

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**



CP (IB) No.493/9/HDB/2018

Under section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of

M/s Ardee Hi-tech Private Limited
(CIN: U29309AP1996PTC025325)
9-30-4, Balaji Nagar, Siripuram
Visakhapatnam – 530003. A.P.

FREE OF COST COPY

.. **Petitioner/
Operational Creditor**

VERSUS

M/s Bevcon Wayors Private Limited
(CIN: U29210TG1994PTC018656)
H-11, IDA, Uppal
Hyderabad – 500039
Telangana.

.. **Respondent
Corporate Debtor**

Date of order: 19th April 2022

Coram:

**HON'BLE DR. VENKATA RAMAKRISHNA
BADARINATH NANDULA, MEMBER (JUDICIAL)**

and

**HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)**

Parties / counsels present:

For the Petitioner: Dr. S.V. Rama Krishna, Advocate

For the Respondent: Shri M. Maharshi Viswaraj, Advocate

ORDER

This petition is filed by M/s Ardee Hi-tech Private Limited/ Operational Creditor, stating that principal amount of **Rs.4,17,06,771/-** (Rupees four crore seventeen lacs six thousand seven hundred and seventy one only) as on 28.02.2018 plus interest is due and payable by the corporate debtor. Hence this petition is filed under section 9 of Insolvency and Bankruptcy Code, 2016, read with Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.



2. The averments made in the petition are as follows:

- (i) The Operational Creditor is a private limited company, incorporated and registered with the Registrar of Companies, Hyderabad under the provisions of the Companies Act, 1956 and so is the Corporate Debtor.

- (ii) The Operational Creditor is engaged in designing, detailed engineering, supply, erection, installation and commissioning of processing plants. Whereas, the Corporate Debtor is engaged in manufacture of material processing equipment, engineering, detailed designing, etc.
- (iii) Having obtained supplies from the Operational Creditor and having completed more than 70% of its erection work, the Corporate Debtor abruptly stopped the project and refused to take delivery of the remaining items.
- (iv) The dues payable to the Operational Creditor, as admitted by the Corporate Debtor, was **Rs.1,26,70,782/-** as on **24.06.2015**, out of which a sum of Rs.10,00,000/- was paid on 31.07.2015. Thus, the Corporate Debtor has failed to pay the remainder as well as overdue amounts on various invoices/ bills submitted on various due dates. As a result, the Operational Creditor plunged into bankruptcy.
- (v) The Operational Creditor issued legal notice dated 08.10.2015 demanding payment of overdue amounts.
- (vi) Statutory Demand Notice in Form-3 dated 26.03.2018 (Annexure A-4, paged 22) was issued to the Corporate Debtor.



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(vii) The Corporate Debtor has suggested some reconciliation and the Operational Creditor has complied with vide its letter dated 17.10.2017.

3. The respondent-corporate debtor has filed counter dated 15.11.2018 disputing the claims made by the petitioner- operational creditor. The averments made in the counter are summarised as under:

(i) The respondent/ Corporate Debtor has entered into an agreement with the Operational Creditor for the project in question. Principal employer of GVK (Coal) Tokisud Pvt Ltd had placed Purchase Orders/ Supply Orders dated 01.11.2012 and 01.12.2012 with the Corporate Debtor. Para 4 of Purchase Order dated 01.11.2012 envisages payment of 10% advance amount, 75% payment against dispatch of material, 5% after commissioning and trial run.

(ii) The Corporate Debtor lays emphasis on **Back to back arrangement**, which envisages that payment would be made only on receipt of payment form principal employer of GVK (Coal) Tokisud Pvt Ltd as well as the repercussions arising



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out of the Hon'ble Supreme Court having cancelled coalblocks awarded by Ministry of Coal.

(iii) The contract of the respondent/ Corporate Debtor with GVK (Coal) Tokisud Pvt Ltd. got frustrated due to *force majeure* conditions. No payment comes from the principal employer of GVK (Coal) Tokisud Pvt Ltd. Hence the respondent has filed MSMED against the said principal employer for pending outstanding payment. Therefore, in view of back to back arrangement the Operational Creditor cannot demand payment.

(iv) The Corporate Debtor submitted that resolution lies before civil court/ arbitration proceedings as provided in Clause 20 of the Purchase Order dated 01.11.2012 (Annexure A5(B), pages 91-102 of the application. Relevant part of Clause 20 reads thus:



“ Whether during the continuance of this agreement or thereafter, such disputes or difference shall be endeavoured to be solved by mutual negotiations, if, however, such negotiations are infructuous, they shall be decided by differences and to and to an umpire to be appointed by the arbitrators in writing before taking upon themselves the burden of arbitration. Such a reference shall be deemed to be submission to arbitration under Indian Arbitration Act, 1996 and of any modification or re-enactment

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thereof. The venue of arbitration shall be Hyderabad only and subject to the above, the civil courts in Hyderabad shall have exclusive jurisdiction in this matter."

- (v) Though the Corporate Debtor admits payment of Rs.10 lacs on 31.07.2015, it refutes the claim of the Operational Creditor that the said payment amounts to 'admission of debt'.

4. The respondent- corporate debtor has filed Additional Counter dated 08.04.2021, wherein,

- (i) The Corporate Debtor laid emphasis on **Back to Back Payment Arrangement** between the Corporate Debtor and Operational Creditor, which provides that the Corporate Debtor would make payment only after receipt of payment from GVK (Coal) Tokisud Pvt Ltd in respect equipment supplied by the Operational Creditor. In this process the Corporate Debtor made payments to the tune of Rs.3,98,79,162/-. However, after cancellation of coal blocks by virtue of judgment of the Hon'ble Supreme Court, GVK invoked *force majeure* clause and stopped taking delivery of equipment from the Corporate Debtor. The Corporate Debtor



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relied on the judgment dated 09.08.2019 of the Hon'ble NCLAT in the matter of IMECO Limited Vs. BEML Limited in Company Appeal (AT) (Insolvency) No.801 of 2018, drawing parallel to Indian Railways in that case having not released funds as was done by GVK (Coal) Tokisud Pvt Ltd in the present case. The relevant part is quoted hereunder:

"8. It is manifestly clear that the obligation to pay on the part of Respondent – Corporate Debtor was contingent upon the release of funds by the Railways and the Railways not having released funds in favour of respondent in spite of allotment of funds by the Railway Board and directions in the Writ Petition and having embarked upon the path of further -18- Company Appeal (AT) (Insolvency) No. 801 of 2018 litigation by preferring appeal against the judgment of Writ Court, default in discharging the obligation of Operational Debt did not occur. Unless the debt is payable default will not occur. A debt, payment whereof is contingent upon a happening or an event as in the case of back-to-back payment clause in the contract governing relations between the parties, cannot be said to have been defaulted unless such happening or event occurs. It is in this context that the debt from which the obligation to pay arises cannot be said to be undisputed."



- (ii) Due to non-acceptance of goods by GVK, the Corporate Debtor sustained losses of Rs.15 crores.

- (iii) The Corporate Debtor issued notices dated 10.12.2016 and 10.04.2017 to GVK demanding payment of outstanding amounts, but to no avail.
- (iv) The Corporate Debtor contended that there are pre-existing disputes and prior to issuance of Demand Notice dated 26.03.2018 under section 8 of the I&B Code, 2016 the Corporate Debtor had raised the disputes by the following communications :

- E-mail dated 26.06.2015 sent by the Corporate Debtor to the Operational Creditor (**page 197** of the application) pointing out that the Corporate Debtor is not liable to pay in view of back to back payment arrangement.
- Letter dated 14.09.2015 addressed by the Corporate Debtor to the Operational Creditor (**page 202** of the application) on the same subject.
- Reply dated 08.06.2016 (**page 218** of the application) given by the Corporate Debtor to the Legal Notice issued by the Operational Creditor.



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5. The Operational Creditor has filed rejoinder dated 22.01.2019 contending that:

- (i) The Corporate Debtor though referred to Clause 20 of the Purchase Order dated 17.09.2012 (Page 95 of the application) emphasising on 'arbitration' clause, the Corporate Debtor has not initiated any arbitration proceedings.
- (ii) The Corporate Debtor admitted that they have paid Rs.10 lacs on 31.07.2015, refuses to admit the said payment was towards the admitted debt of Rs.1,26,70,782/-.



6. We have heard Dr. S.V. Rama Krishna, learned counsel for the Operational Creditor and Shri M. Maharshi Viswaraj, learned counsel for the Corporate Debtor. Perused the application filed by the operational creditor, counter and additional counter filed by the corporate debtor, rejoinder filed by the Operational Creditor and the documents produced before us.

Point No.1 :

Whether the documentary evidence furnished with application shows that the aforesaid debt is due and payable and has not yet been paid?

The Corporate Debtor has neither denied placing of Purchase Orders/ Supply Orders dated 01.11.2012 (Pages 91-102) and 01.12.2012 (Pages 103-117) with the Corporate Debtor nor invoices/ bills (pages 118-158) submitted by the Operational Creditor on various dates. The Corporate Debtor has also admitted execution of works aforesaid and part-payments of the amount covered by the invoices raised by the Operational Creditor. However, the contest of the Corporate Debtor appears to be that the Purchase Order dated 01.11.2012 provides for back-to-back payment transaction with GVK (Coal) Tokisud Pvt Ltd. However, the said GVK (Coal) Tokisud Pvt Ltd has not honoured its payment terms in favour of the Corporate Debtor herein, the Corporate Debtor is unable to make payment to the Operational Creditor and under these circumstances non-payment of the outstanding amount cannot be considered as default. Consequently, the application as filed by the applicant is liable to be dismissed.



7. However, the learned counsel for the Operational Creditor refuted the said contentions and contended that the outstanding debt has been arrived at on the basis of the terms of the Contract Agreement dated 03.09.2012 (page 60) and the terms of the Purchase Order do not provide

for deferring payment to the Operational Creditor till such time the Corporate Debtor receives payment from GVK (Coal) Tokisud Pvt Ltd. In the light of the contest as aforestated, we have carefully perused the invoices/ bills (pages 118-158) submitted by the Operational Creditor on various dates as well as Purchase Orders/ Supply Orders dated 01.11.2012 (Pages 91-102) and dated 01.12.2012 (Pages 103-117).

8. A perusal of Contract Agreement dated 03.09.2012 (page 60) between the Operational Creditor and Corporate Debtor, whereunder Financial Terms and Conditions are spelt out discloses:

"1.10 Payment:

The payment to the contractor for the performance of the work under the contract will be made by the owner a per the mutually agreed approved billing breakup. All payments made during the contract shall be on account payee only. The final payment will be made on completion of all the works and on fulfilment by the contractor of all his liabilities under the contract."



"1.40 Payment schedule:

The contractor shall prepare and submit to the engineer for approval, a break-up of the –

Contract price. This contract price break-up shall be interlinked with the agreed detailed PERT network of the contractor setting forth his starting and completion dates for the various key phases of works prepared as per condition of the section.

Any payment under the contract shall be made only after the contractor's price breakup is approved by the engineer. The aggregate sum of the company's price break up shall be equal to the lump sum contract price."

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"1.60 Terms of Payments:

The terms of payment for the price components of the equipment and its erection are detailed herein for each equipment package. A certain percentage of the equipment and erection costs, for each package shall be paid as initial advance on fulfilment of the following by the contractor."

9. A bare perusal of the above clauses does not envisage payment by the Corporate Debtor only upon the Corporate Debtor receives payment from GVK (Coal) Tokisud Pvt Ltd. Thus, the plea that there is no default in payment of the outstanding dues payable by the Corporate Debtor to the Operational Creditor shall invariably fail.

10. Thus, we hold that there is operational debt due and payable by the Corporate Debtor to the Operational Creditor and the Corporate Debtor has failed to discharge its liability.

POINT no.2 :

Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of demand notice of the unpaid operational debt in relation to such dispute?



11. Before we proceed further we refer to the ruling of the Hon'ble Supreme Court in the matter of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited rendered by the Hon'ble Supreme Court

in Civil Appeal No. 9405 OF 2017 dated 21.09.2017, wherein the Hon'ble

Apex Court held that:

"It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We 72 have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise."

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application"



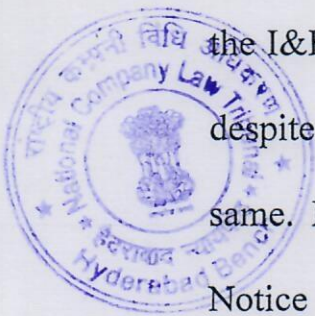
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In the same ruling, it has also been held that,

“Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?”

“If any one of the aforesaid conditions is lacking, the application would have to be rejected.” (Emphasis supplied).

12. While it is the contention of the Operational Creditor that the Corporate Debtor has never raised any dispute much less before receipt of Demand Notice, the Corporate Debtor contends that as such the plea of existence of dispute has been raised prior to receipt of Demand Notice. Here it may be stated that before instituting the present application, the Operational Creditor had served mandatory notice in terms of section 8 of the I&B Code, 2016. It is the contention of the Operational Creditor that despite receipt of the same the Corporate Debtor has not responded to the same. However, the Corporate Debtor claimed that it has sent Reply Notice purportedly to the Operational Creditor. Though the Corporate Debtor has filed the purported Reply Notice, the Corporate Debtor has



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failed to produce any proof of service of Reply Notice on the Operational Creditor or his counsel.

13. That apart a perusal of the notice discloses that the Corporate Debtor has never raised any dispute as regards supplies made by the Operational Creditor. On the other hand the Corporate Debtor has cited reasons, such as, COVID-19 pandemic, non-release of funds by principal employer of GVK (Coal) Tokisud Pvt Ltd., as reasons for default. We therefore, find that the plea of pre-existing debt is absolutely baseless.

14. Hence, the Adjudicating Authority admits this Petition under Section 9 of Insolvency & Bankruptcy Code, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:

(A) Corporate Debtor, M/s Bevcon Wayors Private Limited is admitted in Corporate Insolvency Resolution Process under section 9 of the Insolvency & Bankruptcy Code, 2016,

(B) The Bench hereby prohibits 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; transferring , encumbering, alienating



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or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;

(C) 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.

(D) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall

not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.



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- (E) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (F) That 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, whichever is earlier.
- (G) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.
- (H) That this Bench hereby appoints **Ms.Sistla Manjula**, having IBBI Registration No.IBBI/IPA-001/IP-P00992/2017-2018/11639, having address at Akasam, 2nd Floor, 10-1-171/1/1, Masab Tank, Hyderabad, West Marredpally, Telangana ,500004, e-mail: sistlamanjula@gmail.com as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code. Her Authorisation for Assignment is valid till 29.11.2022. This information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the



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proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

(I) The petitioner is directed to pay a sum of Rs.1,00,000/- (Rupees one lac only) to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

(J) Proposed IRP shall file Form-2 within three days from the date of this order.

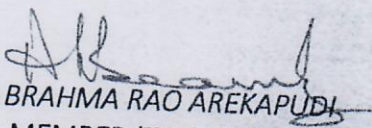
(K) The petitioner is directed to communicate this order to the proposed IRP forthwith.

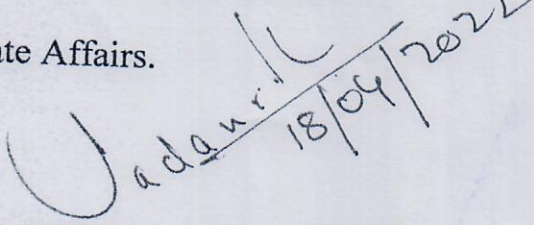
15. Accordingly, this Petition is admitted.

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Registry to send a copy of this order to the Registrar of Companies, Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.



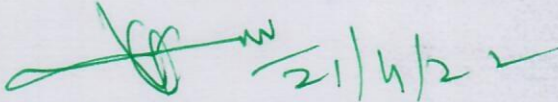

VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)


DR. N.V. RAMAKRISHNA BADARINATH
MEMBER (JUDICIAL)

Karim

**प्रमाणित प्रति
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केस संख्या
CASE NUMBER (P/IB) No. 493/9/HDB/2018
निर्णय का तारीख
DATE OF JUDGEMENT 19/4/22
प्रति तैयार किया गया तारीख
COPY MADE READY ON 21/4/22


Deputy Registrar / Assistant Registrar / Court Officer
National Company Law Tribunal, Hyderabad Bench