



IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

CP (IB) No. 3598/MB/2019

[Under Section 9 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:

KAY BEE FOUNDRY SERVICES PRIVATE LIMITED

[CIN: U27310MH2011PTC214810]

Registered Office: No.602, Wing-C2

Skyline Oasis Building No.3, Millar Compound

Premier Road, Vidyavihar, (W)

Mumbai-400086, Maharashtra.

...Operational Creditor

V/s

TOUGH CASTING PRIVATE LIMITED

[CIN: U27310PN1988PTC046562]

Registered Office: E-68, MIDC, Shirole

Kolhapur-416122, Maharashtra.

...Corporate Debtor

Pronounced: 03.09.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Hearing: Hybrid

Appearances:

Operational Creditor: PCS Divya Momaya, PCS. Dhrumil M Shah & Co. a/w

C.S. Dakshita Garg.

Corporate Debtor: None (*ex-parte*)

**ORDER****[Per: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]****1. BACKGROUND**

1.1 This Company Petition bearing C.P. (IB) No. 3598/MB/2019 (Application) was filed on 09.10.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (AA Rules) by Kay Bee Foundry Services Private Limited, the Operational Creditor (OC), through Mr. Vijay Mahipal, Director of the OC, authorised *vide* Board Resolution dated 17.09.2019 for initiating Corporate Insolvency Resolution Process (CIRP) in respect of Tough Casting Private Limited, the Corporate Debtor (CD).

1.2 The total amount of default alleged is Rs.29,94,404/- (Twenty-Nine Lakh Ninety-Four Thousand Four Hundred Four Rupees) which comprises of the principal amount of Rs. 26,61,526/- as well as the amount of Rs. 3,32,878/- as interest calculated at the rate of 18 (Eighteen) percent per annum from 15.10.2018 to 30.09.2019. The alleged default amount is based on 14 unpaid invoices issued by the OC in lieu of supplying goods to the CD during the period of 30.08.2018 to 14.04.2019.

1.3 The date of default as mentioned in Part IV of the Application is 15.10.2018 to 20.05.2019 which is based upon the due date of payment for each unpaid invoice. Due to the fact that the CD defaulted in payment of its outstanding dues, the OC prays that CIRP may be initiated in respect of the CD under Section 9 of the IBC.




2. CONTENTIONS OF OC

2.1 It is submitted that the OC is involved in the business of Iron and Steel Industry while the CD is a Kolhapur-based private company and is engaged in the manufacture of iron castings. For business purposes, the CD sought supply of alloy raw materials from the OC and issued various purchase orders during 30.08.2018 to 14.04.2019.

2.2 Pursuant to the purchase orders, the OC supplied goods to the CD and raised invoices from 15.09.2018 to 20.04.2019 for the same. As per the said invoices and the purchase orders, interest would be charged at the rate of 18% per annum, in the event of non-payment on due date of payment and the payment was to be made through post-dated cheques (PDCs) within 30 (Thirty) days from the date of invoice.

2.3 The OC submits that the CD issued several PDCs from 24.04.2019 to 05.09.2019, but all the cheques were returned with the remark "*exceeds arrangement*". It is further submitted that the OC consistently pursued recovery of the outstanding amount of the invoices through communication with the CD by emails and letters. The CD, in fact, *vide* email dated 17.04.2019, acknowledged the outstanding amount and requested supply of raw material and even promised to make the payments on or before 19.04.2019, but failed to do so.

2.4 Hence, the OC issued demand notice dated 19.06.2019 under Section 8 of the IBC, demanding payment of the unpaid operational debt, which was in default. In response to the demand notice, the CD replied by letter dated 22.06.2019, admitting that he had issued cheques to the OC against the payable amount. However, since the cheques were returned due to



insufficient funds, it promised to clear all dues in 2-3 instalments on or before 31.08.2019 but the CD failed to fulfill this commitment.

2.5 The OC's banker, Kotak Mahindra Bank issued letter dated 24.09.2019 to the OC certifying that the OC has not received any payment from the CD in its account from 26.07.2019 till date.

3. CONTENTIONS OF CD

3.1 Notices were issued to the CD on 25.10.2019 and 23.12.2019 but it did not make any appearance. Additionally, substituted services were made by publishing in two newspapers, namely, "Times of India" (English) and "Maharashtra Times" (Marathi) by the OC. Despite the above, no one appeared on behalf of the CD.


3.2 We observe that later, Adv. Yash Joglekar appeared on 04.03.2022 for the CD; however, he did not file Vakalatnama and since then, there has been no representation for the CD.

3.3 We also observe that since the CD remained unrepresented in spite of the above, it was set as *ex-parte* on 11.07.2023. Hence, we proceed to deal with the matter based on the available material on record.

4. ANALYSIS AND FINDINGS

4.1 We have perused all the documents and pleadings and heard the authorised representative for the OC.

4.2 We find that fourteen invoices amounting to Rs.29,46,633.43/- for the materials supplied by the OC were issued to the CD from 15.09.2018 to 20.04.2019 and the CD, despite acknowledging the outstanding amounts



and promising to pay the debt, failed to fulfil its commitment, as on the agreed deadline of 19.04.2019. Subsequently, the OC issued Notice on 19.06.2019 under Section 8 of the IBC. In its reply dated 22.06.2019, the CD has admitted liability by saying that the PDCs issued by it were dishonoured as their expected payments were not received on time. The CD also undertook that they would clear all the dues in 2-3 instalments on or before 31.08.2019. There is nothing to show that it has ever fulfilled the commitment to pay off the OC's debt.

4.3 It is observed that the OC has not filed affidavit in terms of Section 9(3)(b) of the IBC. However, the CD has, in response to the Section 8 notice, *vide* letter dated 22.06.2019, admitted the debt and liability and promised the OC payment on or before 31.08.2019. There is no evidence suggesting payment of admitted operational debt and liability by the CD in the present case. In view of the above, we hold that purpose of affidavit under Section 9(3)(b) of the IBC is to demonstrate that no dispute is given by the CD about any dispute relating to unpaid operational debt. Since the operational debt is already admitted by the CD in the reply to Section 8 Notice; the CD has not raised any dispute; and the CD has not demonstrated payment of operational debt thereafter, it can safely be presumed that the CD has not made any payment and the operational debt remains to be in default. The Hon'ble Supreme Court in *Macquarie Bank Vs. Shilpi Cable Technologies Ltd.* [(2018) 2 SCC 674] in paragraph 13 has held that such affidavit is not mandatory when a corporate debtor has responded to the demand notice. Therefore, we hold that the absence of affidavit under Section 9(3)(b) is immaterial in the present matter.




4.4 The actions of the CD consistently demonstrate its failure to adhere to payment obligations, leading to breach of contract. Therefore, based on these observations, it is evident that the CD has continuously defaulted on payments.

4.5 The date of default as mentioned by the OC in Part IV of the Application is 15.10.2018. The Demand Notice also states the same date of default. The total default amount has been shown as Rs.29,94,404/-, as indicated in the tabular statement of outstanding dues. We find that the present Application was filed on 09.10.2019, i.e., within three years from the date of default. Hence, it is maintainable to be adjudicated by us under Section 238A read with Article 137 of the Limitation Act, 1963.

4.6 We find that despite several opportunities granted by this Adjudicating Authority to the CD to be represented; file its reply; and present its case on merits, it chose not to avail itself of the opportunities. As a result, the CD was set *ex-parte*.

4.7 We, therefore, hold that the debt in respect of the goods and materials provided by the OC to the CD falls within the meaning of “operational debt” under section 5(21) of the IBC. The default amount in the present application is Rs.29,94,404/- which is within the threshold limit of One Lakh Rupees under Section 4 of the IBC as the law then was. The Application was filed on 09.10.2019, which is prior to the Notification No. S.O. 1205 (E) dated 24.03.2020, wherein the threshold limit to trigger CIRP was increased from One Lakh Rupees to One Crore Rupees under Section 4 of the IBC, in order to avoid bringing more corporates into insolvency, in the aftermath of COVID-19 Pandemic. For the purpose of this Application,



it is clear that the operational debt of more than One Lakh Rupees is due and payable by the CD to the OC and is not paid under section 4 of the IBC. Therefore, this Application under section 9 of the IBC is maintainable.

4.8 The OC has thus successfully demonstrated and proved the debt and default in this case. Therefore, we are of the considered view that this Application is complete and satisfies all the necessary requirements for admission under Section 9 of the IBC. In view of the above, we find that the matter is fit for admission under section 9(5)(i) of the IBC.

4.9 The OC has proposed the name of Mr. Bharat Ramakant Upadhyay, a registered Insolvency Professional having Registration Number- IBBI/IPA-002/IP-N00120/2017-2018/10289 as the Interim Resolution Professional (IRP), to carry out the functions as mentioned under the IBC.

ORDER

This Application bearing C.P. (IB) No. 3598/MB/2019 under Section 9 of the IBC, filed by Kay Bee Foundry Services Private Limited, the OC, for initiating CIRP in respect of Tough Casting Private Limited, the CD is **admitted.**

We further declare moratorium u/s 14 of the IBC, with consequential directions as follows:

I. We prohibit-

- a) the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the CD.

II. That the supply of essential goods or services to the CD, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under Section 31(1) of the IBC or passes an order for the liquidation of the CD under Section 33 thereof, as the case may be.

IV. That the public announcement of the CIRP shall be made in accordance with the provisions of the IBC, the Rules and Regulations made thereunder.

V. That this Bench hereby appoints **Mr. Bharat Ramakant Upadhyay**, a registered Insolvency Professional having Registration Number- IBBI / IPA-002 / IP- N00120 / 2017-2018 / 10289 and **e-mail-brupadhyay@hotmail.com**, having valid Authorisation for Assignment up to 18.10.2024, as the Interim Resolution Professional (IRP) to carry out the functions under the IBC. The fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.

VI. During the CIRP Period, the management of the CD shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the



case may be, of the IBC. The officers and managers of the CD shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

VII. In exercise of the powers under Rule 11 of the NCLT Rules, we order the OC to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the OC on priority upon the funds becoming available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the Committee of Creditors (CoC).

VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the CD.

IX. The Registry is directed to immediately communicate this Order to the OC, the CD and the IRP by way of e-mail and WhatsApp, not later than two days from the date of this Order.

X. The Registry is directed to communicate this order to the Insolvency and Bankruptcy Board of India forthwith for the purposes of information and record.

Compliance report of the order by Designated Registrar is to be submitted today.

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

//Tanmay Jain//

**Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)**