

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH – I, CHENNAI**

**CP/1254/IB/2018** filed under Section 9 read with Sub Rule (1) of Rule 6 and other applicable Provisions 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 ***M/s. Empee Power Company (India) Limited***

**M/S. A & A INTERNATIONAL TRADING PRIVATE LIMITED**

6-5/140, Block 5,  
Kaviarasu Kannadasan Nagar,  
Kodungaiyur,  
Chennai – 600 018

*... Operational Creditor*

-Vs-

**M/S. EMPEE POWER COMPANY (INDIA) LIMITED**

No.59 Harris Road,  
Pudupet,  
Chennai – 600 002

*... Corporate Debtor*

*Order Pronounced on 31<sup>st</sup> December, 2019*

CORAM:

**R. VARADHARAJAN, MEMBER (JUDICIAL)**  
**ANIL KUMAR B, MEMBER (TECHNICAL)**

*For Operational Creditor : Anant Merathia, Advocate*

*For Corporate Debtor : M. Sneha, Advocate*  
*M.A. Vimal Mohan, Advocate*  
*V. Dinesh Raja, Advocate*



## **ORDER**

**Per: ANIL KUMAR B, MEMBER (TECHNICAL)**

1. This Application has been filed invoking the provisions of Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code-2016") in the format as prescribed under Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as "AAA Rules") by the Applicant viz., **M/s. A & A International Trading Private Limited** (hereinafter referred to as "*Operational Creditor*") against **M/s. Empee Power Company (India) Limited** (hereinafter referred to as "*Corporate Debtor*"). The Operational Creditor seeks to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional.

2. Part-I of the Application sets out about the Operational Creditor from which, it is evident that the Operational Creditor is a Private Limited Company with CIN:U52590TN2009PTC07930. Part-II of the Application gives all the particulars of the Corporate Debtor from which it is evident that the Corporate Debtor is a Private Limited Company with CIN:U40101TN1996PLC037198 which was incorporated on 26.12.1996 and that its nominal share capital and paid up capital is ₹24,00,00,000.00 and



₹23,27,54,000.00 respectively. The Registered Office of the Corporate Debtor as per the Application is stated to be situated at Empee Tower, No.59, Harris Road, Pudupet, Chennai - 600 002.

3. Part-III of the Application shows that the Operational Creditor has not proposed the name of Interim Resolution Professional. From Part-IV of the Application, it is seen that a sum of ₹3,96,29,455.00 (Rupees Three Crores, Ninety Six Lakhs, Twenty Nine Thousand, Four Hundred and Fifty Five only) which includes the Principal sum of ₹3,18,15,835.00 (Rupees Three Crores, Eighteen Lakhs, Fifteen Thousand, Eight Hundred and Thirty Five only) along with the interest of ₹78,13,620.00 (Rupees Seventy Eight Lakhs, Thirteen Thousand, Six Hundred and Twenty only) charged at 18% p.a. on the Principal due to M/s. A & A International Trading Private Limited.

4. As per the brief particulars, the Corporate Debtor had ordered for supply of Non-Cooking Steam Coal from the Operational Creditor as mentioned below:

(i) No. EPCL/NAIDU/COAL/14-15/3 dated 12.09.2014

(ii) No. EPCL/NAIDU/COAL/14-15/4 dated 09.10.2014

(iii) No. EPCL/NAIDU/COAL/14-15/5 dated 28.10.2014



The Operational Creditor has effected supply of coal in accordance with the Purchase Order conditions by various invoices as explained below:

S. No.	Invoice No.	Invoice Date	PO No.	PO Date	Invoice Amount in ₹	Amount Due in ₹
1	1068/14-15	26.09.2014	EPCL/NAIDU/ COAL/14-15/3	12.09.2014	<b>1,74,68,032</b>	<b>80,53,729</b>
2	1092/14-15	06.10.2014	EPCL/NAIDU/ COAL/14-15/3	12.09.2014	<b>1,48,260</b>	<b>1,48,260</b>
3	123/14-15	10.10.2014	EPCL/NAIDU/ COAL/14-15/3	09.10.2014	<b>3,96,620</b>	<b>3,96,620</b>
4	124/14-15	11.10.2014	EPCL/NAIDU/ COAL/14-15/4	09.10.2014	<b>4,01,940</b>	<b>4,01,940</b>
5	125/14-15	13.10.2014	EPCL/NAIDU/ COAL/14-15/4	09.10.2014	<b>7,81,654</b>	<b>7,81,654</b>
6	126/14-15	15.10.2014	EPCL/NAIDU/ COAL/14-15/4	09.10.2014	<b>2,03,000</b>	<b>2,03,000</b>
7	127/14-15	16.10.2014	EPCL/NAIDU/ COAL/14-15/4	09.10.2014	<b>6,98,144</b>	<b>6,98,144</b>
8	128/14-15	17.10.2014	EPCL/NAIDU/ COAL/14-15/4	09.10.2014	<b>7,79,764</b>	<b>7,79,764</b>
9	129/14-15	18.10.2014	EPCL/NAIDU/ COAL/14	09.10.2014	<b>11,35,644</b>	<b>11,35,644</b>
10	130/14-15	20.10.2014	EPCL/NAIDU/ COAL/14-15/4	09.10.2014	<b>45,64,030</b>	<b>45,64,030</b>
11	131/14-15	21.10.2014	EPCL/NAIDU/ COAL/14-15/4	09.10.2014	<b>17,72,258</b>	<b>17,72,258</b>
12	132/14-15	24.10.2014	EPCL/NAIDU/ COAL/14-15/4	09.10.2014	<b>32,30,392</b>	<b>32,30,392</b>
13	027/14-15	18.10.2014	EPCL/NAIDU/ COAL/14-15/5	28.10.2014	<b>1,32,77,580</b>	<b>1,32,77,580</b>
14	Debit Note No.123 dated 28.10.2014					<b>15,21,080</b>
15.	<b>Total Principal Amount Due as on 25.05.2016</b>					<b>3,68,15,835</b>

16.	Cheque received HDFC/703999/18.03.2017	<b>(25,00,000)</b>
17.	NEFT received – IDBI/04.04.2017	<b>(25,00,000)</b>
	<b>Total Principal Amount due as on 05.04.2017</b>	<b>3,18,15,835</b>
18	Interest calculated at 18% p.a. on 3,18,15,835 from 05.04.2017 till 16.08.2018	<b>78,13,620</b>
	<b>Total Amount due (Principal 3,18,15,835/- + 78,13,620/-</b>	<b>3,96,29,455</b>

5. Part V of the Application describes the particulars of the documents, records and evidence of default of the operational debt which include *inter-alia* the following:

As per Annexure 'A' of the application at Page No.10 the total amount as on 05.04.2017 is ₹3,18,15,835.00 and interest for the period from 05.04.2017 to 16.08.2018 is ₹78,13,620.00 and the total amount is ₹3,96,29,455.00 is shown as the amount due from the Corporate Debtor. As per the said Annexure table, part payments are seen to have been received by the Operational Creditor as follows:

Cheque received – HDFC/703999/18.03.2017 is ₹25,00,000.00

NEFT received – IDBI/04.04.2017 is ₹25,00,000.00

Since the actual quantity supplied is less than the quantity specified in the Purchase Order dated 28.10.2014, the excess amount raised has been deducted from the Invoice and the Debit Note issued separately.(Sl.No.14 of the above table)



As per the contractual understanding between the parties, payments in respect of these supplies were due from 25.05.2016.

It is observed that, the Corporate Debtor has committed default in making these payments to the Applicant. As explained hereinabove, a total sum of ₹3,96,29,455/- (Rupees Three Crores, Ninety Six Lakhs Twenty Nine Thousand Four Hundred and Fifty Five only) which includes the sum of ₹3,18,15,835/- (Rupees Three Crores, Eighteen Lakhs, Fifteen Thousand, Eight Hundred and Thirty Five only) along with the Interest of ₹78,13,620/- (Rupees Seventy Eight Lakhs, Thirteen Thousand, Six Hundred and Twenty only) charged at 18% p.a. from 05.04.2017 to 16.08.2018, is in default, as on date of Demand Notice dated 20.08.2018.

6. It is seen that the Operational Creditor has filed the present petition under Section 9 of the I&B Code, 2016 on 16<sup>th</sup> October, 2018 for initiation of Corporate Insolvency Resolution Process ("CIRP") against M/s.Empee Power Company (India) Limited in order to recover the said amount of ₹3,96,29,455/-.

7. As explained above, the Corporate Debtor had made payment of an amount of ₹25,00,000/- (Rupees Twenty Five Lakhs only) on 18.03.2017 and further an amount of ₹25,00,000/- (Rupees Twenty Five Lakhs only) on 04.04.2017; thereafter, the Corporate Debtor stopped making payments and



therefore the amount claimed to be in default as on 04.04.2017 is ₹3,18,15,835/- plus interest ₹78,13,620/- till 16.08.2018 totalling ₹3,96,29,455/- (Rupees Three Crores, Ninety Six Lakhs, Twenty Nine Thousand, Four Hundred and Fifty Five only).

8. In the counter filed by the Respondent/Corporate Debtor, it has been *inter-alia* stated that:

- a) The application filed by the applicant was neither maintainable in law nor on facts.
- b) The Operational Creditor for the very same transaction and for the alleged amount had initiated a civil suit before the Honourable High Court of Judicature of Chennai in C.S.No:324 of 2018 and had attached the amount of the Corporate Debtor lying in the hands of TANGEDCO in O.A.No.4019 of 2018. The Operational Creditor had already initiated action with respect to the same transaction not only against the Corporate Debtor but also against one of its sister concern Empee Sugars and Chemicals in C.S. No: 323 of 2018. Both the suits are pending.
- c) The Corporate Debtor has averred that the claim of the Operational Creditor is barred by limitation since the entire transaction relates to the year 2014 and the Operational Creditor has come forward for the realization only in the year 2018. When the claim itself is time barred the question of initiating



proceedings under section 9 of the Insolvency and Bankruptcy Code 2016 is not at all maintainable.

- d) The Corporate Debtor appears to have sent a reply raising dispute denying the claims made by the Operational Creditor as per Section 8(2) of the Code and therefore the present application was not at all maintainable. The Corporate Debtor has stated that there was defective supply of coal and to the correctness of the amount and therefore the present application was not maintainable.

9. It was stated by the Operational Creditor that the Corporate Debtor, M/s. Empee Power Company (India) Limited, had placed orders for the supply of Non-Cooking Steam Coal upon the Applicant herein through various Purchase Orders and concerned Invoices to the Application. These products were promptly supplied as and when required by the Corporate Debtor. However, the Corporate Debtor had failed to make payments in respect of the materials supplied as mentioned above. A debit note dated 28.10.2014 was raised by the Applicant for an Amount of ₹34,36,682.00.

10. It was further stated that the Corporate Debtor owed outstanding dues for a sum of ₹3,68,15,835.00 towards the Applicant herein as on 25.05.2016 and the Respondent had issued



a cheque in favour of the Applicant on 18.03.2017 to the tune of ₹25,00,000.00 and NEFT payment on 04.04.2017 to the tune of ₹25,00,000.00 towards the discharge of the aforesaid outstanding dues. A Confirmation of Balance letter dated 16.06.2017 confirming a balance of ₹3,18,15,840.00 was issued by the Corporate Debtor to the Applicant herein, thus confirming the outstanding dues owed by the Respondent towards the Applicant. Further it has been stated that the Applicant had approached the Hon'ble High Court of Madras and had filed a suit numbered as C.S.No.324 of 2018 and had also obtained a garnishee order dated 17.05.2018 against the Corporate Debtor herein.

11. It is stated that the Applicant had sent a demand notice dated 20.08.2018 calling on the Respondent to repay the unpaid operational debt owed by the Respondent. The Respondent had sent a reply dated 30.08.2018 to the Demand notice denying the contents of the demand notice sent by the Applicant. The Respondent in its reply had referred to the pending civil suit before the Hon'ble Madras High Court wherein the Applicant had obtained a Garnishee Order to attach the receivables from TANGEDCO. It is pertinent to note that no disputes had been raised by the Respondent at any point of time during the course of the proceedings. It is also seen that the Respondent had issued



a Confirmation of Balance to the Applicant thereby acknowledging its liability owed towards the Applicant vide letter dated 16.10.2017. The dispute raised by the Respondent citing defective supply of coal and incorrectness of the amount are moonshine in nature and a clear afterthought as it is being raised for the first time vide his Reply. The Respondent had in fact erroneously stated in its Reply dated 30.08.2018 that a debit note was issued by it, whilst in reality, the said debit note was issued by the Applicant herein to the Corporate Debtor.

12. The Applicant had obtained a garnishee order to attach the receivables from TANGEDCO and that the same was no bar under Section 9 of the Insolvency and Bankruptcy Code, 2016 to initiate proceedings in the capacity of an Operational Creditor. There are some settled principles regarding what constitutes *bona fide* disputes and if there is no *bona fide* dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding-up of the company.

13. As against the points raised by the Respondent with respect to defective supply of coal and incorrectness of the amount, the applicant had obtained a Garnishee Order, attached the



receivables from TANGEDCO and the same was no bar under Section 9 of the Insolvency and Bankruptcy Code to initiate proceedings as an Operational Creditor.

14. This Tribunal heard both the parties and examined the records produced along with the application, in the counter and in the rejoinder. This Tribunal is satisfied that taking into account the submissions and arguments made by both the parties during the course of hearing that there is a legally valid debt due from the Corporate Debtor to the Applicant/Operational Creditor for an amount of ₹3,96,29,455/- including interest and that the Corporate Debtor has not produced any documentary proof with respect to defectiveness in the supply of coal whether in terms of calorific value or any other specifications or parameters with respect to the contents or other conditions on delivery as contained in any of the Purchase Orders. However, this Tribunal has satisfied itself that the authorized signatory of purchase orders released by the Corporate Debtor, has signed the letter of confirmation of balance dated 16.06.2017 in page no. 32 of the application wherein it is seem to have stated that "Based on the anticipated receipt of payment, we are giving below the schedule of payment. As and when the amount is received by us, we will clear the payment of ₹3,18,15,840/- (Rupees three crore eighteen lakh fifteen thousand eight hundred and forty only).



15. In view of the above, this Tribunal concludes the following:

- (i) Existence of Operational Debt from the Corporate Debtor to the Operational Creditor is proved;
- (ii) Default is proved, since there is acknowledgement of debt as on 16.06.2017 by the authorized signatory who had issued purchase order;
- (iii) dispute with respect to defectiveness of the coal could not be proved to the satisfaction of the Tribunal.

16. Having heard both the parties, we are satisfied that the Corporate Debtor is not in a position pay the dues due to the Operational Creditor. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the list furnished by Insolvency and Bankruptcy Board of India appoints **Ms. R. Lalitha** with Registration Number *IBBI/IPA-001/IP-P00779/2017-18/11352* (Email id:- *lalitharca@gmail.com*, Mobile No: +91 9840796619) as the "Interim Resolution Professional" subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as



envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

- a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the respondent.

17. However, during the pendency of the moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder:

- (2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be



terminated or suspended or interrupted during moratorium period.

- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

18. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

- (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

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.

19. The Operational Creditor is directed to pay a sum of **₹2,00,000/-** (Rupees Two Lakhs Only) to the Interim Resolution Professional upon the Interim Resolution Professional filing the



necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry.

-SD-

**(ANIL KUMAR B)**  
MEMBER (TECHNICAL)

-SD-

**(R.VARADHARAJAN)**  
MEMBER (JUDICIAL)