

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

C. P. No. 3270/I&B/2018

**APPLICATION BY OPERATIONAL CREDITOR TO INITIATE
CORPORATE INSOLVENCY RESOLUTION PROCESS
UNDER THE INSOLVENCY AND BANKRUPTCY CODE,
2016.**

*(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read
with Rule 6 of the Insolvency and Bankruptcy (Application to
adjudicating Authority) Rules, 2016)*

IN THE MATTER BETWEEN

Satish Agro Industries

1/1, Maharani Road, Siyaganj,
Shreenath Chamber, Indore

.... Operational Creditor
Vs

**The Maharashtra Agro Industries
Development Corporation Ltd.**

Krushni Udyog Bhavan, Aarey Milk
Colony, Dinkarrao Desai Marg,
Goregaon East, Mumbai-400065.

.....Corporate Debtor

Order delivered on: 16.07.2021

Coram: Hon'ble H.V. Subba Rao, Member (Judicial)

Hon'ble Shyam Babu Gautam, Member (Technical)

Appearance:

For the Petitioner: Mr. P.S. Thakare, Company Secretary

For the Respondent: Mr. Niraj Prajapati

Per: Shri. Shyam Babu Gautam, Member

ORDER

1. This Company Petition is filed by Satish Agro Industries, (hereinafter called as the 'petitioner' or 'operational creditor') through its Sole Proprietor Mr Satish Jain seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against The Maharashtra Agro Industries Development Corporation Limited (hereinafter called as the 'respondent' or 'corporate debtor') alleging that the respondent committed default in making payment to the petitioner in view of the invoices raised. The petitioner has filed this petition under Section 8 and 9 of Insolvency and Bankruptcy Code (hereinafter called the "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The counsel for the petitioner submitted that there were various agreements between the petitioner and the respondent starting from the year 2009 including agreements dated 03.11.2010, 24.01.2012, 08.11.2013, 22.01.2016 and 04.10.2016 for supply of agricultural implements, tractor drawn implements, power tillers, self-propelled machines, HDPE Pipes, pump sets, plant protection equipment etc. The counsel stated that in accordance with these agreements, the petitioner had been performing its part of obligation and has supplied the required implements/equipment to the respondent. In view of this, the petitioner had raised invoices to the respondent.
3. The counsel for the petitioner submitted that the respondent enjoyed the supplies made by the petitioner since the year 2009 but has made only part payments towards the same and has conveniently ignored clearing the entire invoice amount in a timely manner. On account of the respondent's failure to clear the invoices for the past many years, the outstanding dues towards

the petitioner have increased to the tune of around Rs.1,18,96,237/- out of which only Rs.4,24,080 have been paid to the petitioner till June 2018. The petitioner has also levied an interest of Rs.1,25,06,107/- upon the said principle amount as per the provisions of MSME Act and is calculated till 28.08.2018. Therefore, the total amount claimed by the petitioner comes to a tune of Rs.2,39,78,264/-.

4. The counsel for the petitioner further submitted that a Demand Notice dated 26.06.2018 was issued by the petitioner to the respondent *inter alia* calling upon the respondent to repay the unpaid amount. Reply dated 24.07.2018 was received to this Demand Notice from the respondent but no dispute whatsoever was raised by the respondent in response to the said Demand Notice.
5. The counsel for the petitioner has submitted that even if the respondent is a Government company, CIRP can be initiated against it which is evident from a parallel reading of the definitions of Corporate Person and Government Company under IBC and Companies Act. The applicability of the provisions of IBC is clear on this issue and there is no specific exemption for Government Companies under the IBC. Section 2(1) categorically states that the Code applies to all Companies incorporated under Companies Act, 2013 or under any other previous Company Law.
6. In addition to the aforesaid, the counsel for the petitioner also submitted that its claim for interest in terms of the MSME Act is sustainable. It is a matter of record that Operational Creditor is a MSME governed under the MSME Act. It is submitted that when there is a specific provision in law that mandates the interest to be paid for delay in payment by the person who has taken goods or services then such person is bound by law to pay interest so

provided to such service provider or supplier. It is submitted that in view of the provision of the MSME Act, the Operational Creditor is entitled to claim interest on the amount of operational debt. The claim of interest on the basis of provisions of MSME Act is sustainable in light of the order passed by Hon'ble Hyderabad Bench in the matter of **Shri Shrikrishna Rail Engineers Private Limited Vs Madhucon Projects Limited (IB) No. 305/9/HDB/2017.**

7. The counsel for the petitioner also quoted Section 16 of the MSME Act provides the from which and rate at which interest is payable:
“Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in an law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.”
8. The counsel for the respondent on the other hand submitted that the present petition is *malafide* and non-maintainable. He alleged that the present petition has been maliciously filed with an attempt to wrongfully initiate CIRP against the respondent.
9. The respondent submitted that the respondent is an undertaking promoted by the Government of Maharashtra and is inter alia engaged in the business of developing and promoting agro-based industries and providing assistance to them. It employs about 700 employees and workmen, mostly from the local area of its operations. Its brand i.e. NOGA products are well accepted in the institutional market segment which covers Canteen Stores

Department, Army Purchase Organization, Indian Airline, Air India, Air Caterers, Star Hotels etc. and in the civil market segment which covers most of the metro and mini metro cities through strong dealers and retailers' network. He further submitted that the Respondent is a solvent company and the present petition is nothing but an attempt to extort moneys from the Respondent.

10. The respondent submitted that the amount of Rs.1,18,96,237/- has been claimed by the Petitioner and that the respondent has already paid an amount of Rs. 35,27,009/- to the petitioner under the contract between the parties. The petitioner has accepted these payments without demur and against the invoices raised. He further submitted that the balance amount of Rs. 83,69,228/- is not due and payable as on date for the following reasons:

- i. As per the contract between the parties, an amount of Rs. 55,23,466/- is payable upon receipt of certificate/inspection report of supplied items from State Agricultural University/Government Engineering College and receipt of full subsidy amount. Till date, such amount has not been received and hence, the amount is not payable to the petitioner. The respondent has informed the petitioner about the same and the petitioner is aware of the same. Out of the amount of Rs. 55,23,466/- an amount of Rs. 8,52,105/- is withheld also on grounds set out in para (vi) below.
- ii. As per the contract between the parties, an amount of Rs. 15,95,571/- is payable on back to back basis upon receipt of actual payment to the Respondent from the concerned Zilla Parishad/DSAO. Till date, such amount has not been received and hence, the amount is not payable to the

petitioner. The Respondent has informed the Petitioner about the same and the Petitioner is aware of it.

- iii. An amount of Rs. 3,73,264/- is charged excessively by the Petitioner. Therefore, this amount is not payable on account of rate difference. The respondent has informed the petitioner about the same and the petitioner is aware of the same.
- iv. An amount of Rs. 4,17,323/- is deducted by the Respondent on account of penalty due to late supply under the provisions of the contract between the parties. The respondent has informed the petitioner about the same and the Petitioner is aware of the same.
- v. An amount of Rs. 3,27,604/- is deducted by the Respondent on account of short supply of goods. The respondent has informed the petitioner about the same and the petitioner is aware of the same.
- vi. An amount of Rs. 8,52,105/- is deducted by the Respondent on account of dispute of the petitioner with the Sales Tax/VAT Department in respect of goods supplied by the Petitioner to the Respondent. The Sales Tax/VAT department has issued notices to the Petitioner regarding its liability to charge sales Tax/VAT on the goods supplied by the Petitioner to the Respondent as the Petitioner has not charged Sales Tax/VAT on such goods. The Respondent, by way of abundant caution, has withheld this amount from the sums payable to the Petitioner as the Sales Tax/VAT as the Sales Tax/VAT Department may recover this amount from the Respondent. The dispute between the Sales Tax/VAT Department has not been resolved. The Respondent has informed the Petitioner about the same and the petitioner is aware of the same.

- vii. An amount of Rs. 1,32,000/- has been retained by the Respondent as security deposit which is payable after completion of the contract as per the terms of the contract and receipt of moneys from SAU including subsidy amount. The petitioner is also aware of the same. Since the contract dated 04.11.2016 is not yet completed the respondent is not liable to refund Rs. 1,32,000/- to the Petitioner.
6. The counsel for the respondent submitted that without prejudice to the above, the invoices set out from Sr. No. 1 to Sr. No. 101 in Exhibit "A" of the copy of petition are barred by the law of limitation. Hence, the same are not payable by the respondent to the petitioner and therefore, claim in respect of these invoices is bad in law and not maintainable.
7. The counsel for the respondent submitted that since the above amount of Rs. 1,18,96,237/- less the amount of Rs. 35,27,009/- which has already been paid by the Respondent, is not due and payable to the petitioner as set out above, the claim for interest thereon is also untenable. Even as per Section 15 of the MSME Act, where an MSME supplier supplies goods to any buyer, the buyer is supposed to make payment thereof on or before the date agreed between the parties. The amount claimed by the Petitioner from the Respondent is neither due nor payable. Hence, interest cannot be levied thereon. In any case, the alleged interest rate charged by the Petitioner is usurious and not enforceable.
8. Further, the counsel submitted that, the respondent has filed a reply dated 24.07.2018 in response to Form 3 issued by the petitioner pointing out that the amount claimed is not payable. Despite the same, the petitioner has filed the present petition

and incorrectly averred in the Affidavit in Support thereof that the respondent has not raised any dispute as contemplated under the provisions of the Code. He therefore stated that the present petition ought to be dismissed with exemplary costs.

FINDINGS

We have heard both the sides and perused all the documents submitted by them and after doing so, it is evident that the respondent does not dispute the claim raised by the petitioner. Instead has stated reasons for non-payment on its part. The following are the observations made by this Bench:

9. It is pertinent to note here that according to the submissions of the respondent, out of Rs.1,18,96,237/- as claimed by the petitioner, the respondent has already paid Rs.35,27,009/- and the amount balance is Rs.83,69,228/- out of which Rs.55,23,466/- is not due and payable because Inspection Report has not been submitted by SAU; Rs. 15,95,571/- is not due and payable as it is awaited from the concerned Zilla Parishad/DSAO. Further, the balance amount of Rs.12,50,191/- is not due and payable on account of alleged short supply, penalty and rate difference. But none of these issues were raised by the respondent while replying to the demand notice of the petitioner. On the contrary, the respondent went on to admit its liability to the tune of Rs.91,89,253/- out of the total amount of Rs. 1,18,96,237/- and informed the petitioner that the same shall be paid to the petitioner upon receiving the amount from the concerned Government Authority i.e. the Zilla Parishad. The respondent has also remitted an amount of Rs. 29,20,278/- as part payment of the outstanding dues under the invoices, thereby re-confirming its liability to pay. Also, the respondent

has made part payments. In this matter, the debt and default can be established and therefore, the above reasons stated by the respondent are nothing but admissions on its part. Therefore, we conclude that the contentions raised by the respondent are merely an after-thought for running away from its liability.

10. Now here, the question arises as to whether CIRP can be initiated against a government owned company? Here, it is important to note that the Insolvency Law Committee of 2018 in its Report had unanimously agreed that introduction of such a section will be beneficial for relaxing the procedure under the Code for certain classes of companies, including for MSMEs, under the aegis of public interest while preserving the scheme and objective of the Code. On perusal of this, an exemption has been carved out in Section 29A of the Code to allow promoters in MSMEs to submit a resolution plan in the event that they are not willful defaulters. However, there is no exemption in the provisions of the Code that requires lifting of the corporate veil in the case of a government company to disregard an insolvency plea. Government companies and private companies are placed in the same pedestal under the ambit of the Code.
11. Further, Section 2(45) of the Companies Act, 2013 can be relied upon which defines 'Government Company' as any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company. Section 3(7) of the IBC defines 'Corporate Person' as a company as defined in clause (20) of section 2 of the Companies Act, 2013

(18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.

Therefore, from a parallel reading of the definitions of Corporate Person and Government Company under IBC and Companies Act, it can be summarized that the applicability provision of IBC is clear on this issue. There is no specific exemption for Government Companies under the IBC. Section 2(1) categorically states that the Code applies to all Companies incorporated under Companies Act, 2013 or under any other previous Company Law.

12. It is pertinent to mention that the concept of Government Companies is subsumed in the definition of Corporate Person under the IBC. The same was also held in the case of ***Hindustan Construction Company Limited vs Union of India, WP (Civil) No. 1074 of 2019*** wherein it was widely expressed that the IBC is applicable to Government Companies. However, such applicability has to be seen in the light of whether the Company is performing any sovereign functions and if the answer is yes, then such a Company cannot be brought under IBC. In fact, the Supreme Court was consistent in its application of the principles enunciated in the earlier judgments in determining whether a Government Company is an instrumentality of State. If a Government Company is an instrumentality of the State, then IBC will not be applicable to it but otherwise such Government Company can be brought under the purview of IBC.

Therefore, from the above, it is evident that the Corporate Debtor which has taken goods from the Operational Creditor and

has admitted the rightful and just dues of the Operational Creditor in its reply to the Demand Notice, CIRP can be initiated against the Corporate Debtor despite being a government owned company.

13. Further, we would like to state that the parties have argued based on the interest component whether it is to be excluded, the corporate debtor being a MSME. We believe that the interest component need not be looked into because the principal amount due and payable is above the minimum required amount. Hence, we believe that all the requisite conditions for admission of a petition under Section 9 have been found to be fulfilled and therefore, this petition deserves to be admitted. Accordingly, we pass following:

ORDER

- (a) The above Company Petition No. (IB)-3270(MB)/2018 is hereby admitted and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against The Maharashtra Industries Development Corporation Limited.
- (b) This Bench hereby appoints **Mr. Ashish Vyas**, Insolvency Professional, Registration No: IBBI/IPA-001/IP-P-01520/2018-2019/122267 (ashishvyas2006@gmail.com) as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code.
- (c) The Financial Creditor shall deposit an amount of Rs.2 Lakh towards the initial CIRP cost by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

- (d) 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.
- (e) 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.
- (f) 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.
- (g) That the order of moratorium shall have effect from the date of pronouncement 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 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- (h) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (i) During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors

and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

- (j) Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.

Accordingly, this Petition is allowed.

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

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

Sd/-

H. V. SUBBA RAO
Member (Judicial)