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IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

CP/1305/IB/2018

(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016)

In the matter of ***M/s. Resurgent Power Projects Limited***

M/s. ABB India Limited
Reg. Office at:
21st World Trade Center, Brigade Gateway,
No.162/1, Dr. Rajkumar Road,
Malleshwaram West,
Bengaluru – 560 055

... Operational Creditor

-Vs-

M/s. Resurgent Power Projects Limited
443, Anna Salai,
Teynampet,
Chennai, Tamil Nadu 600 018

... Corporate Debtor

WITH

MA/962/2019 in CP/1305/IB/2018

(filed under Section 60 of the Insolvency and Bankruptcy Code, 2016)

M/s. Resurgent Power Projects Limited
443, Anna Salai,
Teynampet,
Chennai, Tamil Nadu 600 018

... Applicant / Corporate Debtor

-Vs-

M/s. ABB India Limited
Reg. Office at:
21st World Trade Center, Brigade Gateway,
No.162/1, Dr. Rajkumar Road,
Malleshwaram West,
Bengaluru – 560 055

... Respondent / Operational Creditor

Order Pronounced on 4th December, 2019

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Applicant/ Corporate Debtor : *Mr. T. Parthasarathy, Counsel*

For Respondent/ Operational Creditor : *Mr. P.J. Rishikesh, Counsel*

COMMON ORDER

***Per:* R. VARADHARAJAN, MEMBER (JUDICIAL)**

1. The CP/1305/IB/2018 has been filed by the **M/s. ABB India Limited** (hereinafter referred to as *"Operational Creditor"*) against **M/s. Resurgent Power Projects Limited** (hereinafter referred to as *"Corporate Debtor"*) under Section 9 of the Insolvency & Bankruptcy Code 2016 (in short, 'IBC, 2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. The MA/962/2019 in CP/1305/IB/2018 has been filed by the Corporate Debtor under Section 60 of the IBC 2016 r/w Rule 11 of the NCLT Rules, 2016. The prayer made is to decide the maintainability and limitation of CP/1305/IB/2015 as a

preliminary issue before proceeding with the adjudication of the application.

3. A perusal of Part I of the Application shows that the Petitioner is a Limited Company. In relation to the Corporate Debtor, the particulars of the Corporate Debtor is given in Part – II from which it is seen that the date of incorporation of the Corporate Debtor is given as 15th November 1995 and the Authorized Share Capital of the Company is Rs.25,00,00,000/- and Paid-up Capital is Rs.22,37,40,592/-. The Registered office of the Corporate Debtor is situated at No.443, Anna Salai, Teynampet, Chennai, Tamil Nadu – 600 018.

4. In relation to Part III, no Interim Resolution Professional (IRP) has been named by the Operational Creditor. Part IV details the transaction between the Operational Creditor and the Corporate Debtor leading to the debt and default and the amount which is being claimed is Rs.1,52,74,938/- including interest upto 30.04.2018.

5. Part V in the prescribed Application discloses the documents based on which the claim is sought to be substantiated by the Operational Creditor as against the Corporate Debtor including the Award dated 23.10.2017 passed

by the Hon'ble Mr. Justice G.M. Akbar Ali (Retd.) in Arbitration Claim No.14 of 2015 between M/s. ABB India Limited and M/s. Enmas GB Power Systems Projects Ltd..

6. The brief facts of the case are that the Operational Creditor was awarded the work of design, supply, erection, testing and commissioning of EBOP Package for 1x40 MW CPP, vide Letter of Intent (LOI) dated 27.04.2009 by the Corporate Debtor for ultimate user being M/s. ISMT, Chandrapur. In pursuance thereof, a Contract dated 01.07.2009 was entered into between the parties for a contract price of Rs.10,60,00,000/- (Rupees Ten Crore and Sixty Lakhs only) with the commencement date being 27.04.2009. The whole of the said contract was to be completed within a period of 12 months from the date of LOI and synchronizing of the Plant within 16 months from the date of LOI.

7. After some delay, the project was successfully completed in line with the requirements under the LOI and the end user M/s. ISMT had also issued a Commissioning Certificate dated 09.10.2012. Thereafter, the Corporate Debtor has failed to make payments to the Operational Creditor. There was a balance of Rs.2,64,95,645/- in addition to Rs.1,40,45,342/- towards sale tax dues payable by the Operational Creditor with interest @

18% p.a. with penalty for issuance of the C Forms. The Operational Creditor has sent a mail to the Corporate Debtor on 11.02.2013 claiming the above sum and also Rs.1,21,24,285/- on the account of the additional scope of works, price escalation due to delay on the part of the Corporate Debtor. Various e-mails have also been exchanged between the parties to amicably resolve the dispute which never fructified.

8. Thereafter, the Operational Creditor has invoked the Arbitration Clause under Section 11 of the Arbitration and Conciliation Act, 1996 and filed O.P.No.699/2014 and consequently the Hon'ble High Court of Madras has appointed Mr. Justice G.M. Akbar Ali as the Sole Arbitrator to adjudicate the dispute between the parties. The Hon'ble Arbitrator after adjudicating the claim, by its award dated 23.10.2017 awarded a sum of Rs.1,46,17,166/- with 9% interest from the date of the Award in favour of the Operational Creditor.

9. The Operational Creditor has also issued a Demand Notice under Section 8 of the IBC to the Corporate Debtor on 01.05.2018 which was received by the Corporate Debtor on 09.05.2018, to which the Corporate Debtor has sent a reply on 17.05.2018 whereby they admitted their liability and committed to pay a sum of Rs.5 Lakhs per month commencing from June

2018 together with interest @ 9% as per the terms of award passed by the Arbitrator. The said proposal was rejected by the Operational Creditor by their letter dated 28.05.2018 and a request was made to settle the entire amount along with interest within 30.09.2018. In reply, the Corporate Debtor by its letter dated 20.06.2018, accepted its liability and promised to settle the entire amount within the above said date and since the Corporate Debtor has not paid any amount, the Operational Creditor has filed this present petition on 30.10.2018.

10. The Corporate Debtor has filed its preliminary objections on 14.03.2019 wherein it has been stated that the Operational Creditor has initiated Execution Proceedings against the Corporate Debtor in E.P. No. 151 of 2018 before the Hon'ble High Court of Madras and the same is pending and simultaneously the Operational Creditor has also initiated the present proceedings for the enforcement of the award. It is also the contention of the Ld. Counsel for the Corporate Debtor that as per Section 36(1) of the Arbitration and Conciliation Act, 1996 the award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 in the same manner as if, it were a Decree of the Court and it cannot be enforced by way of the present proceedings against the Corporate Debtor.

11. Further, after filing of the preliminary objections, the Corporate Debtor on 25.03.2019 has filed a written proposal for settlement wherein they agreed to settle the above claim amount of Rs.1,52,74,938/- in 20 equated monthly instalments at a sum of Rs.7,63,746/- per month commencing from 25.04.2019. However the said proposal was not acceptable to the Operational Creditor.

12. Thereafter, when the matter was taken up for final submissions on 31.07.2019, the Counsel for the Corporate Debtor stated that the Corporate Debtor has filed an O.P. No. 549/2019 on the file of the Hon'ble High Court of Madras challenging the Award under Section 34 of the Arbitration and Conciliation Act, 1996 and this Tribunal directed the Corporate Debtor to place on record the interim stay order passed, if any, by the Hon'ble High Court of Madras. Thereafter, numerous opportunities were given to the Corporate Debtor to produce the interim stay order but none was produced.

13. In the meantime, after filing of the OP No. 549/2019, the Corporate Debtor on 05.08.2019 has filed an MA/962/2019 under Section 60 of the IBC, 2016 and sought a relief to decide about the maintainability of the application filed by the Operational Creditor in CP/1305/IB/2018 as a preliminary issue

before proceeding with the adjudication of the said application. In support thereof, the Counsel for the Corporate Debtor relied upon the Judgment of the Hon'ble Supreme Court in ***K. Kishan –Vs– M/s. Vijay Nirman Company Pvt. Ltd;*** *2019(1) CTC 484*.

14. On the issue of maintainability of this Petition as raised by the Corporate Debtor in MA/962/2019, it is evident that the Arbitral Award was passed on 23.10.2017 and the Demand Notice was issued on 01.05.2018 and the CP/1305/IB/2018 was filed on 30.10.2018. It is contended by the Ld. Counsel for the Corporate Debtor that as against award passed by the Learned Arbitrator, the Corporate Debtor has preferred a statutory appeal under Section 34 of the Arbitration and Conciliation Act, 2016 before the Hon'ble High Court of Madras in O.P. No. 549 of 2019 and the said matter came up for admission on 01.08.2019 and in the said circumstances, in view of the Judgment rendered by the Hon'ble Supreme Court in ***M/s. Vijay Nirman (supra)***, the instant CP/1305/IB/2018 is not maintainable.

15. However, we are unable to agree with the submission made by the Ld. Counsel for the Corporate Debtor in view of the fact that the said O.P. No. 549 of 2019 was filed before the Hon'ble High Court of Madras only **after** filing of

CP/1305/IB/2018. In para 11 of the ***M/s. Vijay Nirman (supra)***, the Supreme Court has laid down the criteria to be followed by the Adjudicating Authority while examining an application under Section 9 of the IBC, 2016 and the same is extracted hereunder.

> 11. The Adjudicating Authority, therefore when examining an application under Section 9 of the Act, will have to determine the following:-
>
> (i) Whether there is an "operational debt" as define exceeding ₹ 1 Lakh? (See Section 4 of the Act)
>
> (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and
>
> (iii) <u>Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration filed **before** the receipt of the demand notice of the unpaid operational debt in relation to such disputes?</u>

16. Thus, it is clear from the said Judgment that the existence of a dispute between the parties or a record of pendency of a suit or arbitration should be filed **before** the receipt of the Demand notice of the unpaid Operational Debt. Admittedly, in this case, the Demand notice was issued to the Corporate Debtor

on 01.05.2019 to which the Corporate Debtor has admitted his liability and has also stated that they have not filed any appeal against the award of the Arbitrator. The relevant portion of the Reply to the Demand Notice given by the Corporate Debtor is extracted hereunder;

> "...We submit that first of all non – contesting the Arbitration Award was itself our intention is to honour the said Award, eventhough there were grounds for contesting the same...
>
> .....We are making every effort to bring the situation to normalcy in the coming months. During this interim period, to honor the Award, we are able to pay a sum of Rs. 5 Lakhs per month commencing from June 2018 together with interest @ 9% as per the terms of award passed by the Arbitrator..."

17. It is an admitted fact that only after filing of the CP/1305/IB/2018, the Corporate Debtor has filed the O.P. No. 549 of 2019 challenging the arbitral award which cannot be considered as a "pre – existing dispute" as contended by the Ld. Counsel for the Corporate Debtor in view of the above stated facts. Hence, we find no merit in the submissions made by the Ld. Counsel for the Corporate Debtor and therefore the MA/962/2019 filed by the Corporate Debtor stands **dismissed**.

18. In relation to the CP/1305/IB/2018, as stated above, the Corporate Debtor in the Reply to the Demand Notice has categorically admitted its liability and even filed a Written proposal for settlement before this Tribunal thereby agreed and came forward to settle the claim amount of Rs.1,52,74,938/- in 20 equated monthly instalments at a sum of Rs.7,63,746/- per month commencing from 25.04.2019. Moreover, as discussed above, the Corporate Debtor has filed the O.P. No. 549 of 2019 before the Hon'ble High Court of Madras only **after** filing of CP/1305/IB/2018, which cannot be construed as a *"pre-existing"* dispute. The Corporate Debtor hence cannot be allowed to approbate and reprobate in relation to the claim for sake of its own convenience.

19. It has been brought to the notice of this Tribunal that after the Orders were reserved, the Corporate Debtor has filed a Memo SR. No.6175 on 28.11.2019 seeking to reopen the CP/1305/IB/2018 in view of the wrong submission made by the Counsel for the Operational Creditor that no stay has been granted. However, a perusal of the said memo posits that the Corporate Debtor is trying to harp on the same facts as stated in the counter, and in view of the discussions made supra, the said memo stands rejected.

20. From the documents produced on record, it is evident that the claim falls within the period of limitation of 3 years and is not barred by limitation. The claim amount as made in the petition is also in excess of Rs.1,00,000/- being the statutory minimum amount fixed under Section 4 of the IBC, 2016 for approaching this Tribunal by the creditors, in the instant case by an Operational Creditor.

21. By taking into consideration the facts mentioned supra, we are inclined to **admit** the Application as has been filed by the Operational Creditor and consequently Corporate Insolvency Resolution Process is initiated. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the list furnished by Insolvency and Bankruptcy Board of India appoints **Mr. Sundararaman Natarajan** with Registration Number *IBBI/IPA-001/IP-P00757/2017-18/11317* (Email id:- *sundar54@gmail.com*, Mobile No: +91 9789975289) as the "Interim Resolution Professional" subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. As a consequence of the Application being

admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent 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 the possession of the respondent.

22. However, during the pendency of the moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

23. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

24. The Operational Creditor is directed to pay a sum of **₹2,00,000/-** *(Rupees Two Lakhs Only)* to the Interim

Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

25. Based on the above terms, the CP/1305/IB/2018 stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry.

-SD-	-SD-
(ANIL KUMAR B)	**(R.VARADHARAJAN)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Raymond