IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) No. 587/MB-IV/2021
Under Section 9 of the I&B Code, 2016

In the matter of:

Coalnergy Minerals Pte. Ltd.
[IN: FOR077635]
…Operational Creditor/Applicant

V/s

Flash Forge Private Limited
[CIN: U99999MH1991PTC187895]
...Corporate Debtor/Respondent

Order Dated: 19.04.2023

Coram:

Mr. Prabhat Kumar Hon'ble Member (Technical)	Mr. Kishore Vemulapalli Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s)	:	Ms. Manisha T Karia, Advocate.
For the Respondent(s)	:	None.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an application bearing C.P. (IB) No. 587/MB-IV/2021 filed by Coalnergy Minerals Pte. Ltd., the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Flash Forge Private Limited, Corporate Debtor.

2. The Operational Creditor is a Company. The Application is filed by Mr. Tan Bee Hng, Director of the Operational Creditor, duly Authorised vide Authority Letter dated 26.02.2021, claiming total outstanding amount of USD 1,008,145.49 (US Dollars one million eight thousand one hundred forty-five and forty-nine cents only) i.e. Indian Rs.7,33,88,455.02/- (Rupees seven crore thirty-three lakh eighty-eight thousand four hundred fifty-five and two paise only).

3. The date of default is stated to be 31.03.2019 in Part-IV of the Petition. The Petition is filed on 03.06.2021 which is within the period of limitation from the date of default.

4. The case of the Operational Creditor is that:

   4.1 The Operational Creditor is Singapore based Company and is in the business of trading in a wide spectrum of base metals steels products and general commodities.

   4.2 The Corporate Debtor approached the Operational Creditor for purchase of commodities such as Nickel Briquettes, Steel Seamless pipes, Titanium Plates etc. In this regard, the Operational Creditor and the Corporate Debtor entered into various Sales Contracts dated 14.07.2018, 30.07.2018 and 06.10.2018. The Operational Creditor performed its part of the obligations in terms of the sales contract executed between the parties and sent the goods to the Corporate Debtor.

   4.3 The Corporate Debtor never complained or pointed out any default in fulfilment of the contractual obligation by the Operational Creditor. The Operational Creditor following the standard practice, terms and conditions of the agreement, delivered the goods to the Corporate Debtor and accordingly raised the invoices which were duly acknowledged by the Corporate Debtor.

4.4 The Operational Creditor on 23.10.2019, sent a reminder to the Corporate Debtor to pay the overdue and outstanding payments and agreed interest charges on the overdue amount at the rate of 2% per month.

4.5 Vide E-mail dated 10.01.2020, the Corporate Debtor acknowledged its liability, and sent a payment plan to the Operational Creditor. the Corporate Debtor time and again gave false assurances to the Operational Creditor and shared another repayment plan dated 28.02.2020 vide E-mail dated 28.02.2020 for the outstanding amount, which the Corporate Debtor never adhered to.

4.6 The Corporate Debtor sent new time lines for the repayment of outstanding dues on 23.10.2020 vide its E-mail dated 23.10.2020, however, again the Corporate Debtor failed to make the payment as per the time lines. Vide the said repayment plan, the Corporate Debtor admitted amount of payment along with interest due to the Operational Creditor is USD 1,400,000/-.

4.7 The Operational Creditor issued a Legal Notice dated 16.12.2020 for an amount of USD 1,400,000.00 upon the Corporate Debtor. The Corporate Debtor has replied to the said Legal Notice vide its letter dated 10.01.2021. The Operational Creditor issued Demand Notice dated 11.01.2021 in Form-3 upon the Corporate Debtor claiming total outstanding of USD 1,008,145.49 (US Dollars one million eight thousand one hundred forty-five and forty-nine cents only). The Corporate Debtor has replied to the said Demand Notice vide its letter dated 21.01.2021 stating that the disputed amount is not payable by the Corporate Debtor; and there exists prior dispute in relation to the amount claimed by the Operational Creditor. The Corporate Debtor further stated in its reply to Demand Notice that the Operational Creditor was merely an intermediary in the sale and purchase trades, giving rise to the debt claimed & referred in the Demand Notice; and sales contract categorically states that the contract shall be governed and construed in accordance with the law of Singapore.

4.8 The Operational Creditor has filed the Statement of Account maintained with Standard Chartered Bank. The Operational Creditor has filed an affidavit as required u/s 9(3)(b) of the Code.

5. The Corporate Debtor has filed its Affidavit-in-reply dated 06.01.2022 denying its liability submitting as under:

5.1 The Corporate Debtor is an intermediary and the buyer with respect to the materials supplied is a third party whose name has been deliberately suppressed by the Operational Creditor. The Sales Contract clearly shows that the Payment Plan was merely an internal arrangement among the parties and does not amount to any acknowledgement of debt.

5.2 As per clause 5 of the said contract, it stated that *"the parties are hereby agreed that the Ultimate Buyer shall be responsible to undertake the insurance of the said goods for the period of transit against the risk of loss or destruction in the name of the Buyer and in the event of loss or destruction, the buyer will be entitled to the insurance claim."* This clearly shows that the buyer is not the ultimate buyer and the said contract is a contingent contract, wherein the performance of the Ultimate Buyer is also integral part for its complete compliance.

5.3 As per Clause 7 of the said contract, it is stated that the contract shall be governed by and construed in accordance with laws of Singapore.

5.4 The Operational Creditor has not provided copies of Bill of Lading, Delivery receipt duly signed by the Corporate Debtor, LC created if any and purchase orders placed by the Corporate Debtor and the proof of placing orders, etc.

5.5 The letters dated 28.02.2020 and 23.10.2020 clearly stated that the payment will be made as per the schedule only when the payment is received from the actual buyers as the Corporate Debtor is merely acting as an intermediary in the trade/transaction.

6. The Corporate Debtor did not appear on 28.02.2023 i.e. when the matter was listed for final hearing. On 22.10.2021,07.01.2022, 15.07.2022 and 22.09.2022 the Corporate Debtor appeared before us. On 13.12.2022 and 28.02.2023 also, the Corporate Debtor did not appear when the matter was listed. The Corporate Debtor had filed an Application bearing IA No. 896 of 2023 seeking to de-reserve the main Company Petition as the Corporate Debtor wanted to file the written submissions in the matter. The said Application was dismissed.

Findings:

7. We have heard the arguments of the Learned Counsel for Operational Creditor and perused the records available on record.

7.1 After perusal of the material on record, this Bench observes that the Operational Creditor and the Corporate Debtor entered into Sales Contracts under which the Operational Creditor supplied Nickel Briquettes, Steel Seamless Pipes, Titanium Plates, etc to the Corporate Debtor's nominated ultimate buyer for which the Corporate Debtor was liable to make payments to the Operational Creditor. Pursuant to the said supply, the Operational Creditor has raised invoices upon the Corporate Debtor. The details of invoices and date of default of each invoice is as follows:

Invoice Number	Date	Invoice Amount in Rupees	6Amount due/Balance Payment (USD)	Date of Default
INS 1078/18	06.08.2018	7,86,598.26	2,91,693.64	04.11.2018
INS 1096/18	06.08.2018	32,287.92	27,451.90	04.01.2019
INS 1097/18	30.10.2018	7,28,806.49	6,19,797.66	28.01.2019
INS 1100/18	29.10.2018	23,670.49	21,192.94	27.01.2019
INS 1104/18	31.12.2018	2,68,237.63	48,009.35	01.04.2019
Total			10,08,145.49	

7.2 We find that the contention of non-delivery of the proof of delivery of goods such Bill of Lading, Delivery Receipt duly signed by the Corporate Debtor or LC, etc is unfounded as the material was supplied to the Ultimate Buyer, under instruction of the Corporate Debtor only and the Operational Creditor had no privity of contract with the Ultimate Buyer. It is not the contention of the Corporate Debtor that there existed tri-partite contract between the Operational Creditor, the Corporate Debtor and the Ultimate Buyer, whereby its obligations were limited.

7.3 We find from the Contract(s) entered into between the Operational Creditor and the Corporate Debtor that the Corporate Debtor was responsible to make payments of goods against supply thereof to the Ultimate Buyer, as nominated by it. We also find that the Corporate Debtor has sent two repayment plans dated 28.02.2020 and 23.10.2020 wherein the Corporate Debtor has agreed to pay the outstanding dues of Corporate Debtor within the period prescribed in the repayment plan, hence, the above-mentioned contentions of the Corporate Debtor cannot be considered. As regards clause 5 of the contract relied upon by the Corporate Debtor in its defence, we find that said clause only stipulated that Ultimate Buyer shall be responsible to insure the goods in transit and any claim for loss of goods shall belong to the Buyer. This condition further affirms our view that the title in the goods passed in favour of the Buyer upon its loading upon the vessel. Further, the condition under the Contract as to jurisdiction lying in Singapore can not preclude the Operational Creditor to take recourse to the Code, as it is a special statute and deal with defaults of the Corporate Debtor to have it resolved. We have perused the copy of invoices also, wherein the consignee is stated to be "To Order", which indicates that the goods were to be delivered by the vessel master to the party under order of the buyer only. Further, we do not find any communication from the Corporate Debtor that the goods under each of invoice(s) were not received by it or the party under its order, hence the allegation of non-supply of Original Bill of Lading appears to be false, as in the absence of such Bill of Lading, the delivery of goods could not have taken place. Further, we find from the letter(s) proposing payment plan that these letter(s) can not said to result into a new obligation thereby shifting the date of default in accordance with such letter(s). It is settled law that the date of default does not change, even if the creditors allows some further time to make payments due from the debtor. Also, said letter(s) can not make the obligation of the Corporate Debtor dependent upon the receipt of payment from the Ultimate Buyer, as there was no understanding under the Contract(s) to this effect, under which goods were supplied and gave rise to the debt claimed in this application.

7.4 In view of the foregoing, we feel that there exists an operational debt of more than Rs. 1,00,00,000/- and the said debt has not been paid. The default occurred when each of invoice fell due for payment, as more appropriately shown in table under Para 7.1 above. The disputes raised by the Corporate Debtor are not nothing but moon shine defences and have no substance. Accordingly, we feel that the present application deserves to be allowed.

8. The Applicant has proposed not proposed the name of Insolvency Resolution Professional as Interim Resolution Professional (IRP) in the matter.

<u>ORDER</u>

9. This Application being C.P. (IB) No. 587/MB-IV/2021 filed by Coalnergy Minerals Pte. Ltd., the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code)

seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Flash Forge Private Limited, Corporate Debtor is **admitted**. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

I. That this Bench as a result of this prohibits:

a) 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;

b) transferring, encumbering, alienating or disposing of by the corporate debtor 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 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;

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

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

III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to

a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
b. a surety in a contract of guarantee to a Corporate Debtor.

IV. 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 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.

VI. That this Bench appoints Mr. Yatinkumar Sumatilal Shah, a registered insolvency resolution professional having Registration Number [IBBI/IPA-001/IP-P-01785/2019-2020/12764], Contact: 9820135632, E-mail: yatinshah01@yahoo.co.in as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

e) The Financial Creditor shall deposit a sum of Rs.5,00,000/- (Rupees five 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).

f) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor.

g) The Registry is directed to immediately communicate this order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or Whats App. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Kishore Vemulapalli
Member (Judicial)

19.04.2023