is stated that since the payment was not made by the respondent, the petitioner on 01.02.2014 filed a case bearing MSEFC Case No.07 of 2014 before the Medium and Small Enterprises Facilitation Council (hereinafter called as MSEFC) for arbitration of the dispute as per provisions of the Micro, Small and Medium Enterprises Development Act, 2016 (hereinafter referred to as MSMEDA). It is stated that MSEFC passed final award dated 20.06.2015 directing the respondent to pay the principal amount of ₹37,68,496.35 and interest of ₹32,03,787.61 calculated up to 31.10.2014

Atul K. Prasad

as per Section 15 and 16 of the MSMEDA and further directed that the respondent shall pay further compound interest with monthly rests at the rate of three times of the bank rate as notified by Reserve Bank of India from time to time till realisation of dues. The copy of the award dated 20.06.2015 is stated to be enclosed as Annexure-6 to the application.

5. It is further stated that despite the direction passed in the award dated 20.06.2015, the respondent failed to make the payment of the unpaid debt and the petitioner sent a Demand Notice dated 25.01.2018 despatched on 27.01.2018 by speed post in Form 3 as well as Form 4 under Section 8(1) of the Code read with Rule 5 of the Rules. The copies of the Demand Notices dated 25.01.2018 (*supra*) and postal track record are stated to be enclosed as Annexure-7 of the application. The postal tracking report at page 133 of the petition shows the delivery on 31.01.2018. It is stated that no reply was filed and therefore, the respondent failed to show any proceedings challenging the award dated 20.06.2015 (*supra*). A copy of the affidavit on behalf of the petitioner that no notice has been given by the respondent relating to the dispute of the unpaid operational debt is stated to be enclosed as Annexure-8 of the petition.

6. It is also stated that a copy of certificate issued by Axis Bank dated 03.03.2018 confirming that there is no payment received from the respondent of the full unpaid operational debt and the statement of accounts is stated to be annexed as Annexure-9 (colly) of the petition. It is prayed that an order initiating the CIRP as per the provision of the Code be passed and Interim Resolution Professional be appointed. In Part III of Form 5, Shri Giridhari Lal Sharma has been proposed as Interim Resolution Professional.

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The copies of the registration certificate, declaration and consent of the proposed Interim Resolution Professional are stated to be enclosed as Annexure-11 of the petition.

7. The reply was filed by the respondent by diary No.1560 dated 14.05.2018. It is stated therein that the respondent is a sister concern of Sravanthi Energy Pvt. Ltd. which was in the process of installing two gas based Power Plants of 225 megawatts each at Kashipur, Uttarakhand and the Ministry of Petroleum and Natural Gas, Government of India vide its letter 20.08.2010 conveyed to M/s Sravanthi Energy Pvt. Ltd. that allocation of gas will be available for the projects in pipeline as and when the project would be ready to commence production and loan amount of ₹622.50 crores was approved by the consortium of IFCI Ltd. and State Bank of Patiala vide Trust and Retention Account Agreement dated 25.08.2010 and therefore, M/s Sravanthi Energy Pvt. Ltd. placed order for erection of Plant on the respondent for setting up the Power Plant on EPC basis.

8. It is then stated that when the erection of the Plant was in full swing, the Central Electricity Authority, Government of India vide its communication dated 19.03.2012 conveyed its inability to commit on the gas supply till the year 2015-16 and due to the change in the projected gas supply by the Government of India to the said Plant, the financial institution stopped further funding and as a result of this development, the respondent could not pay to suppliers as per the commitments of the purchase orders. It is stated that in the year 2017 the Government of India assured regular supply of gas and M/s Sravanthi Energy Pvt. Ltd. has completed one project of 225 megawatts and has commenced power production with effect from August,

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2017 and the total production of the unit is being supplied to Uttarakhand Power Corporation under a power purchase agreement. It is stated that the Joint Lenders Forum has discussed in its meeting dated 23.04.2018 to clear the payment of the respondent and thereafter the respondent shall be in position to clear its outstanding dues. It is stated that it is settled law that the Tribunal is not a forum wherein one can seek the execution of a decree against another company via means of application under the Code and that the amount claimed by the petitioner does not fall within the ambit of the definition of operational debt as defined under Section 5(21) of the Code.

9. It is averred that the petitioner has already filed an Execution Petition before the Execution Court at Gurgaon, Haryana for the execution of the award passed under the MSMEDA, which is currently pending and the law is clear that no person/party can seek similar relief arising from similar fact against the same party in different forums and that would amount to forum hunting and therefore, non-maintainable. It is stated that the order of the MSMEDA Arbitral Tribunal is an administrative order which provided no avenue/platform for the respondent to address the claim against it and the order was passed not following a judicial process and therefore, it is not an order that follows the principles of natural justice and fair trial. It is stated that the petitioner is seeking multiple remedies and indulging in forum shopping based on an administrative order which was obtained *ex-parte* against the respondent.

10. During the course of hearing, the learned counsel for the petitioner relied on the petition in Form 5 and stated that the debt arose from supply of LT Power and Control Cables and MV Power Cables and therefore,

was an operational debt. It was argued that the MSEFC by its award dated 20.06.2015 had given clear directions regarding payment of principal amount of ₹37,68,496.35 alongwith interest by the respondent and that this amount was not paid and therefore, execution proceedings were filed in the court at Gurgaon.

11. In reply therefore, the learned counsel for the respondent stated that the award dated 20.06.2015 of MSEFC was only an administrative order and not a judicial order and that Section 19 of the MSMEDA provided for a right of appeal only on payment of 75% of the amount of the award. It was stated that the Joint Lenders Forum was trying to provide funds to M/s Sravanthi Energy Pvt. Ltd. which in turn would make payment to the respondent and thus respondent would be enabled to clear the outstanding dues of the petitioner.

12. In rejoinder, the learned counsel for the petitioner referred to the copy of the award dated 20.06.2015 passed by MSEFC (Annexure-6 of the petition) and stated that this order showed that the respondent participated in the proceedings before MSEFC and also filed the counter before the MSEFC. It was stated that the award dated 20.06.2015 has not being challenged by the petitioner and therefore, becomes final.

13. We have heard the learned counsel for the petitioner and the respondent and have also perused the records of the case.

14. The present petition is filed under Section 9 of the Code and is an application for initiation of CIRP by operational creditor. Section 9 of the Code reads as under:-

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9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, —

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if —

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

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15. The provisions of Section 9(1) of the Code are satisfied since the application by the petitioner for initiating the CIRP is filed after the expiry of 10 days from the date of delivery of Demand Notice in Form 3 and 4 sent under section 8 (1) of the Code read with rule 5 of the Rules. (Date of delivery of Demand Notice is 31.01.2018 and application is filed on 06.03.2018). The provisions of Section 9(2) of the Code are complied since the application under Section 9(1) is filed in the prescribed Form 5. As discussed above, the provisions of Section 9(3) of the Code are satisfied since copy of the Demand Notice is enclosed alongwith the application; affidavit of no notice given by the corporate debtor relating to a dispute of the unpaid operational debt is filed; copy of certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor is filed. In addition, the requirement of Rule 6 (2) of the Rules is also satisfied since the copy of the petition filed with the Adjudicating Authority was sent by speed post at the registered office of the respondent on 06.03.2018 (Annexure 13 of the petition).

16. Section 9(5) of the Code provides for admission of the application if the five conditions specified therein are satisfied. In view of the discussion made above, conditions (a) to (d) are satisfied in the present case. In the reply, the respondent has also not raised any objection to the satisfaction of the above conditions. The contentions raised by the respondent in its reply and arguments are now being considered.

17. The respondent's first contention is that amounts are due from its sister concern Sravanthi Energy Pvt. Ltd. and on receipt of the dues, the

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payment to the petitioner would be made. The respondent has not drawn attention to any agreement with the petitioner making receipt of dues from the sister concern a pre- condition to the payment to the petitioner.

18. The second contention is that the petitioner has already filed an execution petition before the execution court at Gurgaon Haryana for the execution of the award passed under the MSMEDA which is currently pending and the law is amply clear that no person/party can seek similar relief arising from similar facts against the same party in different forums and that would amount to forum hunting and therefore, would be non-maintainable.

19. The award is under Section 18 of the MSMEDA. Section 18(1) of MSMEDA states that notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under Section 17, make a reference to the MSEFC. Section 17 of MSMEDA states that for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16. The award under MSMEDA in the present case is given on an application filed by the petitioner (supplier) for goods supplied by the petitioner (supplier) to enforce the liability of the respondent (buyer) to pay the amount with interest thereon. On the other hand, the application under Section 9 of the Code is not for the recovery of the debt simpliciter but for initiating the CIRP. Therefore, the MSMEDA and the Code operate in different spheres and forum hunting cannot be said to take place.

20. The third objection is that the amount arising due to the award of the MSEFC does not fall within the ambit of the definition of operational

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debt as prescribed in the statute. The present petition is filed in respect of debt arising from supply of LT Power and Control Cable and MV Power Cables for a total amount of ₹52,81,203.35 for which part payment of ₹15,12,707/- was made by the respondent on various dates and therefore, there was balance principal amount of ₹37,68,496.35 due as on 09.09.2013 (refer Annexure 5 of the petition). Operational debt as defined in Section 5(21) of the Code *inter alia* means a claim in respect of the provision of goods or services. The present case is of a claim in respect of sale of goods by the petitioner to the corporate debtor. Therefore, it is an operational debt.

21. The fourth contention is that the platform provided by the court cannot be exploited for execution of a decree/order. We have already observed above that the CIRP is a separate process. Therefore, the contention of the respondent cannot be accepted.

22. The fifth contention is that any proceeding and action under the Code would be irreversibly detrimental to the respondent as there is no actual debt payable to the petitioner based on an administrative order which was passed without affording any opportunity to be heard to the respondent. We find that a copy of the award dated 20.06.2015 passed by MSEFC is at Annexure-6 of the petition. It is *inter alia* noted in the order that both the parties were present before the council on 06.05.2014 in its 27th sitting and the O.P. (respondent in the present case) filed counter before the Council with a copy to the petitioner. The O.P. (respondent in the present case) is stated to be absent in the 37th sitting of MSEFC on 20.06.2015. However, the position is that the respondent participated in the proceedings before the MSEFC and was given an opportunity of being heard and had filed counter

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before the MSEFC also. MSEFC also passed order on 20.06.2015 after considering the objections and issues raised by the respondent in the counter filed by it.

23. It would be relevant to refer to Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 which reads as under:-

"1. Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

2. On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part- III of that Act

3. Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 Of that Act.

4. Notwithstanding anything contained in any Other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

5. Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference".

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24. So according to the aforesaid provision the Council has acted as an Arbitrator and made the award. Such an award is executable as a decree of the Civil Court.

25. Section 19 of the aforesaid Act has reference to application for setting aside of the decree, award or other orders. Admittedly no such application has been filed. Therefore, the order passed by the Council can be said to have attained finality. Section 24 of the said Act further says that the provisions of Sections 15 to 23 of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, the contention raised by the respondent that the award passed by the Council is an administrative order cannot be sustained.

26. We may add here that in para 5 of the reply filed by diary No.1560 dated 14.05.2018, the respondent has stated that the respondent and the applicant/complainant entered into a financial transaction wherein the petitioner supplied ACSR Moose for a total consideration of ₹47,87,667/- to the respondent and due to certain irregularities in the payment made by the respondent, the complainant initiated arbitration proceedings under MSMEDA. Therefore, the respondent is accepting that the debt for goods supplied by the petitioner is due from them. This is also confirmed by the contents of paragraphs 1 to 4 of the reply in which it is stated that the respondent could not make payment to its suppliers since it did not receive payment/funds from its sister concern M/s Sravanthi Energy Private Limited.

27. In view of the above discussion, it is held that the conditions provided for in section 9(5) (i) (a) to (d) are satisfied in the present case.

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28. As regards Section 9 (5) (e) of the Code it has already been discussed above that petitioner has proposed Shri Giridhari Lal Sharma as Interim Resolution Professional and his registration certificate, declaration and consent are at Annexure-11 (colly) of the petition. We find that that in Form 2 submitted by Shri Giridhari Lal Sharma, he has certified that there are no disciplinary proceedings pending against him with the Board or Indian Institute of Insolvency Professionals of ICAI) of ICAI. The condition of Section 9 (5) (e) of the Code is satisfied.

29. In result thereof the conditions provided for by Section 9 (5) (i) of the Code are satisfied in the present case and the petition is admitted. The moratorium is declared for prohibiting all of the following in terms of sub-section (1) of Section 14 of the Code:-

- 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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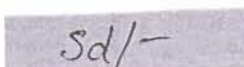
d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

30. It is further directed that the supply of essential goods or services to the corporate-debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The provisions of sub-section (1) of Section 14 of the Code shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

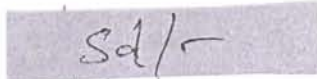
31. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section(1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

32. The matter be posted on 04.06.2018 for passing formal order to appoint Interim Resolution Professional with further directions.

Copy of this order be communicated to both the parties.


(Justice R.P. Nagrath)
Member (Judicial)

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open court*


(Pradeep R. Sethi)
Member (Technical)

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