

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD
COURT - 2**

COMPANY APPLICATION No. CP (IB) 380/NCLT/AHM/2020

[Application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency & Bankruptcy Code, 2016]

In the Matter of:

Kilburn Engineering Ltd.

**Applicant/
Operational Creditor**

Versus

DCW Limited

**Respondent/
Corporate Debtor**

Order Pronounced on: 31/03/2022

Coram:

**Dr. Deepti Mukesh, Hon'ble Member(Judicial)
Ajai Das Mehrotra, Hon'ble Member (Technical)**

MEMO OF PARTIES

Kilburn Engineering Limited

Plot No. 6, MIDC – Saravali

Kalyan Bhiwandi Road

Tal. Bhiwandi

Dist. Thane 421 311

Maharashtra State

...

Applicant/Financial Creditor

Versus

DCW Limited

Soda Ash Division

Dhrangadhra

Dist. Surendranagar 363 315

Gujarat State

...

Respondent/Corporate Debtor

Appearance:

For Applicant : Mr. Luckyraj Indorkar, Advocate

For the Respondent : Mr. Rohit Gupta, Advocate

ORDER

Per: Dr. Deepti Mukesh, Member (Judicial)

1. This application is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Mr. Arvind Bajoria, Company Secretary of **M/s. Kilburn Engineering Limited** (for brevity 'Applicant') authorised vide Board Resolution dated 08.02.2020, with a prayer to initiate the Corporate Insolvency process against **DCW Limited** (for brevity 'Corporate Debtor').

2. The Applicant operational creditor is a limited company incorporated under the provisions of Companies Act, 1956 on 07.09.1987 duly registered with the Registrar of Companies, Mumbai having registered office at MIDC, Saravali, Dist. Thane, Maharashtra State engaged in the business of manufacture and supply of special purpose machinery.

3. The corporate debtor is a limited company, incorporated under the provisions of Companies Act, 1956 on 28.01.1939, duly registered with Registrar of Companies, Ahmedabad with CIN: L24110GJ1939PLC000748 and having registered office at Dhrangadhra, Gujarat State. Authorised share capital of the corporate debtor is Rs. 65,00,00,000/- and paid up share capital of the company is Rs. 52,20,60,736/-. The corporate debtor company is engaged in manufacture and supply of Soda Ash.

4. It is submitted that the corporate debtor had placed an order dated 26.12.2016 for the supply of Rotary Calciner 350 TPD (Steam Tube Dryer) to be supplied at the Dhrangadhra Plant of the corporate debtor for a total value of Rs. 14,68,80,000/- (Rupees fourteen crores sixty-eight lacs eighty thousand only). As per the terms and conditions of the purchase order, the applicant had delivered the machinery on 03.05.2018 and also

successfully commissioned the machinery on 12.09.2018. Despite timely delivery and commissioning of the machinery, money due and payable as per terms of purchase order was not paid by the corporate debtor. There is a clause in the purchase order that Performance Bank Guarantee (PBG) was to be submitted four and a half months after completion of the last supply or successful commissioning of the machinery by corporate debtor for an amount 10% of the total purchase order. The PBG was to be valid for a period of 12 months from the date of successful commissioning of the machinery. Since the amount due against supply of machinery was not paid by the corporate debtor, the PBG was not submitted. Thus on expiry of 12 months of commissioning of machinery which fell on 12.09.2019, the amount of Rs. 1,28,00,000/- (Rupees one crore twenty-eight lacs only) became due and payable to the applicant. The corporate debtor vide balance confirmation form, has admitted and confirmed that as on 28.02.2019 an amount of Rs. 2,06,20,538/- (Rupees two crores six lacs twenty thousand five hundred thirty-eight only) is due and payable to the operational creditor.

5. It is submitted by the applicant that vide mail dated 05.09.2019 the corporate debtor informed about the cash flow problems being faced by it and assured to make payment of Rs.

20,00,000/- by 06.09.2019 and another Rs. 20,00,000/- within a week thereafter.

6. It is further submitted by the applicant that instead of paying the outstanding amount as promised in the email dated 05.09.2019, the corporate debtor raised debit note dated 01.05.2020 for an amount of Rs. 2,19,06,759/- towards late delivery of the machinery, expenses incurred on behalf of the applicant, cost of supporting roller grinding work, loss of production and cost of three rollers.
7. It is further submitted that the applicant had redressed all the technical service issues faced by the corporate debtor even after successful commissioning of the Rotary Calciner. The balance amount was payable as on 12.09.2019 i.e. one year after successful commissioning of the machinery as the Rotary Calciner was successfully commissioned on 12.09.2018. It is also evident from the Annual Report of the corporate debtor for the financial year 2018-2019 dated 06.09.2019 wherein the corporate debtor has admitted the successful installation as under:

"A new Calciner of 350 MT/day capacity has been successfully installed and commissioned by September, 2018 and it is resulted in stoppage of one set of flow conveyors and rotary valves in soda ash recirculation system. This has resulted in power saving of 11 KW &

reduction in break down and maintenance expenses of conveyors. The new calciner has also contributed to consistency in production of soda ash & flexibility in increasing the production of soda ash due to higher calciner capacity, whenever sodium bicarbonate production has to be curtailed due to market conditions or due to interruptions in bicarbonate plant”

8. The applicant has submitted that demand notice in Form 3 dated 06.07.2020 under the provisions of the IB Code was sent to the corporate debtor which was replied by corporate debtor vide letter dated 15.07.2020. In the reply, the corporate debtor disputed claim of the applicant and countered the claim based on the debit note of Rs. 2,19,00,759/- raised by the corporate debtor for late delivery of the machinery, expenses incurred on behalf of the applicant, cost of supporting roller grinding work, loss of production and cost of three rollers.

9. The applicant filed application under Section 9 of the IB Code. As per part IV form 5 an amount of Rs. 1,57,01,928/- (Rupees one crore fifty-seven lacs one thousand nine hundred and twenty-eight only) along with compounded monthly interest @ 12.75% per annum from September 2018 i.e. an amount of Rs. 47,72,159/- (Rupees forty-seven lacs seventy-two thousand one hundred fifty-nine only) is due and payable to the applicant by the corporate debtor.

10. Corporate Debtor filed affidavit in reply inter alia stating
 - that, there is a pre-existing dispute and the machinery supplied by the applicant is faulty, the applicant has failed to rectify the fault having caused huge losses to the corporate debtor;
 - that, there was considerable delay in despatch and delivery of the machinery at the site of the corporate debtor;
 - that, the applicant is liable to pay a sum of Rs. 2,19,06,759/- along with compound monthly interest @ 14.5% per annum to the corporate debtor.

11. The applicant filed affidavit of rebuttal along with annual report of the corporate debtor for the financial year 2018-19. The applicant also filed affidavit for bringing additional documents and placing on record invoices, delivery challans and transport receipts relating to the supply, delivery and commissioning of the machinery at the site of the corporate debtor.

12. The registered office of the corporate debtor is situated in Gujarat and, therefore, this Tribunal has jurisdiction to entertain and try this application.

13. As per part IV, form 5 date of default is 04.03.2018 and the application is filed on 24.11.2020. Therefore, the application is well within the limitation and not barred by limitation.

14. Heard submissions and perused the documents on record. On perusal of the records it is found that as per the terms and conditions of purchase order dated 26.12.2016 delivery period is 12 months from the date of purchase order and performance guarantee is for twelve months from the date of commissioning i.e. 26.12.2017. In the annual report for the financial year 2018-19, the corporate debtor itself has admitted that "A new Calciner of 350 MT/day capacity has been successfully installed and commissioned by September, 2018" which fortifies statement of the applicant that the machinery was delivered and commissioned as per the stipulated time period of the purchase order. On 28th February, 2019, by balance confirmation form, the corporate debtor confirms that an amount of Rs. 2,06,20,538/- is due and payable to the applicant by the corporate debtor. In reply to email of the applicant dated 28.08.2019, the corporate debtor vide email dated 29.08.2019 assures to clear the outstanding payments and seeks more time on the ground of general slowdown in the economy. By email dated 05.09.2019, the corporate debtor assures that "as

informed over phone, we will positively send Rs. 40 lacs within the next 15 days, Rs. 20 lacs will be sent tomorrow 6th September, 2019 and another Rs. 20 lacs within a week thereafter. Balance amount, will be positively cleared latest by October". Against the above assurances, only Rs. 20,00,000/- has been received by the applicant on 05.09.2019.

15. The events in sequel referred to above clearly reflects that, as per the purchase order, the applicant had delivered and commissioned the machinery at the site of the corporate debtor as per the schedule and had redressed all the technical service issues faced by the corporate debtor even after successful commissioning of the Rotary Calciner. There is no pre-existing dispute. The debit note claimed to have been raised by the corporate debtor is not proved to have been served on the corporate debtor. Moreover, time and again the corporate debtor has promised to pay and has paid Rs 20 lacs as part payment.
16. In the given facts and circumstances, the present application is complete and the applicant is entitled to claim its dues. Therefore, the present application is admitted in terms of Section 9 (5) of the IB Code, 2016.

17. The applicant has proposed the name of Mr. Rajesh Kumar Mittal as Insolvency Resolution Professional, who is hereby appointed as IRP of corporate debtor having registration number IBBI/IPA-002/IP-n00083/2017-18/10224 having office at 204/A, Navjyoti Darshan CHS, Near Purnima Talkies, Murbad Road, Kalyan (W) – 421 301 having e-mail ID csrajeshmittal@gmail.com subject to the condition that no disciplinary proceedings are pending against him. Specific consent of the IRP is filed in Form 2 along with disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which is on record.
18. We direct the Operational Creditor to deposit a sum of Rs. 2.00 lacs (Rupees two lacs only) with the Interim Resolution Professional, namely Mr. Rajesh Kumar Mittal to meet out the expenses to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

19. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14 (1), shall follow in relation to the Corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.
20. A copy of the order shall be communicated to the Applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

- Sd/- -
Ajai Das Mehrotra
Member (Technical)

Sd/
Dr. Deepti Mukesh
Member (Judicial)

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