

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

**C.P. (IB) No. 1793 /KB/2019**

In the matter of:

Under section 9 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Utkal Engineering Enterprises

... Operational Creditor

-Versus-

Venus Controls & Switchgear Private Limited

... Corporate Debtor

**Coram:**

**Shri Rajasekhar V.K., Member (Judicial)**

**Shri Harish Chander Suri, Member (Technical)**

**Appearances (via video conferencing):**

For the Operational Creditor : 1. Mr. Nirmalya Dasgupta, Advocate

2. Ms. Pritha Basu, Advocate

For the Corporate Debtor: Mr. Jayabrata Mukherjee, Advocate

Date of Hearing: 20.09.2021

Date of pronouncing the order: 25.11.2021

**ORDER**

**Per : Rajasekhar V.K., Member (Judicial):**

1. This Court convened through video conferencing.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code) by Utkal Engineering Enterprises (Operational Creditor), represented by one of the Partners of the

Operational Creditor, Mr. Yogesh Kumar Agarwal, authorised by a Letter of Authority dated 21.09.2019, seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against Venus Controls & Switchgear Private Limited (“Corporate Debtor”).

3. The Corporate Debtor is a private company limited by shares and incorporated on 05.07.1989 under the Companies Act, 1956, with the Registrar of Companies (RoC), West Bengal, having Corporate Identification Number: U31200WB1989PTCO47170. Its registered office is at 32, Ezra Street, North Side, Police Station- Hare Street, Kolkata-700001, West Bengal.
4. The present petition was filed on 16.10.2019, before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs.29,23,354/- (Rupees Twenty-Nine Lakh Twenty-Three Thousand Three Hundred and Fifty-Four only) as on 30.09.2019, which is stated to be the date of default.
5. ***Submission of the learned Counsel for the Operational Creditor***
  - 5.1. The case of the Operational Creditor is that the Corporate Debtor had engaged the Operational Creditor for manufacturing and supplying PSC Poles. The Corporate Debtor placed a Letter of Intent<sup>1</sup> bearing no. VCSPL/DEOGARH-001/UEE/16-17/0001 dated 26.12.2016 which was accepted by the Operational Creditor.
  - 5.2. That the Operational Creditor manufactured 1000 PSC Poles, on inspection of the PSC Poles by the Corporate Debtor and NTPC Limited on 03.01.2017, it was found that 990 PSC Poles were in good order and the same were transported to the Corporate Debtor. 17 PSC Poles were damaged in transit, the remaining 973 PSC Poles were accepted by the Corporate Debtor.
  - 5.3. The Operational Creditor raised invoices<sup>2</sup> for the 973 PSC Poles including transportation charges amounting to Rs.22,86,550/-

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<sup>1</sup> Annexure IV at pages 149-151

<sup>2</sup> Annexure VII at pages 175-

(Rupees Twenty-Two Lakh Eighty-Six Thousand Five Hundred and Fifty only).

5.4. The Corporate Debtor made a part payment of Rs.5,00,000/- (Rupees Five Lakh only) on 31.03.2017, bringing the outstanding principal amount down to Rs.17,86,550/- (Rupees Seventeen Lakh Eighty-Five Thousand Five Hundred and Fifty only). Thereafter, the Operational Creditor drew cheque no. 000169 for further part payment of the Rs.5,00,000/- (Rupees Five Lakh only) on 20.05.2017 and 28.07.2017, which was dishonoured on both occasions with the remark "Funds Insufficient".

5.5. Further, an invalid VAT Exemption Certificate was issued by the Corporate Debtor. After the Corporate Debtor failed and neglected to provide a valid VAT Exemption Certificate, the Operational Creditor raised a debit note dated 25.05.2017 amounting to Rs.2,75,122/- (Rupees Two lakh Seventy-Five Thousand One Hundred and Twenty-Two only) towards VAT @14.5% p.a. After addition of the amount covered in Debit Note, the principal amount outstanding is Rs.20,61,672/- (Rupees Twenty Lakh Sixty-One Thousand Six Hundred and Seventy-Two only) which was failed and neglected to be paid by the Corporate Debtor even after several written reminders and assurances.

5.6. On 04.07.2017, the Corporate Debtor sent a letter to the Operational Creditor with a proposal to settle the outstanding dues with conditions which were not accepted by the Operational Creditor.

5.7. The Operational Creditor issued a legal notice on 21.04.2018 which was replied to by the Corporate Debtor raising frivolous issues. Thereafter, the Operational Creditor issued a statutory demand notice under section 8 of the Insolvency and Bankruptcy Code, 2016 on 23.09.2019.

5.8. That the Operational Creditor is entitled to a sum of Rs.29,23,354/- (Rupees Twenty-Nine Lakh Twenty-Three Thousand Three

Hundred and Fifty Four only) comprising of the outstanding Principal sum of Rs.20,61,672/- (Rupees Twenty Lakh Sixty-One Thousand Six Hundred and Seventy-Two only) and interest amounting to Rs.8,61,682/- calculated on the principal sum @18% per annum up to 30.09.2019 along with further interest calculated 18% p.a on the principal amount from 01.10.2019 till the principal sum is paid in full.

**6. *Submissions of the learned Counsel appearing on behalf of the Corporate Debtor***

**6.1.** Learned Counsel on behalf of the Corporate Debtor submits that the Company Petition has been filed by an unregistered partnership firm and section 69(2) of the Partnership Act, 1932 states that an unregistered partnership firm cannot institute a suit against a third party for enforcement of right.

**6.2.** It is further asserted that the petition has been filed by Mr. Yogesh Kumar Agarwal based on a letter of authority dated 21.09.2019, but since the Financial Creditor is an unregistered partnership firm, there are no records of the number of partners in the firm.

**6.3.** It is submitted that the Corporate Debtor had sent a letter dated 20.07.2018 raising disputes.

**6.4.** It is further submitted that the Corporate Debtor had ordered 1000 PSC poles from the Operational Creditor, for rural electrification work, which the Corporate Debtor had undertaken with NTPC Limited as per their agreement.

**6.5.** It is stated that in the month of February, 2017 NTPC stopped the project of rural electrification due to unavoidable circumstances and closed the project sites. In the month of April 2017, Officers of NTPC Limited visited all the project sites to take control over the unused materials lying at the project (including materials supplied by the Operational Creditor). The Officers of NTPC Limited discovered that all the materials supplied by the Operational Creditor

were defective in nature and inferior to NTPC Limited's standard and could not be put to use. Therefore, NTPC Limited rejected those materials and refused to take handover of such defective materials supplied by the Operational Creditor. NTPC Limited has declined and blocked all the invoices raised by the Corporate Debtor and refused to pay for any of the above material supplied. The Corporate Debtor suffered huge losses due to the supply of defective materials.

6.6. The learned Counsel denies that an amount of Rs.20,61,672/- is due and payable along with an interest of 18% p.a. It is averred that no agreement had been entered into with respect to the interest of 18% p.a. nor was the interest mentioned in the invoices sent by the Operational Creditor, hence the Corporate Debtor is not liable to pay any interest.

6.7. It is further denied that NTPC Limited issued Material Despatch Clearance Certificate CHP Clearance/ Interim Inspection Report, the certificates are neither signed nor stamped by NTPC Limited.

**7. *Rejoinder to the reply of the Corporate Debtor***

7.1. The learned Counsel asserts that the Operational Creditor was constituted in 1978 and then reconstituted on 1.10.2016 by a reconstituted Deed of Partnership. The provisions of section 69(2) of the Indian Partnership Act 1932, does not prevent the Operational Creditor from filing an application under the provisions of Code. In support of his contention, the learned Counsel relied on the following judgments:

7.1.1. *N. N. Enterprises v. Relcon Infra Projects Limited*<sup>3</sup>  
(paragraphs 15,16, 17 and 21)

7.1.2. *Relief Infrastructures v. Ashirbad Real Estate & Transport Private Limited*<sup>4</sup> (paragraph 4)

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<sup>3</sup> I.B. No. 3980/MB/C-IV/2018 dated 01.01.2020

<sup>4</sup> C.P (IB) No. 915/KB/2018 dated 19.03.2020

7.1.3. Shree Banke Bihari Pole Industries v. Romesh Power Products Private Limited<sup>5</sup> (paragraphs 7, 10 and 11)

7.1.4. Kalra Iron Stores v. Faridabad Fabricators Private Limited<sup>6</sup> (paragraphs 7 and 9)

7.1.5. Shree Balaji Steels v. Gontermann Peipers (Inida) Limited<sup>7</sup> (paragraphs 2, 8, 9 and 10)

7.1.6. Kottamasu Sreeman Narayanmurthy v. Chakka Arjanadu<sup>8</sup>

7.2. It is further submitted that the Material Dispatch Clearance Certificate and CHP Clearance/Interim Inspection Report are uploaded by NTPC Limited at their Official website and can be obtained from such website and hence do not require stamp or signature of the representative of NTPC or Corporate Debtor.

### *Findings and Analysis*

8. Heard the learned Counsel for the Operational Creditor and the Corporate Debtor and perused the record.
9. The Corporate Debtor has taken the following defences:
  - a. The Company Petition is not maintainable;
  - b. Dispute was raised before the demand notice was sent;
  - c. The agreement or letter of intent did not include interest.
10. The case of the Corporate Debtor is that an unregistered partnership firm is not eligible to file an application under the Code as it is barred by section 69(2) of the Partnership Act, 1962. This question has been answered numerable times and it is now a settled law that a partnership firm is entitled to file an application under section 9 of the Code as an

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<sup>5</sup> IB No. 562/ND/2018, T.A. No. 105/2018 dated 22.02.2019

<sup>6</sup> (1992) 73 Comp Cas 330 dated 31.10.1990

<sup>7</sup> 2003(114) Comp Cas 193 dated 15.05.2002

<sup>8</sup> AIR 1939 Madras 145 dated 19.10.1938

application under Code would not constitute a suit, hence we shall not delve into an issue which is already a settled principle in law.

11. On perusal on the record, the Corporate Debtor in its letter dated 20.07.2018 has raised issues in reply to the notice sent by the Operational Creditor 21.04.2018, raising similar contentions as mentioned above. Be that as it may, we cannot ignore the email correspondence between the Operational Creditor and Corporate Debtor on May, 2017 or the letter by the Corporate Debtor sent on 04.07.2017, wherein the Corporate Debtor has sent the letter for the purpose of reconciliation of the outstanding dues and the email correspondence thereafter wherein there have been negotiations for settlement. All these events have taken place after NTPC Limited shut down the project on February, 2017 and before the dispute was raised *via* a legal notice on 20.07.2018, hence this act on the part of the Corporate Debtor is questionable and the act of raising a dispute appears to be an afterthought.
12. When the Corporate Debtor has acknowledged the fact that there is an outstanding amount which is to be paid to the Operational Creditor then the fact whether NTPC Limited did certify the PSC Poles or not is out of the question. If the Operational Creditor had not done the work according to the letter of intent, then the Corporate Debtor would not have accepted that an amount was due.
13. Lastly, The Corporate Debtor has raised a contention that it is not liable to pay an amount of Rs.29,23,354/- (Rupees Twenty-Nine Lakh Twenty-Three Thousand Three Hundred and Fifty Four only) which includes Rs.8,61,682/- calculated on the principal sum @18% per annum and Rs.2,75,122/- (Rupees Two lakh Seventy-Five Thousand One Hundred and Twenty-Two only) towards VAT @14.5% p.a. The Corporate Debtor has denied that there was an agreement for charging interest. On perusal of the records, we also find that there has been no agreement between the Operational Creditor and the Corporate Debtor

with regard to any interest. Further, the bills that have been raised by the Operational Creditor do not reflect any interest component.

14. Be that as it may, if we deduct the interest component and the VAT amount from the amount claimed by the Operational Creditor, an amount of Rs.17,86,550/- is due and payable for the services provided by the Operational Creditor which is more than the minimum amount stipulated in Code at the relevant time.
15. In view of the above circumstances, the present petition made by the Operational Creditor is complete in all respect as required by law. The petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4(1) of the Code, *i.e.*, Rupees one lakh, at the relevant time.
16. It is, accordingly, hereby ordered as follows:-
  - a. The application bearing CP (IB) No. 1793/KB/2019 filed by Utkal Engineering Enterprises, the Operational Creditor, under section 9 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Venus Controls & Switchgear Private Limited, CIN: U31200WB1989PTC047170, the Corporate Debtor, is **admitted**.
  - b. There shall be a moratorium under section 14 of the IBC.
  - c. The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e. Mr. Aditya Vikram Varma, registration number IBBI/IPA-001/IP-P02031/2020-2021/13212, email: [adityavikramvarma@yahoo.co.in](mailto:adityavikramvarma@yahoo.co.in), is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g. The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.

- h. The Operational Creditor shall deposit a sum of Rs.3,00,000/- (Rupees Three 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).
- i. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- j. Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
17. **CP (IB) No. 1793/KB/2019** to come up on 24.01.2022 for filing the periodical report.
18. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**Harish Chander Suri**  
**Member (Technical)**

**Rajasekhar V.K.**  
**Member (Judicial)**

25.11.2021

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