IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court-II)
KOLKATA

C.P. (IB) No. 1092/KB/2020

An application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

In the matter of:

OMM Constructions, a partnership firm having its office at Lane No.L-4/A4, Jagannath Mandie Colony, Budharaja, Sambalpur, Odisha – 768004;

....Operational Creditor

-Versus-

Tuaman Engineering Limited[CIN U45205WB2005PLC105270], having its registered office at 23A, Netaji Subhas Road, 8th Floor, Room No. 16, Kolkata – 700 001;

...Corporate Debtor

Date of hearing: 13 April, 2023
Order Pronounced on: 15 June, 2023

Coram:

Smt.Bidisha Banerjee, Member (Judicial)
ShriBalraj Joshi, Member (Technical)

Appearances (via video conferencing/physical)

For the Operational Creditor	:	Mr.Deepnath Roy Chowdhury,Adv.
	:	Mr. Hareram Singh, Adv.
	:	Mr. Bhaskar Dwivedi,Adv.
For the Corporate Debtor	:	Mr.Rishav Banerjee, Adv.
	:	Ms. Shrinalli Kajaria,Adv.

O R D E R

Per: Bidisha Banerjee, Member (Judicial)

1. The Court convened *via* hybrid mode.

2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ***('the Code')*** read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Bijay Kumar Mishra, Partner, Omm Constructions ***('Operational Creditor')*** duly authorised *vide* Authorization Letter dated 05 October, 2020[1]for initiation of Corporate Insolvency Resolution Process ***('CIRP')*** against Tuaman Engineering Limited ***('Corporate Debtor')***.

3. The present Petition was filed on ***13 October, 2020*** before this Adjudicating Authority. The total amount claimed in default is Rs.4,85,75,983/- (Rupees Four Crore Eighty Five Lakh Seventy Five Thousand Nine Hundred Eighty Three only) as on 29 August, 2020 along with interest @18% per annum on and from 16 October, 2017. The ***date of default*** is stated to be as on ***16 October, 2017***;

4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.3,00,00,000/- (Rupees Three Crore only) with subscribed share capital of Rs. 2,88,20,000/- (Rupees Two Crore Eighty-Eight Lakh Twenty Thousand only). Part – IV of the Petition deals with the particulars of the Operational Debt.

5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor***.

5.1 The Operational Creditoris a Partnership Firm within the meaning of Partnership Act, 1932 and is engaged in the business of construction on behalf of several of its clients across the country.

5.2 The Corporate Debtor had engaged the Operational Creditor as its sub contractor to act for the contract taken by the Corporate Debtor i.e., for construction of Toilet Blocks under Swachh Vidyalaya Abhiyan in Govt. Schools in the District of Nuapada, Nabarangpur, Odisha.

---
[1]Annexure – B, Page 20 of the Petition.

5.3 Accordingly, the Operational Creditor rendered its services towards the Corporate Debtor as per work order dated 29 May, 2015 by constructing total 1324 units of Toilet at Naupada, Sinapali and Nabarangpur.

5.4 The Operational Creditor had from time to time raised its invoices upon the Corporate Debtor. The invoices were received by the Corporate Debtor but they have failed to make full payment on account of the invoices raised

5.5 The Corporate Debtor has deliberately failed and willfully neglected to make payments to the Operational Creditor on account of several bills raised between 10 August, 2015 and 24 April, 2016.

5.6 The Corporate Debtor has never disputed the bills raised by the Operational Creditor or never disputed the quality of services rendered by the Operational Creditor.

5.7 The Operational Creditor on several occasions has requested the Corporate Debtor to make payment of the unpaid bills and the Corporate Debtor even admitted the debt, but, however, made no payment. The last request made by the Operational Creditor with promise by the Corporate Debtor to make next payment within 3 months *[Annexure 'G']*

5.8 The Operational Creditor issued a statutory notice in Form-3 under Section 8 of the Code calling upon the Corporate Debtor to forthwith make payment of Rs.4,85,75,983/- (Rupees Four Crore Eighty Five Lakh Seventy Five Thousand Nine Hundred Eighty Three Only),which was the amount in default committed by the Corporate Debtor. The notice was delivered to the Corporate Debtor on 10 September, 2020 *[Page 87 of the Petition]*.

6. ***Per contra, submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor would be as under:***

6.1 That, the said Application filed by the Operational Creditor is not maintainable in law. There is no amount due and payable by the Corporate Debtor to the Operational Creditor and the alleged claim of the Operational Creditor is barred by limitation.

6.2 As admitted by the Operational Creditor in the Application, the purported bills relied upon by the Operational Creditor were dated between 10 August, 2015 and 24 April, 2016. The said Application has been filed on 12 October, 2020, which is way beyond three years from the date of the purported bills in question.

6.3 The Operational Creditor has attempted to rely upon certain forged and fabricated documents to purportedly prove before this Adjudicating Authority that the Corporate Debtor has acknowledged and admitted the alleged operational debt in question.

6.4 Even assuming but not admitting that the purported acknowledgment was a genuine and bona fide acknowledgement given by the Corporate Debtor, even as per the case made out by the Operational Creditor, the said purported acknowledgement is of 19 January, 2017 *[at page 61 of the said Application]*.

6.5 Thus, after taking into consideration Section 18 of the Limitation Act, 1963, three years from the date of acknowledgement, which is 19 January, 2017 expired on 19 January, 2020 and the Application, preferred on 12 October, 2020, which is way beyond the period of limitation prescribed under the Limitation Act,

6.6 Furthermore, mere deduction of TDS by the Corporate Debtor does not amount to admission of debt whatsoever. TDS were booked against some of the bills raised by the Operational Creditor upon the Corporate Debtor much before the purported failure on the part of the Operational Creditor to fulfil its obligations under the contract in question.

6.7 The Operational Creditor has very cleverly mentioned the date of default as 16 October, 2017 without explaining the basis on which such purported date of default been arrived at. There is no basis for giving the purported date of default as 16 October, 2017 and the Operational Creditor should be called upon to strictly prove such purported date of default.

6.8 The Application has been filed by the Operational Creditor on the basis of some manufactured documents, signatures which were obtained from the representative of the Corporate Debtor by force, coercion, and threat.

6.9 In connection thereof, a complaint before the police authorities was also made by the said representative of the Corporate Debtor.

7. ***Rejoinder filed by the Operational Creditor***

7.1 The reply filed by the Corporate Debtor is based on false and frivolous allegations. The sole motive behind manufacturing such allegations as to forceful obtainment of signature allegedly on challans and other documents from the representative of Corporate Debtor on 22 September 2015, and allegedly again on January 20, 2017, is a mala fide defence, with an attempt to escape the admissions made by the Corporate Debtor by executing and issuing various documents inter alia, acknowledging their liabilities.

7.2 Between 2015 to 2020 various correspondences were exchanged by and between the parties but not even a single correspondence recorded even any hint of such alleged incident of obtaining forceful signatures on challans or documents, as attempted to portray by the Corporate Debtor against the Operational Creditor. On the contrary the Corporate Debtor has made payment to the Operational Creditor on several occasions between February 2017 and July 2017.

7.3 The Corporate Debtor despite writing correspondences between 2015-2022, did not wrote a single word relating to any such alleged incident of forceful obtaining of signatures on documents, to the Operational Creditor.

7.4 Surprisingly the Corporate Debtor continued with the transactions with the Operational Creditor, without raising any single objection or protest, except writing one short letter to the Superintendent of Sambalpur, Odisha Police without making any copy to Local Police Station or to the Operational Creditor, only for the purpose of creating a supporting document, even without giving any details, contacts or address of the accused persons or of the Operational Creditor, so that no further investigation, could be proceeded with the Police Authority.

Analysis and Findings

8. We have heard the Learned Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.

9. Before delving into the merits of the case, the issue that seeks our consideration is, whether the Application filed by the Operational Creditor under section 9 of the Code is barred by limitation?

10. From the records it is seen that the bills relied upon by the Operational Creditor were raised between 10 August, 2015 and 24 April, 2016. Whereas, the Application under section 9 of the Code has been filed on 12 October, 2020, which is way beyond three years from the date of the purported bills in question. But we cannot wave aside the fact that the Corporate Debtor has made certain part-payments against bills on 17 February, 2017, 17 March, 2017, 06 May, 2017 and lastly on 15 July, 2017 *[At page 12para (dd) Clmn. 7, 8, 10, 11 of Chart in the Reply Affidavit of the Corporate Debtor*]. This would extend the limitation from 15 July 2017 to 15 July, 2020.

11. Be that as it may, the Hon'ble Supreme Court *vide* its order dated 10 January, 2022 in ***Re: Cognizance for Extension of limitation***[2] has held that; *"The Period from 15 March, 2020 till 28 February, 2022 shall stand excluded from the purpose of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings."*

Hence, even if the last purported acknowledgement is of 19 January, 2017, the Application falls within the extended period of limitation as the above proposition indicates. Therefore, it cannot be thrown away as barred by limitation. No contrary view is suggested through any other authority or precedent.

12. With respect to the contention of pre-existing dispute as raised by the Corporate Debtor, the documents raising allegation of alleged non-completion of work by the Operational are all between 01 September, 2015 to 25 November, 2015. However, the bill dated 24 April, 2016 *[at Pages 27-31 of Petition]* clearly reflects deduction already made by the Corporate Debtor on account of alleged incomplete work.

[2]Suo Moto Writ Petition (C) No.3 of 2020

13. Notwithstanding, the contention of pre-existing dispute, the Corporate Debtor made an unconditional acknowledgement in writing to the amount due of Rs.4,88,32,091.33/- payable by the Corporate Debtor*[at pages 61 -60 of Petition]*. Further, even after issuing acknowledgement in January 2017, the Corporate Debtor has thereafter made certain part-payments against bills on 17 February, 2017, 17 March, 2017, 06 May, 2017 and 15 July, 2017 *[At page 12para (dd) Column. 7, 8, 10, 11 of Chart in the Reply Affidavit of the Corporate Debtor*].

14. In view of the above facts and circumstances, we are satisfied that the present petition made by the Operational Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time. Further, as envisaged under section 9(3)(b) of the Code, an affidavit has also been filed by the Operational Creditor.

15. It is, accordingly, hereby ordered as follows:-

a. The application bearing ***CP (IB) No. 1092/KB/2020*** filed by Omm Constructions, the Operational Creditor, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Tuaman Engineering Limited, is ***admitted***.

b. There shall be a moratorium under section 14 of the IBC.

c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the

Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

e. ***Mr. Uttam Kumar Agarwal,*** registration number ***IBBI/IPA-001/IP-P-02075/2020-2021/13226***, email: ***uttamagarwal_ca@yahoo.co.in***, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.

g. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

h. The Operational Creditor shall deposit a sum of ***Rs.3,00,000/- (Rupees Three Lakh only)*** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

i. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

j. Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. 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.

16. ***CP (IB) No. 1092/KB/2020*** to come up on ***01 August, 2023*** for filing the periodical report.

17. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The order is pronounced on 15th day of June, 2023

SA [LRA]