

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. No. 4464/I&BP/2018

Under section 9 of the IBC, 2016

In the matter of

Tapan Engineers and Fabricators,
49/2, Lakdi Bunder Darukhana,
Mumbai-400010

...Petitioner

V/s.

Omkar Gratings Private Limited

Gala No. B-5, Hema Industrial Estate,
Plot No. 4, Sarvodaya Nagar,
Jogeshwari East, Mumbai-400060,
Maharashtra

... Corporate Debtor

Order delivered on: 09.12.2019

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri V. Nallasenapathy, Member (Technical)

For the Petitioner: Adv. Karl Tamboly a/w
Adv. Kunal kannuago a/w
Adv. Amey Hadwale
i/b Adv. Geeta Lundwani

For the Respondent: Adv. Hiral Thakkar a/w
Adv. Jay Bhatia a/w
i/b Adv. Gaurav Joshi

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. This Company Petition is filed by Tapan Engineers and Fabricators (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Omkar Gratings Pvt. Ltd. (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default in making payment of ₹5,15,57,288/- including interest

@ 24 % p.a., by invoking the provisions of Section 9 of the Insolvency & Bankruptcy Code (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Petitioner was engaged in the business of trading iron and steel and supplied certain MS sheet cutting to the Corporate Debtor vide several invoices. The said invoices remained unpaid and the ledger statement as on 30.09.2018 shows that an amount of ₹3,78,75,308/- is amount due and payable by the Corporate Debtor to the Petitioner. The Petitioner has also enclosed the copy of the meetings dated 23.10.2017 wherein the Corporate Debtor has confirmed the payment of outstanding amount and interest against the sale of plot at Mamor Wada, on receipt of advance payment from buyer by 30.10.2017 and further, the Corporate Debtor shall pay an amount of ₹50 lacs from 31.12.2017.

3. The Petitioner has issued notice under Form 3 and Form 4 dated 17.10.2018 claiming an amount of ₹5,15,57,288/- which is inclusive of interest (Principal amount of INR 3,78,75,308/- plus interest of ₹ 1,36,81,980/-). The Petitioner has also annexed interest calculation sheet and 9(3)(b) affidavit as they have not received any reply from the ₹5,15,57,288/-.

4. The Corporate Debtor has filed reply denying all the allegations made in the petition. They further submitted that they have received the notice under section 8 and they immediately approached the Petitioner upon receipt of the said notice and the Petitioner informed the Corporate Debtor to ignore the said notice and hence, under the bonafide reason of assurances the Corporate Debtor did not reply to the notice.

5. The Corporate Debtor further sought inspection of the documents such as;

- (a) original purchase orders/ emails placing the order for the goods;
- (b) the alleged original invoices;
- (c) the alleged documents of proof of delivery of goods;
- (d) the alleged lorry receipts referred to in the Application under section 7 and
- (e) covering letters / emails which alleged invoices were forwarded to the Corporate Debtor and proof of receipt thereof.

6. The Petitioner has refused the inspection of documents from the Corporate Debtor. The Corporate Debtor further claims that the Petitioner has not defined what was the work assigned, but has just given the reference to the words "as per the instructions of the Corporate Debtor from time to time". The Corporate Debtor also claims that the Petitioner has not shown any proof and / or given any documentary evidence to proof their case as to what was the nature of instructions was received by them and that the statement of ambiguous and the statement was not maintainable.

7. The Corporate Debtor further submitted that the Petitioner claims dues for providing transport services and states that they have been dealing in the business of iron and steel and thus, there is a contradiction whether these were the invoices towards the supply of goods or services. The Corporate Debtor also pointed out that the columns with reference to lorry no. in the invoices were left blank and certain invoices contain the reference of the lorry no. It is however, a point to be noted that Bill No. TEF/00219 dated 24.01.2017 contains lorry no. and also has an annexure i.e. Form A.R.E.-1, likewise a Bill No. TEF/00234 dated 27th March, 2017 has reference to a Lorry No. and also has Annexure Form A.R.E.-1 annexed thereto. Thus, out of the said 41 bills, 2 bills contain the Lorry No. including Form A.R.E. -1. The details relating to the said 2 bills are explained in detail herein below. Thus, the balance 39 bills have no reference to any purchase orders.

8. The Corporate Debtor states that there was no actual sale of goods, no actual delivery of goods, no transport receipts and delivery challans, hence claim that the said transaction is highly doubtful and baseless and without any merits. The Corporate Debtor further confirmed that the part payment of ₹20 lacs on account of some other transactions and that the said amount was not paid under the 39 invoices as claimed by the Petitioner.

9. The Corporate Debtor further submitted that they had business with the Petitioner and had sold goods to the Petitioner, as the Petitioner did not have the export license, the Petitioner requested the Corporate Debtor to export the goods on behalf of the Petitioner. The ledger statement of the Corporate Debtor proving the actual sales and purchase are annexed to the reply.

10. The Petitioner filed the rejoinder and confirmed that the invoices were raised towards the supply of goods and not for transport services. The Petitioner has inadvertently committed the clerical / typographical error mentioned in the synopsis that the bills and invoices were raised towards the transport services. The Petitioner also confirmed that the goods were sold on the ex -godown basis, the Corporate Debtor used to place verbal orders to the Petitioner and bring its own vehicle to the godown and take the custody of goods in his possession. And that it why the invoices did not wear the lorry nos. the Petitioner further maintained the stock registered which recorded the sale of goods to the Corporate Debtor and they also pay VAT on the same. The audit report evidences the payment of VAT towards the sale transaction towards the year 2016.

11. The Petitioner further confirmed that there was no written contract in respect of unpaid invoices. The Corporate Debtor further acknowledges the liability of payment by confirmation of accounts for the year 01.04.2015 to 31.03.2017.

12. Further the Petitioner relied upon the minutes of the meeting dated 23.10.2017 wherein the Corporate Debtor admitted the liability and confirmed to sell the flat at Mamor Wada and pay the amount of Rs. 50 lacs by 30.10.2017 and balance by 31.12.2017. The Corporate Debtor in part discharged its liability by issuing 5 cheques having no. 032757, 032758, 032759, 032760 and 032761 dated 25.05.2017 of ₹10 lacs each. However, all the cheques were dishonored with the confirmation that the payment stopped by the drawer.

13. The Petitioner further claimed that they have not used the services of the Corporate Debtor to export goods and that the Corporate Debtor is trying to create confusion in the minds of the Hon'ble Tribunal. The Petitioner further reiterated that they have supplied goods to the Corporate Debtor and that the invoices remained unpaid, thus making out of clear case of a debt and default as committed by the Corporate Debtor.

14. The Corporate Debtor filed sur-rejoinder and claimed that the invoices raised by the Petitioner do not have any acknowledgement to show the delivery to the Corporate Debtor. Therefore, claimed that in absence of valid sale contract and proof of delivery of goods to the Corporate Debtor, the entire claim of the Petitioner cannot be entertained. They also claim that the minutes of the meeting which confirms the debt was executed in good faith in lieu of the close relations between the parties for the purpose of availing bank loan facilities, to justify to the bank that the Petitioner would be receiving huge amounts from the Corporate Debtor.

15. Both parties were heard at length and have submitted their written submissions. The Petitioner relied upon the invoices along with this ledger account to demonstrate that an amount of ₹3,78,75,308/- is due and payable by the Corporate Debtor, the said fact of sale to Corporate Debtor was reflected in the stock registers and the VAT returns of the Petitioner, the Corporate Debtor also availed the VAT credit and that there was cross

matching of annexure j 1 and j 2 for the year 2016-2017. Upon perusal of the said document stock register and entries in J1 and J2 it is clearly seen that the Corporate Debtor have made the purchases worth ₹4,26,39,667/- from the Petitioner and availed VAT credit. The Petitioner further relied upon the judgement of the Hon'ble NCLAT in Gupshup Technology India Pvt. Ltd. Vs. Interpid Online Retail Pvt. Ltd. wherein it was held that the Supreme Court clarified that section 3(6) defines claim to mean a right to payment even if it is disputed. The Code gets triggered the moment default of Rs. 1 lac or more occurs. Therefore, it is cleared that the when the respondent has disputed the amount, as the amount is more than Rs. 1 lac, the application under Section 9 cannot be rejected. Further there is no pre-existing dispute between the parties and the Corporate Debtor has clearly admitted his liability which is evident from the minutes of the meeting 23.10.2017.

16. The Petitioner has also relied upon the judgement passed by the Hon'ble NCLAT in "Ahluwalia Vs. Raheja wherein it was held that "if it comes to the notice of the Adjudicating authority that the Operational debt is exceeding Rs.1 lac and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of a suit or arbitration proceedings filed before the receipt of demand notice of an unpaid 'operational debt', an application under section 9 cannot be rejected and is required to be admitted". The Petitioner further claimed that the cheques issued by the Corporate Debtor as a part of the discharge of his liability was dishonored and hence the debt and default of the Corporate Debtor is proved beyond doubt.

17. The Corporate Debtor vide its written submission claimed that there is no documentary proof which claims delivery of goods and delivery challans, excise invoices have been submitted along with the petition. The Corporate Debtor further reiterate that there is an existence of dispute between the parties and amount is due and payable to the Petitioner. The

Corporate Debtor relied upon the judgment of K. Kishan vs. Vijay Nirman Company Pvt. Ltd. wherein it was held that the operational Creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The judgement further clarified that the object of the Code, insofar as operational creditors are concerned, it to put the insolvency process against a Corporate Debtor only in clear cases where a real dispute between the parties as to the debt owned does not exist”

18. The Corporate Debtor further claimed that there is dispute between the parties and the goods were not delivered to the Petitioner by the Corporate Debtor as no proof of delivery including the delivery challans, no transport receipts, no excise invoices, lorry nos. etc. were enclosed. The Corporate Debtor further claimed discrepancies in the ledger statement produced by the Petitioner and the Petitioner failed to provide the inspection of the documents. The counter claim of the Corporate Debtor cannot be set off against the claim of the Petitioner as there is no acknowledgement of debt in the minutes of meeting dated 23.10.2017, between the parties and there is a confirmation of debt with respect to liability of payment of Petitioner’s dues.

19. Upon perusal of the invoices enclosed by the Petitioner which remained unpaid by the Corporate Debtor, it can be said that the goods were sold under several invoices with specific averments of delivery ex-taloja. This is a sale under ex-works, according to which the buyer has to take the delivery of the goods from the work shop of the seller as per Sales of Goods Act. The sales entry in the stock register maintained by the Petitioner clearly demonstrate that there is a sale of goods to the Corporate Debtor. The audited tax statements recording the VAT sales further confirms that there has been a sale of goods to the Corporate Debtor. The Corporate Debtor also has availed the VAT credit by showing the purchases from the Petitioner for that relevant year. The minutes of the meeting dated

23.10.2017, further confirms the acknowledgement of debt and payment of liability of the Corporate Debtor. Hence, it can be said that the Corporate Debtor has defaulted in making the payment of unpaid invoices and this petition needs to be admitted.

20. One Mr. Bharatiraju Vegiraju, residing at 612, Manish Chambers, Sonawala Road, Goregaon (East), Mumbai-400063 having Registration No. IBBI/IPA-002/IP-N00706/2018-2019/12325 has given his consent in Form No. 2 to act as an Interim Resolution Professional.

21. This Bench having been satisfied with the Petition filed by the Petitioner which is in compliance of provisions of section 9 of the Insolvency and Bankruptcy Code admits this Petition declaring moratorium with the directions as mentioned below:

- (a) That this 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 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 the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- (b) 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.

- (c) 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.
- (d) That the order of moratorium shall have effect from 09.12.2019 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.
- (e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (f) That this Bench hereby appoints Ms. Bharatiraju Vegiraju, residing at 612, Manish Chambers, Sonawala Road, Goregaon (East), Mumbai-400063 having Registration No. IBBI/IPA-002/IP-N00706/2018-2019/12325 as an interim resolution professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code.

22. Accordingly, this Petition is admitted.

23. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Suchitra Kanuparthi
Member (Judicial)