

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No.I)
KOLKATA**

C.P (IB) No. 1673/KB/2019

*An application under section 9 of the Insolvency and Bankruptcy Code, 2016 read
with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority)
Rules, 2016.*

In the matter of:

Hasibul Hossain, Sole Proprietor, The Imperial Electric Company Private Limited, a sole proprietorship firm, having its business at 2, Elliot Road, Kolkata – 700016.

...Operational Creditor

Versus

Bhagalpur Electricity Distribution Company Private Limited[CIN U40300WB2013PTC193917], a company incorporate under the Companies Act, 1956, having its registered office at 22, AbanindraNath Thakur Sarani, Block A, 3rd floor, Kolkata – 700016 .

...Corporate Debtor

Date of Hearing: 02.09.2022

Date of pronouncing the order: 12.10.2022

Coram:

Shri Rohit Kapoor : ***Member (Judicial)***

Shri Balraj Joshi : ***Member (Technical)***

Appearances (through Video Conferencing/physical hearing)

For the Operational Creditor : Mr. Rishav Banerjee, Advocate

: Mr. Aishwarya Kumar Awasthi, Advocate

For the Corporate Debtor : Mr. Joy Saha, Sr. Advocate

: Mr. Anirban Ray, Advocate

: Mr. Snehashis Sen, Advocate

ORDER

Per Rohit Kapoor, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (***‘the Code’***) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Hasibul Hossain, Sole Proprietor, The Imperial Electric Company Private Limited (***‘Operational Creditor’***) for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against Bhagalpur Electricity Distribution Company Private Limited (***‘Corporate Debtor’***).
3. The present Petition was filed on ***06 August, 2019*** before this Adjudicating Authority. The total amount claimed in default is Rs.1,64,23,282.81/- (Rupees One Crore Sixty Four Lakh Twenty Three Thousand Two Hundred Eighty Two Eighty One Paisa only).
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.50,00,000/- (Rupees Fifty Lakh only) with subscribed share capital of Rs.1,00,000/- (Rupees One Lakh only) with interest @18%.
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Corporate Debtor placed various work orders (***‘Work Orders’***) with the Operational Creditor, the details of which are as follows;
 - i. Work Order No. BEDCPL/KOL/IEC/14-15/001 dated 12 August, 2014 (as amended on 16 August, 2014 and extended on 27 June, 2016) in relation to Operation and Maintenance of distribution system for urban area of Bhagalpur DF.
 - ii. Work Order No. BEDCPL/KOL/IEC/17-18/KOL/W.O/OPEX/11 dated 18 August, 2017 in relation to Operation and Maintenance of distribution system for urban area of Bhagalpur DF.
 - iii. Work Order No. BEDCPL/KOL/IEC/16-17/KOL/W.O./O&M/OPEX/033 dated 03 March, 2017 for LT AB Cabling of 11KV Khalifabag Feeder’s LT Circuits of Bhagalpur DF and

Meter Reading to ultimate Bill Distribution of 2500 identified consumers (KCC) vide W.O. No.BEDCPL/14-15/KOL/W.O/OPEX/17 dated 26 December, 2014

- 5.2 In relation to the aforesaid work orders, the Operational Creditor used to raise invoices from time and time. Payments were made by the Corporate Debtor between 15 November, 2014 to 28 March, 2018. Thereafter, on 30 November, 2017, the abovementioned work orders were cancelled and were terminated at the instance of the Corporate Debtor. The Corporate Debtor represented that the principal employer of the Corporate Debtor had terminated its contract with the Corporate Debtor, as a consequence of which the service of the Operational Creditor would no longer be required.
- 5.3 After such termination the Operational Creditor from time to time requested the Corporate Debtor to clear its dues for the works carried before the termination of the work orders. The Corporate Debtor also issued a Certificate of Satisfaction in relation to the said work orders, but failed to clear the outstanding dues.
- 5.4 After several rounds of negotiations between the parties, on 27 March, 2018 a 'Memorandum of Understanding' (*'MoU'*) and a 'No Due Certificate' (*'NDC'*) Agreement was executed between the parties. Under the NDC, the Corporate Debtor was required to pay a sum of Rs.40,00,000/- (Rupees Forty Lakh) to the Operational Creditor by 29 March, 2018 and Rupees Twenty Five Lakh by 30 June, 2018, aggregating to Rs.65,00,000/- (Rupees Sixty Five Lakh only). It was also settled that upon payment of Rs.65,00,000/- (Rupees Sixty Five Lakh only), the total dues of Rs.1.70 Crores would stand settled.
- 5.5 On 28 March, 2018, in terms of the NDC the Corporate Debtor transferred a sum of Rs.40,00,000/- (Rupees Forty Lakh) to the Operational Creditor, however, failed to pay the balance sum of Rs.25,00,000/- (Rupees Twenty Five Lakh). Hence, the MoU was never given effect and stood cancelled due to breach. On 30 July, 2018, the Corporate Debtor requested its bank, Bank of India (*'Bank'*) to release the Contract Performance Bank Guarantee (*'CPBG'*) being no.40321PEBG150001 dated 08 January, 2015 for Rs.17,36,746.79

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issued by the Operational Creditor in its favor in relation to the above mentioned work orders.

- 5.6 On 09 August, 2018, the Operational Creditor requested the Corporate Debtor to confirm the amount of Rs.1,64,23,282.81 outstanding against the Operational Creditor. In reply to the letter dated 09 August, 2018 of the Operational Creditor, the Corporate Debtor by its letter dated 17 August 2018 has admitted its liability for the said sum of Rs.1,64,23,282.81 .
- 5.7 The Operational Creditor thereafter sent the statutory demand notice dated 01 June, 2019 being the notice under section 8 of the Code in FORM - 3 to the Corporate Debtor which the Corporate Debtor duly received. In reply to the said statutory demand notice dated 01 June, 2019 of the Operational Creditor, the Corporate Debtor issued a letter dated 12 July, 2019, whereby it sought to deny the averments made in the said letter dated 01 June, 2019.

6. *Submissions by the Ld. Advocate appearing on behalf of the Corporate Debtor.*

- 6.1 The said application is not maintainable in law and is vexatious. The term Operational Creditor has been defined under section 5(2) of the Code, which means a person to whom any Operational Debt is owed and the term ‘person’ is defined under section 3(23) of the Code. From the said sections, it is apparent that a Proprietorship concern does not fall under the definition of the Operational Creditor.
- 6.2 The Corporate Debtor had issued certain work order for maintenance of distribution system for Bhagalpur Urban Area. Work order was also issued on 18 August, 2017 in relation to the operation and maintenance of electrical network distribution system for Bhagalpur D F Area, as well as work order dated 18 March, 2017 for LT AB Cabling 11 K.V. L T Circuit of Bhagalpur D F area. It is also pertinent to note that there was no work order on 03 March, 2017. Payments were made from time to time against the bills raised by the Operational Creditor.

- 6.3 The termination of the work orders were not due to Corporate Debtor but due to illegal termination by South Bihar Power Distribution Company Limited ('SBPDCL'), because of which the Corporate Debtor had also suffered a huge loss and damages. The Corporate Debtor had already invoked Arbitration Clause against SBPDCL.
- 6.4 No Due Certificate was given by the Operational Creditor against the settlement of all outstanding invoices upon receipt of Rs.65,00,000/- (Rupees Sixty Five Lakh only). There was a specific clause that at no point of time the settlement amount would exceed the sum of Rs.65,00,000/- (Rupees Sixty Five Lakh only)[*at page 216 of the Petition*].
- 6.5 Further, the Operational Creditor was aware of the arbitration proceedings between the Corporate Debtor and SBPDCL, and sought for further amount of Rs.10,00,000/- (Rupees Ten Lakh only) from the Corporate Debtor. Subsequently, a MoU dated 27 March, 2018 was entered between the parties, whereby a sum of Rs.10,00,000/- (Rupees Ten Lakh only) over and above the sum of Rs.65,00,000/- (Rupees Sixty Five Lakh only) was agreed to be paid by the corporate Debtor, upon the Corporate Debtor getting an Arbitral Award in its favour, or, 7% commission off the total cash received upon sale of O&M spares and inventory items[*at page 215 of the Petition*].
- 6.6 Pursuant to this agreement, the Corporate Debtor had made a payment of Rs.40,00,000/- (Rupees Forty Lakh) on 28 March, 2018. Hence the question is to be decided whether the Operational Creditor would be entitled to an amount over Rs. 65 lakhs in an independent Arbitration proceeding. As a matter of fact there was a discussion between the parties that after payment of Rs. 40 lakhs, the balance payment would be made after the Arbitration. This would be also evident from certain E mails.
- 6.7 In the meantime, pursuant to the Memorandum of Understanding dated 27 March, 2018, the Corporate Debtor called upon the Operational Creditor to carry out the inventory of O & M spares so that the final amount could be reached, however, the Operational Creditor failed and refused to act in terms of the Memorandum of Understanding dated 27 March, 2018, which in turn

caused loss and damages to the Corporate Debtor. Because of their failure to carry out the said inventory which they had agreed to assist and take part in, the Corporate Debtor has not been able to carry out proper sale or trade of such O& M spares and the inventory items. The Corporate Debtor has not been able to assess its loss and damages and hence reserves its rights to claim of such loss and damages as against the Operational Creditor.

- 6.8 The present application has been made illegally and contrary to the 27 March, 2018. The Operational Creditor has sought to use the process under the Insolvency & Bankruptcy Code, 2016 for recovery of its dues. There is no dispute that both the parties have acted in terms of the agreement dated 27 March, 2018 and as such the alleged sum of Rs. 1.98 crores or any part thereof admittedly is not payable.

Analysis & Findings

7. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.
8. The Hon'ble NCLAT in *Neeta Saha vs. Mr. Ram Niwas Gupta*¹ has held that “on construing of Section 2(f) and Section 3(23) together, it can be safely understood that the Sole Proprietorship Firm comes under the definition of Person.” Thus, the Applications filed by the Sole Proprietorship Firm under the provisions of Section 7 and Section 9 of the Code to initiate CIRP against the Corporate Debtor is maintainable. Hence, the plea taken by the Corporate Debtor with respect to the maintainability of an application filed by a Sole Proprietorship Firm does not hold water.
9. With respect to the debt and default, it will appear from page 216 (*Volume II of the Petition*), the Corporate Debtor agreed to make payment of Rs.40,00,000/- within 29 March, 2018 and Rs.25,00,000/- within 30 June, 2018. However, the Corporate Debtor failed to pay the sum of Rs.25,00,000/- within 30 June, 2018. Further, the MoU dated 27 March, 2018 expressly records that the settlement was to be paid as per the milestone payment as

¹Order dated 25th February 2020 in Company Appeal(AT) (Insolvency) No. 321 of 2020.

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mentioned in the MoU. Admittedly, the Corporate Debtor failed to act upon the settlement agreement and failed to pay the sum of Rs.25,00,000/- by 30 June, 2018 and as such, the Corporate Debtor was in breach of the Settlement Agreement dated 27 March, 2018.

- 10.** Further, the Operational Creditor by a letter dated 09 August, 2018 addressed to the Corporate Debtor (*at pages 232 to 235 of the Petition*) wherein the Operational Creditor terminated the Settlement Agreement dated 27 March, 2018. This termination of the MoU dated 27 March, 2018 was never challenged by the Operational Creditor. On the contrary, the Corporate Debtor by its letter dated 17 August, 2018 unconditionally and unequivocally admitted its entire liability and/or debt of Rs.1.64 crores and the Corporate Debtor confirmed that Rs.1.64 crores is due and payable by the Corporate Debtor to the Operational Creditor (*at page 234 of the Petition*).
- 11.** In view of the above facts and circumstances, we are satisfied that the present petition made by the Operational Creditor is complete in all respects 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, stipulated at the relevant point of time. Further, as envisaged under section 9(3)(b) of the Code, an affidavit has also been filed by the Operational Creditor.
- 12.** It is, accordingly, hereby ordered as follows:-

 - a) The application bearing ***CP (IB) No. 1673/KB/2019*** filed by Mr. Hasibul Hossain, Sole Proprietor, The Imperial Electric Company Private Limited, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Bhagalpur Electricity Distribution Company Private Limited, 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

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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) **Ms. Purvee Anoop Mehrotra**, registration number **IBBI/IPA 001/IP-P-02389/2021-2022/13659**, email; **purvimehrotra.78@gmail.com**, 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 the RP, as the case may be, 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 the RP, as the case may be, in terms of section 17 of the Code. 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.1,00,000/- (Rupees One Lakh only)** with the IRP to meet the expenses arising out of issuing

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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 and email 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.

- 13.** *CP (IB) No. 1673/KB/2019* to come up on **15.11.2022** for filing the periodical report.
- 14.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 12th day of October, 2022

SA [LRA]