SL. No.5

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Special Bench (Video Conference)

CORAM: DR.VENKATA RAMAKRISHNA BADARINATH NANDULA – HON'BLE MEMBER (J)
CORAM: SHRI SATYA RANJAN PRASAD, HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 08.12.2022 AT 4:00 PM THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) No.716/9/HDB/2019
NAME OF THE COMPANY	RKI Builders Pvt Ltd
NAME OF THE PETITIONER(S)	Sheetal Ispat Pvt Ltd
NAME OF THE RESPONDENT(S)	RKI Builders Pvt Ltd
UNDER SECTION	9 of IBC

ORDER

Orders in **CP(IB) No.716/9/2019** pronounced, recorded vide separate sheets. In the result, the Company Petition is allowed. CIRP is initiated against the Corporate Debtor and moratorium imposed in terms of Section 14 of IBC.

Sd/-
MEMBER (TECHNICAL)

Sd/-
MEMBER (JUDICIAL)

Syamala

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II, HYDERABAD

C.P. (IB) No. 716/9/HDB/2019
Under Section 9 of the IB Code, 2016, r/w
Rule 6 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority) Rules, 2016.

In the matter of
M/S RKI BUILDERS PRIVATE LIMITED

Between:

M/S Sheetal Ispat Private Limited,
Thr. its authorized representative,
Sanjay Kumar Sharda, Chartered Accountant,
Regd. Office: 6-56/2, Opp. I.D.P.L. Factory,
Balanagar, Hyderabad,
Telangana – 500037.

… Operational Creditor/ Applicant

A N D

M/S RKI Builders,
Regd. Office: Plot No. 7, D. No. 8-2-269/w/7,
IV Floor, BLKR House Women's Coop Society Sagar Society,
Road No. 2, Banjara Hills,
Hyderabad – 500034.

… Corporate Debtor/ Respondent

Date of Order: 08.12.2022

Coram:

Dr. Venkata Ramakrishna Badarinath Nandula, Member, Judicial

Sri Satya Ranjan Prasad, Member, Technical

Counsel present:

For the Petitioner	:	Mr. Sunil Kumar Jain, PCS
For the Respondent	:	Mr. Giridhar, Advocate

Per : Bench

O R D E R

1. Under consideration is an Application filed by M/S Sheetal Ispat Private Limited (hereinafter referred to as "the Applicant") under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code, 2016"), read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking initiation of Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") against M/S RKI Builders Private Limited (hereinafter referred to as "the Corporate Debtor"), alleging a default of an operational debt of a sum over Rupees One Crore by the Corporate Debtor.

2. Brief facts of the case, as submitted by the Applicant, are as follows:

a) The Applicant is a company, incorporated under the Companies Act, 1956, bearing CIN: U27109TG2011PTC073457, and is engaged in the business of trading in iron and steel products.

b) The Corporate Debtor is a company, incorporated under the Companies Act, 1956, bearing CIN: U45200TG2003PTC040886, and is involved in civil engineering and constructions.

c) The Corporate Debtor placed purchased orders on various dates, to the Applicant, pursuant to which the Applicant dispatched the material to the Corporate Debtor and raised various tax invoices for supply of goods in the period of 2014-15.

d) The goods were duly delivered to the complete satisfaction of the Corporate Debtor and no complaints of any nature were made regarding the said goods.

e) The Corporate Debtor had paid a sum of Rs. 1,50,53,235/- on various dates until 02.04.2019, against the total sales made, amounting to Rs. 1,59,51,486/-, leaving behind an amount of Rs. 8,98,283/-. The Corporate Debtor was under the obligation to clear the amount as per the terms of supply, and was requested by the Applicant time and again, vide telephonic conversations and personal meetings, to clear the amount due, which the Corporate Debtor failed to do.

f) The Corporate Debtor issued a cheque, dated 15.07.2019, bearing No. 493046 for Rs. 2,00,000/-, towards payment of the outstanding dues. However, the cheque was returned unpaid due to insufficient funds.

g) The transaction between the Applicant and the Corporate Debtor is a commercial transaction, and as such the Corporate Debtor is liable to pay an interest of 24% per annum, on the due amount of Rs. 8,98,283/-. Hence, the total outstanding amount payable to the Applicant is Rs. 43,05,543.62/- [including an interest of Rs. 28,87,509/- and GST of 18% on the interest, which amounts to Rs. 5,19,751.62 upto 07.09.2019].

h) The Applicant issued the statutory notice, dated 07.09.2019, under Section 8 of the Code, 2016. After receipt of the said notice, the Corporate Debtor had not complied with the said notice, nor did it raise any dispute with regard to the unpaid dues.

Submitting thus, the learned counsel for the Applicant prayed that the instant Application be admitted and CIRP be initiated against the Corporate Debtor.

3. The Corporate Debtor filed its counter, denying the averments made by the Applicant and *inter alia* stating as follows:

a) The Corporate Debtor is a going concern with a turnover of nearly about Rs.150 Crore, and had been steadily making business transactions with the Applicant on a running account basis, since 2013.
b) The Applicant had sent a demand notice to the Corporate Debtor on 07.09.2019, on receipt of which, the Corporate Debtor had insisted to meet the Applicant in person, to seek clarifications with regard to the demand notice and to produce the necessary records.
c) Prior to issuing the demand notice, the Applicant had never made any claims to the Corporate Debtor with regard to the alleged payments. The Corporate Debtor informed the Applicant that it was willing to pay the agreed balance amounts so long as the Applicants would provide it with all the appropriate records of the alleged debt.
d) While the discussions were under way, the present Application has been filed by the Applicants, without the knowledge of the Corporate Debtor.
e) This Tribunal, on 27.01.2020, 12.02.2020 and 20.02.2020, had recorded the willingness of the parties to enter settlement talks and directed the parties to file a joint memo.
f) The Corporate Debtor had prepared a Banker's Cheque, dated 07.03.2021, which was refused by the Applicant, without any apparent reason. It is evident from the actions of the Applicant that from the very beginning, it had no intention of receiving the alleged debt amount, had intentionally delayed and then computed an exorbitant interest rate over the alleged debt amount.
g) Furthermore, the Applicant has charged the Corporate Debtor with a monthly compound interest rate of 24%, which is a clear exploitation of a legal remedy available under the statute. Such a rate of interest would be contrary to the provisions of the Usurious Loans Act, 1918. The appropriate interest chargeable is given under Section 34 of the Code of Civil Procedure Code, 1908.

h) In the present case, the interest as per the rate of a nationalized bank is 8% and it is evident that the interest of 24% is not tenable under the law.

i) Furthermore, an additional GST of 18%, is being charged by the Applicant, which is a blatant violation of law as the Applicant has no power under the Part III of the Central Goods and Services Tax Act, 2017, to charge GST under such circumstances.

j) Moreover, the invoices filed by the Applicants, clearly include all necessary taxes. Therefore, it is very unbecoming of the Applicant to be charging such additional taxes.

k) The intention of the Code, 2016, is to keep the company a going concern and not to recover debts. The Applicant ought to have filed a civil suit in case it intends to recover any debt from the Corporate Debtor, and certainly ought not knock on the doors of this Tribunal to further its intentions of forcing a going concern to wind up. Further, the Section 65 of the Code, 2016, reads as follows:

65. Fraudulent or malicious initiation of proceedings: -

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

Submitting thus, the learned counsel for the Corporate Debtor prayed that the Application be dismissed as it is evident that the Applicants had the sole intention to force the Corporate Debtor, a going concern, into premature winding up.

4. The Applicant, in its written submissions, stated as under:

a) The Applicant dispatched material to the Corporate Debtor and raised various tax invoices for supply of goods in the period from the year 2014 to the year 2015. The goods were delivered to the satisfaction of the Corporate Debtor and no complaints whatsoever were made. However, complete payment was not made.

b) The following are the invoices against which complete payment has not been made by the Corporate Debtor:

   1.) Invoice No. SISPL/521/2014-15, dated 17.07.2014, for an amount of Rs. 11,50,153/-, due to be paid on 16.08.2014.

   2.) Invoice No. SISPL/778/2014-15, dated 27.08.2014, for an amount of Rs. 3,47,036/-, due to be paid on 26.09.2014.

c) The instant Application is not barred by limitation as the aforementioned invoices remain outstanding and the following is the breakup of the payment received by the Applicant thereunder:

   1.) Against Invoice No. SISPL/521/2014-15, Rs. 63,116/- received on 23.08.2016, Rs. 1,00,000/- received on 06.06.2018 and Rs. 1,00,000/- received on 02.04.2019.

   2.) Against Invoice No. SISPL/778/2014-15, Rs, 2,35,790/- received on 31.01.2015 and Rs. 1,00,000/- received on 16.09.2017.

5. The Corporate Debtor, in its written submissions, stated as under:

a) The Applicant has not filed the complete set of invoices, amounting to Rs. 1,59,51,486/-, in support of its claim, but has filed only two invoices, thereby establishing that the Applicant filed an incomplete application.

b) As per agreement, the Applicant is entitled to claim interest which is a simple interest, but the Applicant calculated compound interest and GST at 18%, on the outstanding amount. The claim of the Applicant is false and is based on a false statement of account.

c) The instant case is barred by limitation. As per the Applicant, the material was supplied to the Corporate Debtor in the year 2014, but the present Application has been filed in the year 2019.

d) The Applicant contends that the cheques issued by the Corporate Debtor were dishonoured. However, the Hon'ble NCLAT in *Ravi Iron Ltd.* v. *Jia Lal Kishori Lal & Ors.* [Company Appeal (AT) Insolvency No. 122 of 2022], held that dishonour of cheques may give right to an Operational Creditor to take appropriate proceeding, but shall not give extension of the limitation for the Application under Section 9 of the Code, 2016.

6. In the light of the contest, the following points emerge for our consideration:

1.) Whether there exists a debt that is due and payable by the Corporate Debtor? If so, whether there has been a default of the same?

2.) Whether the instant Application is barred by limitation?

7. We have heard Mr. Sunil Kumar Jain, learned PCS, representing the Applicant and Mr. Giridhar, learned counsel for the Corporate Debtor. We have also carefully perused the record. We proceed to consider the points as under.

<u>Point No. 1</u>

Whether there exists a debt that is due and payable by the Corporate Detor? If so, whether there has been a default of the same?

8. At the outset, it is pertinent to refer to the demand notice, dated 07.09.2019, issued under Section 8 of the Code, 2016, in which the Operational Creditor had firmly asserted the debt that is due to be paid by the Corporate Debtor, along with the details of the relevant invoices. The said demand notice had been received by the Corporate Debtor on 14.09.2019, as per the postal acknowledgement.

9. Despite the receipt of the demand notice, the Corporate Debtor neither rebutted the contents therein nor did it repay the debt. Thus, the debt and the default thereof, as claimed in the demand notice, remain undisputed. In this context, it is appropriate to refer to the judgement of the Hon'ble Supreme Court in *M/S S.S. Engineers* v. *Hindustan Petroleum Corporation Ltd.* [Civil Appeal No. 4583 of 2022], in which it was held as follows:

> *"On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor."*

10. Thus, based on the undisputed factual matrix of the case at hand, the irresistible conclusion that this Adjudicating Authority can arrive at is that there is an operational debt that is owed by the Corporate Debtor, to the Operational Creditor herein and there is a default of the same. Hence, Point No. 1 is answered accordingly.

Point No. 2

Whether the instant Application is barred by limitation?

11. It is true that the Applicant has presented only two invoices dating back to the year 2014, totaling to an amount of Rs. 14,97,189/-, out of which a principal sum of Rs. 8,98,283/- is being claimed.

12. As can be ascertained from the record, the cause of action for the instant Application arose in the year 2014, when the said invoices became due and payable, but the said due was allegedly not discharged by the Corporate Debtor.

13. It is the case of the Applicant that the limitation for filing the instant Application has been saved by the fact that the Corporate Debtor has been making payments in instalments, thereby acknowledging the debt due to the Applicant.

14. It is settled law that part payments of a debt amount to acknowledgement of liability. Further, it is trite law that acknowledgement of debt within the prescribed period extends limitation under the Code, 2016. Consequently, an application under Section 9 of the Code, 2016, will be accepted even after three years from the date of default, if the Corporate Debtor has acknowledged the liability during the limitation period and in such a scenario the fresh limitation period will be reckoned with, from the acknowledgement of liability and not from the date of default.

15. As is brought forth by the record, an amount of Rs. 63,116/- was paid by the Corporate Debtor on 23.08.2016, which is within the prescribed period of limitation for the cause of action arising from the said Invoice No. SISPL/521/2014-15, thereby causing a fresh period of limitation to start from the said date. Subsequently, another payment was made on 06.06.2018, i.e., within the fresh period of limitation and this payment conferred a fresh period of limitation.

16. Similarly, an amount of Rs. 2,35,790/- was paid by the Corporate Debtor on 31.01.2015, which is within the prescribed period of limitation for the cause of action arising from the said Invoice No. SISPL/778/2014-15, thereby causing a fresh period of limitation to start from the said date. Subsequently, another payment was made on 16.09.2017, i.e., within the fresh period of

limitation and this payment caused a fresh period of limitation to start yet again.

17. Therefore, in view of the above, it is clear that the date from the limitation is to be reckoned with 02.04.2019 for the Invoice No. SISPL/521/2014-15 and 16.09.2017 for the Invoice No. SISPL/778/2014-15, respectively. In the light of the periods of limitation so arrived at, it is but obvious that the instant Application has been filed within the period of limitation. Point No. 2 being answered accordingly, we hold that the instant Application is not barred by limitation.

18. Before proceeding further, it would be appropriate to note here that the total amount of debt that is due in the instant Application is below the current threshold amount of Rupees One Crore, which is mandatory for the initiation of the CIRP. We deem it prudent to clarify the issue. The instant Application was filed in the year 2019, when the threshold amount for the initiation of CIRP was only Rupees One Lakh. It has been judicially settled that the increase in the threshold amount will have a prospective effect and not a retrospective one.

19. The National Company Law Tribunal, New Delhi Bench in its judgment in *BLS Polymers Ltd.* v. *RMS Power Solutions (P) Ltd*. [2021 SCC OnLine NCLT 66] held that the notification, dated 24.3.2020, numbered as CG-DL-E-24032020-218898, which enhanced the threshold limit from Rupees One Lakh to Rupees One Crore to initiate insolvency proceedings under the Code, 2016 is only applicable in respect of defaults that occurred on or after the date of notification, i.e.,24.3.2020 and not prior to that. In the case at hand, as per the invoices, the amounts were due and payable prior to the issuance of the

said notification, dated 24.03.2020. Hence, the notification increasing the threshold amount has no application here.

20. In the circumstances of the instant matter, we are of the view that a debt is owed by the Corporate Debtor, to the Applicant and there has been a default thereof. There is also no evidence of a pre-existing dispute between the parties, which might have prevented the instant Application.

21. Accordingly, the instant petition is, hereby, admitted and this Adjudicating Authority orders the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed within the timelines stipulated in the Code, 2016, reckoning from the date of this order.

22. The Applicant has proposed Mr. Rajkumar Sarda for appointment as the Interim Resolution Professional (hereinafter referred to as the "IRP"). Hence, we appoint Mr. Rajkumar Sarda, bearing Registration No.: IBBI/IPA-001/IP-P-01777/2019-2020/12740, R/o H. No. 24, Asbestos Colony, Opp. Vikrampuri, Telangana – 500009, E-Mail ID: rajsarda@gmail.com, Ph.: 9704405326, as the IRP for the Corporate Debtor. The IRP is directed to file his consent and the Authorisation for Assignment within three days from the date of receipt of this order.

23. The IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the Insolvency and Bankruptcy Code, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.10. The moratorium is hereby declared which shall have effect from the date of this Order till the completion of Corporate Insolvency Resolution Process, for the purposes

referred to in Section 14 of the I& B Code, 2016. It is hereby ordered to prohibit all of the following, namely:

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 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 the possession of the Corporate Debtor.

e) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

24. However, the supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, the provisions of Sub-section (1) of Section 14 of the Code, 2016, shall not apply to such transactions, arguments or arrangements as notified by

the Central Government in consultation with a financial sector regulator or any other authority.

25. The IRP shall comply with the provisions of Sections 13 (2), 15, 17, and 18 of the Code, 2016. The directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor is expected to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his function under Section 20 of the Code, 2016.

26. The Operational Creditor and the Registry are directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this Order as per the provisions of the Code, 2016.

27. The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP.

28. The Registry shall also communicate this order to the Registrar of Companies, Hyderabad, for updating the status of Corporate Debtor in website of the MCA.

29. Accordingly, this Application is admitted.

Sd/-
(Satya Ranjan Prasad)
Member, Technical

Sd/-
(Dr. N.V. Ramakrishna Badarinath)
Member, Judicial