

305

IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH, KOLKATA

CP(IB) No. 30/KB/2019

IN THE MATTER OF

An application Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the of the Insolvency and Bankruptcy (Application to Adjudicating Authority)Rules, 2016 for initiation of Corporate Insolvency Resolution Process.

And

IN THE MATTER OF

M/s Dynamic Cables Limited, having its registered office at F-260, Road No.13, Vishwakarma Industrial Area, Jaipur- 302013.

.....Operational Creditor

Versus

IN THE MATTER OF

M/s India Power Corporation (Bodhgaya) Limited , having its registered office at Plot X 1, 2 & 3, Block-EP, Sector -V Salt Lake, Kolkata- 700091, West Bengal.

.....Corporate Debtor

Date of Hearing : 05.11.2019

Order Delivered on : 08.11. 2019

Coram:

Madan B Gosavi, : Member (J)

Virendra Kumar Gupta, : Member (T)

For the Operational Creditor : 1.Mr. Aditya Vijay, Advocate
: 2.Mr.Narendra Bhati, Advocate
: 3.Ms. Pooja Jewrajka, Advocate

sd/

A
sd/

For the Corporate Debtor : 1.Mr. Rishav Banerjee, Advocate
: 2.Mr.Rajarshi Banerjee, Advocate
:3.Mr. A.K.Awasthi, Advocate

ORDER

Per Virendra Kumar Gupta, Member (T)

This application under Section 9 IBC, 2016 has been filed by the Operational Creditor namely Dynamic Cables Limited to initiate Corporate Insolvency Resolution Process against Corporate Debtor namely India Power Corporation (Bodhgaya) Limited. The amount of default has been claimed at Rs. 2,32,46,235/- (Rs. Two Crore Thirty Two Lakhs Forty Six Thousand Two Hundred Thirty Five) including interest of Rs. 19,16,988/- (Nineteen Lakhs Sixteen Thousand Nine Hundred Eighty Eight).

2. The relevant facts, in brief, are that the Operational Creditor supplied cables to the Corporate Debtor against the purchase orders issued by the Corporate Debtor. First purchase order bearing no. 620000414 was issued on 05.12.2017. The total value of this purchase order was 2,66,97,824.50/-. The first lot of goods worth Rs. 96,62,690/- was supplied in December, 2017. Second lot worth of Rs. 1,69,25,218/- was supplied in January, 2018. It has been stated in the form that Principal sum of Rs. 95,69,241/- was still outstanding against this purchase order. Another purchase order/LOA No. HO/ PUR/ IPC (BG)/L/LOA/011/1819 was issued on 09.04.2018. The value of this purchase order/LOA stood at Rs. 3,66,77,518/-. Against this, goods

sd

sd

worth Rs. 1,54,95,036/- were supplied in May 2018 in one lot. In second lot goods worth Rs.97,01,684/- were supplied in 2nd half of May, 2018. The balance goods were not supplied because of non receipt of payment of earlier outstanding bills. The value of total supplies against this letter of award has been stated at Rs. 2,51,96,720/- It has been stated that due to unavoidable circumstances at the end of Corporate Debtor and at the request of the Corporate Debtor through email dated 19 July, 2018 certain goods were taken back by the Operational Creditor. The value of such goods was Rs. 1,73,53,591/-. Thereafter, several efforts have been made by the Operational Creditor to get the outstanding released but such efforts did not yield any result. This led to issue of notice of demand under section 8 of IBC which was delivered through email on 18.11.2011 in addition to it being served through post. The Corporate Debtor replied to this notice on 27.11.2018.

3. The learned counsel appearing on behalf of the Operational Creditor narrated these facts and drew our attention to page 19 of the petition containing summary of claims and amount payable as on 2.11.2018. The learned counsel further drew our attention to page 50 of the paper book containing the email received from the Corporate Debtor on August 27, 2018 where the Corporate Debtor had admitted the amount of debt and also informed the Operational Creditor that a definite payment plan would be provided shortly. Thereafter, the learned counsel drew our attention to the various documentary evidences to substantiate its claim. It was also pleaded that in the reply to the notice

sd

sd

of demand, the Corporate Debtor had claimed that there were pre existing disputes between the parties but infact no such disputes existed.

4. The learned counsel for the Corporate Debtor, on the other hand, submitted that the Corporate Debtor had sent a letter on 14th May, 2018 regarding disputes which existed and also claimed to have been exchanged correspondences in this regard. Thus, it was claimed that there existed a dispute prior to the issue of notice of demand and, therefore, such petition was liable to be dismissed on this ground only.

5. Thereafter, it was pleaded that the Corporate Debtor by way of email dated 19th July, 2018 had asked the Operational Creditor to take back all the cables supplied by the Operational Creditor which had been taken back , hence, no claim /debt remained to be paid. Therefore, for this reason also the petition was not maintainable. The learned counsel also took a plea that claim, made by the Operational Creditor was of the nature of damages which could not be considered as operational debt and, therefore, this application was not maintainable. In this regard, he further pleaded that unless damages crystallized, no debt could have been said to become mature and payable in terms of provisions of section 73 of Indian Contract Act, 1872. In this regard, he placed reliance on the decision of the Mumbai Bench of NCLT in the case of Tata Chemicals Ltd. Vs. Raj Process Equipments and System Pvt. Limited vide its order dated 30.11.2018 to paras 15 to 21 of the said order. The learned counsel also placed reliance on the decision on another decision of the Mumbai Bench in the case of Gujarat Urja Vikas

Sd

Sd

Nigam Ltd. Vs Nitash Co-generation Pvt. Ltd. order dated 08.05.2019 for the proposition that the claim for damages could be made only what it had been ascertained and crystallized. It was further claimed that the amount of goods taken back had been unilaterally valued by the Operational Creditor. It was also contended by the Corporate Debtor that if the value of goods taken back was deducted from the amount claimed, the net balance would become Rs. 50,000/- which was less than Rs. 1 Lac and, therefore, the petition could be dismissed on this basis also.

6. The learned counsel for the Corporate Debtor, in support of its claim regarding pre existing dispute, relied on the decision of this Tribunal in the case of Sanjay Sharma Vs M/s Jai Balaji Industries Ltd. in CP (IB) No./160/KB/2018, wherein it has been observed that in case of pre existing dispute what was to be seen by the Tribunal that there existed some dispute in respect of operational debt but no roving enquiries were to be made in summary proceedings. He particularly drew our attention to para 15 of the said order dated 23rd October, 2019. The Corporate Debtor also claimed that in the Power of Attorney/Authority letter name of the Corporate Debtor was not mentioned, hence, petition was not maintainable for this reason also. The Corporate Debtor also referred to Annexure-D at page 19 of Sur Rejoinder containing email dated 2nd November, 2019, which was in response to the mail sent by the Operational Creditor on July 26, 2019 and on this basis it was pleaded that no amount was payable since the goods had already been taken back.



7. In the Rejoinder, it was pleaded on behalf the Operational Creditor that in response to the mail dated 7.2.2018, the same person had offered to pay 70% of the due amount as full and final payment, hence, the various claims made by the Corporate Debtor were contrary to the actual facts.

8. The learned counsel for the Operational Creditor said that purported letter dated 14th May 2018 had not been served and no evidence was brought on record by the Corporate Debtor, hence, no cognizance was to be taken of this letter. In this regard, he placed reliance on the decision of the Hon'ble NCLAT in the case of Naveen Kumar Dixit Vs Jaswant International (P.) Ltd. vide its order dated 8th May, 2019, wherein in the similar circumstances claim of the Corporate Debtor regarding existence of prior dispute had been rejected. The learned counsel specifically submitted that the amount claimed in the petition was in respect of supplies which were not taken back, hence, nature of claim was of unpaid outstanding amount relating to supplies made and was not on account of goods taken back as canvassed by the Corporate Debtor .

9. We have considered the submissions made by both the sides and also perused the material on record. It is noted that the goods have been supplied in respect of one purchase order and one letter of award placed by the Corporate Debtor. The value of both taken together is 5,17,84,628/-. The first plea made by the Corporate Debtor is that goods had been taken back, hence, no amount was due and payable. In this regard, it is noted that goods have been taken back on 20th August

sd

sd

2018 in respect of supplies which were made against LOA dated 9th April, 2018. It is noted that except making claim that all the goods have been taken back, no documentary evidence to support such claim has been brought on record by the Corporate Debtor, hence, such contention remains substantiated. It is further to be noted that vide email dated July 19, 2018 specific description of the goods which were requested to be taken back as there were lying unused have been given. The Items specifications and quality are also mentioned in this email. The quantities of such goods are much less as compared to the quantity ordered. It is also noteworthy that in letter of award dated 9th April, 2018, other items have also been ordered to be supplied. If the fact of non supply of certain goods by the Operational Creditor is taken into consideration then also the goods supplied in pursuance of first purchase order and LOA remain unpaid as evident from the chart submitted at page 72 of the paper book, apart from this factual position subsequently vide letter dated August 27, 2018 which is subsequent to the lifting of goods on 20th August 2018, the Corporate Debtor has requested the Operational Creditor to wait for the payment plan. There have been numbers of mails and whatsapp messages in regard to release of payment. In none of these mails claim that no amount was due and payable have been made, for this reason on November 2, 2019 for the first time such claim has been made and that too in response of mail written by the Operational Creditor in July, 2019. Thus, this claim is clearly an after-thought and without any corroborative material being brought on record. Accordingly, we reject the same.

sd
PJ

sd

10. As regard to aspect of pre existing dispute, it is noted that all correspondences between the parties have taken place, though , email or whatsapp except the purported letter of 14th May, 2018. This fact by itself leads to a conclusion that such letter has been created to defeat the claim made by the Operational Creditor particularly when no proof of service of this letter has been brought on record. The decision of Hon'ble NCLAT relied on by the Operational Creditor also supports this view.

11. We also do not find any merit in the contentious made by the Corporate Debtor as regard to defect in Power of Attorney as this is not mandatory requirement under IBC.

12. Since, we have already held that there exists no prior dispute, hence we do not consider it necessary to deal with the decision of this bench in the case of Jay Balajee Industries (supra) relied by the Corporate Debtor except that creation of such dispute appears to be malafide in nature. Hence, this decision, in essence goes against the Corporate Debtor. Similarly, we have already held that it is not a case of damages or claim, hence , other decisions relied by the Corporate Debtor also do not help to the cause of Corporate Debtor.

13. The application is otherwise complete in all respects and defect free. The name of the IRP is not required to be proposed by the Operational Creditor as it is not mandatory in case of application filed under section 9 of IBC, 2016. We shall appoint the IRP from the approved list maintained by IBBI.



Sd



Sd

14. We admit this petition and order as under:-

ORDER


- i) The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, M/s India Power Corporation (Bodhgaya) Limited is hereby **admitted**.
- ii) We declare a moratorium and cause public announcement in accordance with Sections 13 and 15 of the I&B Code, 2016.
- iii) The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The Interim Resolution Professional shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - 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

sd

sd

property including any action under the Securitization 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.
- v) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi) 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.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) 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.
- ix) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x) **Ms. Savita Agarwal, IRP Registration No. IBBI/IPA-001/IP-P00101/2017-18/10201**, E-mail: savita_22@hotmail.com, mobile no 9831634214, is appointed as Interim Resolution Professional.


PJ



- v. The Operational Creditor to pay a sum of Rs. 2,00,000/- (Rs. Two Lakhs) to IRP as advance fee as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill. In case further funds are required during Corporate Insolvency Resolution Process and if not provided by Committee of Creditors then IRP/RP can approach this Tribunal for that purpose.
- xii) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- Xiii) List the matter on **30.12.2019** for the filing of the **progress report**.
- xiii) Registry is hereby directed under section 7(7) of the I.B. Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the IRP by Speed Post as well as through e-mail.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.


(Virendra Kumar Gupta)
(Member (T))


(Madan B Gosavi)
(Member (J))

Signed on 8th November, 2019