NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 14.12.2021 AT 10.30 AM

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP (IB) No.63/9/AMR/2020		9 of IBC	Bharat Heavy Electricals Ltd Vs Kakateeya Fabs Pvt Ltd

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

CP (IB) No.63/9/AMR/2020 is admitted, vide separate orders.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
*** *** ***

CP (IB) No. 63/9/AMR/2020

In the matter of a Petition 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
M/s. KAKATEEYA FABS PRIVATE LIMITED

Between:

M/s. Bharat Heavy Electricals Limited,
Registered office at BHEL House,
Siri Fort, New Delhi – 110049
through its Manufacturing Unit at BHEL,
Ramachandrapuram, Hyderabad – 502032.

... Operational Creditor

AND

M/s. Kakateeya Fabs Private Limited,
its Registered & Head Office at C-6,
APIC Autonagar, Vishakhaptanam – 530012
represented by its Managing Director.

... Corporate Debtor

Date of Order: 14.12.2021

CORAM:

Justice Telaprolu Rajani, Member Judicial.

Appearance:

For Operational Creditor	:	Mr.Ch.Pushyam Kiran, Advocate.
For Corporate Debtor	:	Mr.M.Naga Deepak, Advocate.

ORDER

1. This Application is filed by M/s. Bharat Heavy Electricals Limited ("hereinafter referred to as Operational Creditor") seeking initiation of Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Kakateeya Fabs Private Limited ("hereinafter referred to as Corporate Debtor") alleging that the Corporate Debtor committed default in making payment of Principal of

Rs.29,77,129.75/- with future interest towards invoices raised against the goods supplied. Hence petition under Section 9 of Insolvency and Bankruptcy Code, 2016 (referred to as "Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking admission of the Petition, initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Insolvency Resolution Professional (IRP) as prescribed under the Code and Rules thereon.

2. The Operational Creditor is a Company registered under the Companies Act, 1956 and a Public Sector Enterprise working under the administrative control of Department of Heavy Industries, under the Ministry of Heavy Industries & Public Enterprises, Government of India. A customer of the Operational Creditor, M/s.Ideal Energy Project Limited, placed an order dated 31.12.2009 on the Operational Creditor for supply and erection of main plant and equipment consisting of Steam Generator, C & I, electrical equipment and other packages for Ideal Energy Project Limited's II 270 MW unit at IEPL, near Bela Village, Nagpur District, Maharashtra. The Operational Creditor, in turn, placed a subcontract on the Corporate Debtor Visakhapatnam for manufacturing of Deaerator Assembly of the above mentioned project.

3. In terms of the subcontract, the Operational Creditor had sent material to the Corporate Debtor in Visakhapatnam for manufacturing of Deaerator Assembly meant for Ideal Energy (BHEL Customer). However, vide letter dated 14.11.2011, Ideal Energy informed the Operational Creditor that it wishes to cancel the contract issued to the Operational Creditor as it had not

received environmental clearance and coal linkages for the proposed unit. After receiving the said communication from Ideal Energy, the Operational Creditor informed the Corporate Debtor regarding the same and instructed the Corporate Debtor not to carry out any furthei work under the Subcontract. The same was agreed by the Corporate Debtor. However, it was informed by Corporate Debtor that heater assembly was already processed. In view of the same, the Operational Creditor agreed to receive the partially completed deaerator assembly.

4. In view of the above developments, an amended Purchase Order dated 22.01.2015 was issued by the Operational Creditor to the Corporate Debtor informing the Corporate Debtor to cancel the delivery of goods except item 40 deaerator heater assembly. In terms of the subcontract, material for manufacture was to be supplied by the Operational Creditor to the Corporate Debtor. Therefore, material that was already supplied by the Operational Creditor before the amendment purchase order was issued, was lying with the Corporate Debtor. When the Corporate Debtor was requested by the Operational Creditor to return the material, the Corporate Debtor asked the Operational Creditor to deduct the cost of materials lying with the Corporate Debtor. The total cost of the material lying with the Corporate Debtor was Rs.**35,95,456**/-. After adjusting the said amount against bills that were pending to be paid to the Corporate Debtor, amount was still outstanding.

5. In view of the same, Operational Creditor has issued legal notice dated 12.08.2016 calling upon the Corporate Debtor to pay an amount of Rs.30,39,760/- which is inclusive of the value of material and taxes. In reply to legal notice, the Corporate Debtor admitted that the materials are lying with the Corporate Debtor as

claimed by the Operational Creditor but had requested the Operational Creditor to take the material back. In view of the fact that the Corporate Debtor stated that it is willing to return the material lying with it, the Operational Creditor did not pursue the legal notice. However, despite stating that it will return the material, the Corporate Debtor had not returned the material to the Operational Creditor and on continuous follow up with Corporate Debtor. The Corporate Debtor vide letter dated 22.04.2019, had given the details of the total material lying with him and it was stated that the material shall be handed over to the Operational Creditor by 21.05.2019. But it was not handed over to the Operational Creditor as promised by the Corporate Debtor.

6. Subsequently, the Corporate Debtor vide an email dated 15.06.2019, stated that the material supplied by the Operational Creditor had got mixed up with other material belonging to the other customers of the Corporate Debtor. Hence in lieu of the material, the Corporate Debtor stated that the estimated cost of the material lying with it is Rs.23,00,000/- would be returned and also requested the Operational Creditor to inform the actual cost of the material plus taxes within 45 days.

7. The Operational Creditor has calculated the material cost and taxes and informed to the Corporate Debtor on 13.07.2019 that the amount due was Rs.29,77,129.75/- with further interest @18% PA from 13.07.2019 till date of realisation. Despite the expiry of 45 days, the Corporate Debtor did not make any payment to the Operational Creditor. The Operational Creditor issued a Demand Notice dated 18.12.2019 to the Corporate Debtor under Section 8 (1) of the IBC, 2016 to pay the due amount along with interest. The Corporate Debtor replied to the same on 28.12.2019 raising dispute

which is time barred and without any truth or substance. Since the Corporate Debtor has admitted its liability, the Petition needs to be admitted.

8. The Corporate Debtor filed Counter applying the process in which the contract between the Operational Creditor and the Corporate Debtor is executed and further contending as follows:

Every transaction between the parties is through issuance of work order/purchase order by the Operational Creditor. The Operational Creditor sends raw material to the Corporate Debtor. After the completion of the project, the Operational Creditor reconciles the raw materials consumed and the scrap remaining with the Corporate Debtor. The Operational Creditor treats the scrap as sale and the bills are issued by deducting the cost of scrap remaining with the Corporate Debtor.

9. The Operational Creditor issues tax invoices for the deducted amount i.e., an amount equivalent to the scrap remaining with the Corporate Debtor. The Operational Creditor issues tax invoices for the deducted amount i.e., an amount equivalent to the scrap remaining with the Corporate Debtor. It charges Excise Duty and VAT for the scrap amount sold to the Corporate Debtor and the Corporate Debtor claims these amounts as tax inputs. The entire payment exercise is through the Operational Creditor's portal /App "PRADAN". A perusal of the statement on PRADAN App would show that the Operational Creditor has kept payments pertaining to purchase order numbers D911K00052, D911K00053 and D911K00031, in abeyance.

10. The transactions with respect to the Purchase Orders issued by the Operational Creditor cannot be treated separately and the accounts

with respect to all the Purchase Orders as mentioned above have to be dealt together to reconcile the accounts and ascertain the liability of all the parties. The Operational Creditor has issued a rate contract for fabrication of "deaerators" to the Corporate Debtor and issued a Purchase Order No. D911K00031 and amended Purchase Order dated 22.01.2015. It is admitted that the Operational Creditor has cancelled the work and informed the Corporate Debtor to return the raw materials. The Corporate Debtor immediately informed the Operational Creditor to collect the material. But the Operational Creditor neglected to collect the raw material and has calculated the value of the raw material to be Rs.29,77,129.75/-.

11. Meanwhile, through the letter dated 10.08.2019 the Corporate Debtor requested the Operational Creditor to clear the pending payments that were blocked since 25.07.2015 as reflected in the PRADAN Portal. The Operational Creditor, then informed the Corporate Debtor that the said payments were processed, and the amounts were adjusted against scrap of purchase orders. The Operational Creditor has surreptitiously passed the pending bills and adjusted the said amounts towards scrap without informing the Corporate Debtor. There was no update in the PRADAN Portal. On demand, the Operational Creditor provided an account statement dated 06.09.2019, wherein the Operational Creditor deducted Rs.86,50,170.38/- towards scrap. The Corporate Debtor through letter dated 14.09.2019 disputed the deductions made and sought an explanation. The Operational Creditor sent another statement dated 17.09.2019 with a scrap deduction of Rs.47,64,838.28/-. A total amount of Rs.56,28,131.69/- was deducted as scrap.

12. The statement of the Operational Creditor showed difference of Rs.38,85,332.10/-. The Operational Creditor sought specific details of the deduction for various purchase orders. In reply to the request made, the Operational Creditor has only sent the quantity of the material deducted, and did not send the details of the amounts deducted for each material. This made it impossible for the Corporate Debtor to reconcile the value of the goods and scrap and thereby disputed the amounts deducted.

13. The Operational Creditor through email dated 18.09.2019 informed the Corporate Debtor that scrap deduction for purchase order No. D911K00052 was done in January, 2014. The statement dated 17.09.2019 shows that the Operational Creditor has once again deducted scrap amounts for PO Number D911K00052 again in 2016. Noticing this inconsistency, the Corporate Debtor letter dated 15.10.2019 requested the Operational Creditor, details of the deductions under various Purchase Orders and sought a clarification. The Operational Creditor has sent a scrap invoice No.741032 dated 05.03.2016 to the Corporate Debtor only on 06.09.2019, charging Rs.5,95,604.81/- as Excise Duty and Rs.2,67,688.60/- towards VAT. Due to the delay, the Corporate Debtor could not claim tax credit towards these amounts.

14. The Corporate Debtor has preferred an application before Micro and Small Enterprises Facilitation Council for the payments that the Operational Creditor had to make and the same is pending. The Operational Creditor has cancelled the Purchase Order after completing part of the work. The Operational Creditor has to collect the raw material. Hence, it is denied that the Corporate Debtor did not return the goods. Hence the Petition is liable to be dismissed.

15. Rejoinder is filed by the Operational Creditor contending that it is irrelevant to the facts of the present case whether the Corporate Debtor is a Micro, Small or Medium Scale Enterprise. The Operational Creditor issues orders to the Subcontractors through a tendering process and raw materials are supplied to the Subcontractor by the Operational Creditor. After completion of the work, the scrap lying with the subcontractor is treated as sale and value of the scrap is deducted from the amounts payable to the subcontractor. In case material is not returned to the Operational Creditor, the value of the material is deducted from the amounts payable to the Corporate Debtor. In such a case too, it is considered and treated as sale and value of such material is deducted from the amounts payable to the subcontractor. This is an established practice between the Operational Creditor and its subcontractors, including the Corporate Debtor. PRADAN is a software created to facilitate the flow of information between the Operational Creditor and its subcontractors. It can by no means be the basis on which the Corporate Debtor can make a claim against the Operational Creditor, especially when there is no other corroborative evidence and there is a denial and a bonda fide explanation to the contrary by the Operational Creditor. It is not an acknowledgement of liability by the Operational Creditor. Even, according to the document filed by the Corporate Debtor, the vendor has been blocked for payment from 25.07.2015 and it has not been kept in abeyance as stated by the Corporate Debtor.

16. The Corporate Debtor has remained silent and never raised an issue about his for more than four years. Even in the correspondence exchanged between the Operational Creditor and Corporate Debtor prior to the letter dated 10.08.2019, the Corporate Debtor has never

raised this issue. It shows that the dispute now being raised is barred by limitation and is an afterthought. The Corporate Debtor sent the letter dated 10.08.2019 after agreeing to make payment to the Operational Creditor vide its email dated 15.06.2019. This established that the dispute being raised by the Corporate Debtor is spurious, illusory, mala-fide and time barred.

17. Each purchase order constitutes a separate contract. The Corporate Debtor has remained silent for more than 4 years. The Corporate Debtor did not raise even a whisper about any amounts being due to it from the Operational Creditor. In fact, tax of an amount of Rs.1,03,046/- was deducted by the Operational Creditor while making the adjustments in relation to the TDS. Certificate was issued by the Operational Creditor. No double deduction was made by the Operational Creditor and no mention about the same is made in the letter dated 15.10.2019 by the Corporate Debtor.

18. The Operational Creditor did not receive any notice from the MSME Council regarding filing of any application by the Corporate Debtor and the document filed in Annexure R11 would show that it has been filed only in respect of one Purchase Order D911K00053. A new invoice dated 14.01.2020 seems to be the basis for the petition before the MSME Council. The Operational Creditor is not aware of any such invoice. The Corporate Debtor has suppressed the fact that it had approached the NCLT, New Delhi by way of a petition under Section 9 of the IBC, 2016 for the amount of Rs.71,42,982/- which is claiming falsely. The same was returned with objections and there has been no update regarding the said Petition since then. Since the dispute raised by the Corporate Debtor is time barred and illusory, the same has to be ignored and the Petition is to be admitted.

19. Written submissions filed by both the Counsels. Heard the arguments of both the Counsels. The facts admitted are that the Operational Creditor has given subcontract to the Corporate Debtor and due to the cancellation of the contract by the Ideal Energy who is the customer of Operational Creditor due to non-receiving of environmental clearance and coal linkages, the subcontract with the Corporate Debtor was cancelled by the Operational Creditor and the same was agreed by the Corporate Debtor. A legal notice was issued on 12.08.2016 to the Corporate Debtor and a reply notice was issued by the Corporate Debtor on 10.11.2016 admitting that the material is lying with the Corporate Debtor. It is also admitted that by virtue of email dated 15.06.2019, the Corporate Debtor informed the Operational Creditor that the material got mixed up with the other material and hence value of the material would be returned to the Operational Creditor. All these took place prior to issuance of demand notice. An email was also sent by the Operational Creditor to the Corporate Debtor specifying the amount that is due to the Operational Creditor. Since no reply was received for the same a demand notice as required under Section 8 (1) of IBC, 2016 was sent to the Corporate Debtor on 18.12.2019.

20. The Corporate Debtor then raised a dispute in the reply notice with regard to certain dues from the Operational Creditor which on the face of it is time barred. There is no dispute that the said amounts became due in the year 2015 and there is no claim made with regard to the said amounts. The copy of the statement of PRADAN Portal would show that there was a blocking of the amounts towards the scrap and as rightly contended by the counsel for the Operational Creditor, no amounts are kept in abeyance. It was contended that in spite of knowing the fact that the said amounts are blocked, no claim was raised against the said amounts and there

is no whisper raised claiming the said amounts till notice was issued by the Operational Creditor. The said fact is not disputed by the counsel for the Corporate Debtor.

21. As contended by the Counsel for the Corporate Debtor in the written submissions that the ***Apex Court, in Delta International Limited and Shyam Sundar Ganeriwalla and Ors, in AIR1999 SC2607*** observed that the intention of the parties is to be gathered from the documents itself, this Tribunal gathers the truth from the above discussed facts.

22. There is no counter argument to the submission made by the counsel for the Operational Creditor that a Petition was moved under IBC by the Corporate Debtor for the amounts which were allegedly due from the Operational Creditor and the same was returned and thereafter, the same was not resubmitted before the NCLT, New Delhi. By virtue of the said conduct, the Corporate Debtor stands waiving the claim for the amounts due from the Operational Creditor if any. Hence, when such is the case, raising the issue of the due amounts from Operational Creditor at this stage would not get any favour to the Corporate Debtor.

23. The other argument extended by the Counsel for the Corporate Debtor is that the amounts were being paid to the Operational Creditor against running account and that the claim for a particular invoice cannot be made exclusively. But the fact remains, that the subcontract in respect of which this particular invoice is raised is terminated between the parties and there is correspondence between the parties with regard to the mode in which the amount should be paid to the Operational Creditor. This invoice is for the value of the material and not for performance of the contract.

24. A letter dated 22.04.2019 was issued by the Corporate Debtor stating that surplus materials are lying with them vide Purchase Order No. D911K00031 and the same would be handed over to them by 21.05.2019. The list of the materials is also specified in the said letter. There is another letter 15.06.2019 where in it is stated that they have explained that they have undertaken a lot of projects for BHEL and other customers like BGR, HSL, etc., the plates got mixed up. With a view to return the materials they tested the materials to ensure themselves that the materials are of the same grade which they have received from BHEL. The materials did not match with the original BHEL materials. They undertook to pay the cost of the materials and estimated the cost at Rs.23 Lakhs approximately. They also requested to deduct 10% cost from the cost of the materials considering that all materials are old and are not in original plate form. They have also requested the Operational Creditor not to add overheads and interest on the cost of the materials. They also undertook to pay the amount within 45 days from the date of the confirmation given by the Operational Creditor.

25. The Counsel for the Operational Creditor drew the attention of the Tribunal to the mail dated 13.07.2019 wherein total amount of Rs.33,87,437.51/-is shown as due. Out of the same, the administrative and other overhead charges @15% as per BHEL guidelines were waived as per, the request made by the Corporate Debtor. It is also not disputed that 10% deduction was done from the cost considering that the materials are old, as requested by the Corporate Debtor. Hence in the light of the above proved facts, I opine that the dispute raised by the Corporate Debtor is only frivolous.

26. Hence I am of the considered view that it is a fit case to admit and order initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor. The Operational Creditor has suggested one name i.e., Mr.Anubolu Kuladeep (**IBBI/IPA-002/IP-N00974/2020-2021/13055**) as Insolvency Resolution Professional (IRP).

ORDER

The Company Petition is admitted. The Corporate Insolvency Resolution Process of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence.

i. Mr.Anubolu Kuladeep (IBBI/IPA-002/IP-N00974/2020-2021/13055), having office at C-406, SRI Kalki Heights, Manjeera Pipeline Road, Madinaguda ,Hyderabad,500049; e-mail: ***ip.anubolu@gmail.com***; Mobile:**9008066133** is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending against him as per the IBBI website.

ii. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.

iii. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.

iv. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effectively discharging his functions under the Code.

v. The Registry shall communicate the order to the Operational Creditor and the Corporate Debtor forthwith.

vi. The Operational Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu