

IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT NO.1, MUMBAI BENCH

C.P. (IB)No.3735/NCLT/MB/2018

Under Section 9 of the I&B Code, 2016

In the matter of:

Forever Glory Trading Limited

...Operational Creditor/ Petitioner

V/s

Global Powersource (India) Limited

...Corporate Debtor / Respondent

Order Dated: 03.06.2020

Coram:

Hon'ble Member (Judicial), Smt. Suchitra Kanuparthi

For the Petitioner: Kochhar & Co., Advocates and Legal Consultant

For the Respondent : kalpesh joshi, Advocate

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. This is an Application being C.P.(IB) No.3735/NCLT/MB/2018 filed by Forever Glory Trading Limited, the Operational Creditor/Petitioner, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Global Powersource (India) Limited, the Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

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BRIEF FACTS:

2. The Application is filed by Mr. Pulikottil Chakkunny Jose, authorised signatory of Petitioner, claiming a total default amount of USD 2,90,260/- which is amounting to Rs.2,10,87,389/- (Two Crore Ten Lakh Eighty-Seven Thousand Three Hundred Eighty-Nine Only), at the rate of 1 USD=Rs.72.65as on 27.09.2018 with interest @12%p.a.
3. The Petitioner is a company incorporated under the laws of Angilla and as part of its business supplies batteries to various clients globally. The Corporate Debtor approached the Petitioner in the month of April 2015 and visited the factory of the Petitioner and carried battery tests in order to ensure quality and performance of the batteries. The Corporate Debtor placed an order for one container of batteries pursuant to the fee quote of USD 49 FOB for the 65AH battery by the Petitioner.
4. The Corporate Debtor issued several Purchase Orders during the period September and October 2015 and agreed to payment of 90 days with respect to the initial order for 3 containers of 65AH-12V and 1 container of 100AH-12V batteries. Same was reflected in the minutes of the meeting dated 24.09.2015 and signed by the Corporate Debtor and Long Chang Battery Company Limited (Holding Company)(LCB) which is the holding company of the Petitioner Company. MOU dated 24.09.2015 executed between the Corporate Debtor and the LCB, which set out specific terms and conditions of any warranty claim and it was agreed between the parties that the warranty claims shall be raised on a monthly basis in the form

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of debit note to be raised on LCB. It was further agreed that upon receiving the debit note, LCB was to sign and issue a credit note in favour corporate debtor on a monthly basis and the claim compensation was to be set off from the outstanding amounts. Thus there were separate concluded contracts entered into between the parties, one dealing with the sale of batteries and other relating to warranty claim, if any.

5. The Petitioner submitted that the Corporate Debtor's technical representatives would carry out 100% inspection before shipment and any grievance regarding quality of shipment, the said shipment would be immediately rejected. Further even after the shipment/consignment of batteries arrived in India, the Corporate Debtor's representative would once again test the shipment has always accepted the shipment/ consignment of batteries upon its fullest satisfaction in terms of quality.
6. The Corporate Debtor again sent email dated 08.03.2016 wherein again sent purchase order for five containers of 100AH for the supply of the batteries. The Petitioner honoured all the Purchase Orders raised by the Corporate Debtor and supplied the necessary batteries in a timely manner and at the time the Petitioner raised the invoices for the same. However the Corporate Debtor has failed to make the payments towards the certain orders. The Petitioner further submitted consolidated list showing the details of the invoices for which payments made by the Corporate Debtor as well as invoices for which no payment received by the Petitioner. In spite of numerous reminders via email, the corporate debtor

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continued to default in making payments and informed the Petitioner that the delay in payments was because, the corporate debtor was unable to arrange requisite funds.

7. The Petitioner's representatives Tsun Fu Chang and Pham Thie Thuy Dieu held meeting with the Corporate Debtor on 15.06.2017 at Mumbai. At the Meeting the issues related to outstanding dues payable by the Corporate Debtor as well as Corporate Debtor's warranty claims were discussed. Pursuant to the said meeting, Payment Agreement dated 15.06.2017 was executed between the Corporate Debtor's Mr. Nirav Joshi and Mr. Chang (Petitioner's representative). As per the said payment Agreement, the Corporate Debtor agreed to clear all the pending dues as latest by September, 2017. It was also agreed that the certain invoices would be settled against the Corporate Debtor's warranty claim which was same agreed as per the terms of the MOU dated 24.09.2015.
8. The Petitioner sent repeated reminders to the Corporate Debtor, however the Corporate Debtor continued to avoid making payment as agreed under the Payment Agreement. Thereafter, the Corporate Debtor made one payment of USD 45,360/- as against the Invoice No. R18-16002.
9. The Corporate Debtor further defaulted on the payment terms of the said Payment Agreement raising issues relating to the warranty claims, basically to avoid the payment. The Petitioner submitted that they entered into Secondary Payment Agreement with the Corporate Debtor on 11.10.2017. As per the said Secondary

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Payment agreement the Corporate Debtor agreed to clear all the dues under the invoices as enlisted in the same agreement. It was further agreed that certain invoices were adjusted as against the Corporate Debtor's warranty claim. The corporate debtor vide email dated 4.11.17 admitted its liability and stated they were arranging funds to make payment. The corporate debtor again vide email dated 21.11.2017 stated that they were in discussion with their finance team and would require a week's time to arrive at an amicable solution.

10. The Petitioner submitted that even after repeatedly follow in respect to the outstanding dues, the Corporate Debtor failed to make the payment to the Petitioner. Therefore, the Petitioner issued legal Notice dated 16.11.2017, calling upon the Corporate Debtor to make the payment of outstanding dues within ten days of receipt of the same. The Petitioner further submitted that despite receipt of the legal Notice and repeated follow-up through emails, the Corporate Debtor chose not to make payments as well as not file any reply or denial to the said legal Notice.
11. Thereafter, the Corporate Debtor made a payment of USD 39,950.40 towards Invoice No. R65-16013 on 23.11.2017 as per said Secondary Payment Agreement.
12. The Petitioner vide email informed the corporate debtor that if the outstanding payments were not made within two weeks, they would consider taking legal action. Several reminder emails were sent between 09.12.2017 to 21.08.2018 by

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the Petitioner seeking payment of outstanding amounts. However the Corporate Debtor chose to ignore the reminders.

13. Therefore, the Petitioner issued Demand Notice dated 28.08.2018 to the Corporate Debtor under Section 8 of the I&B Code demanding payment of outstanding amount of USD 2,90,260/- amounting to Rs.2,03,29,810.40 at the rate of 1 USD = Rs.70.04 as on 27.08.2018 with interest @12% p.a. and it was received and acknowledged by the Corporate Debtor. The Corporate Debtor sent an email dated 05.09.2018 as well as letter dated 18.09.2018 in receipt of the said Demand Notice.
14. The Corporate Debtor filed reply on 21.11.2018 to the Present Application and submitted that the batteries as purchased was covered under warranty period of 2 (two) years. Further submitted that as agreed in mutual agreement, warranty claims shall be raised on monthly basis in the form of debit notes by the company and in return petitioner will raise a credit note acknowledged the same. However, from March 2017 onwards the Petitioner has not acknowledged the warranty claims.
15. The Corporate debtor submitted that the Petitioner has purposely shown warranty claims as separate concluded contract and fail to establish as to why no credit notes have been issued against the warranty claims from March 2017. The Corporate debtor submitted that the last sale of batteries was made in March 2017

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and warranty claims would continue till March 2019. The Corporate Debtor also submitted the table showing details of purchase and warranty claims.

16. The Corporate Debtor further submitted that as regards claim of the Petitioner for the balance dues are concerned, the Corporate Debtor has made payments in past and is ready to clear the legitimate balance amount subject to adjustment of warranty claims till March 2019.
17. The Corporate Debtor also submitted that with respect to warranty claims has been raised since its inception and that Petitioner have always duly acknowledged the same by raising several credit notes. The Corporate Debtor replied to the demand notice by email and requested to meet the Petitioner with regard to setting off warranty claims. In addition to the email, the Corporate Debtor also sent a letter dated 18.09.2018 stating their concern with respect to warranty claims.
18. The Petitioner filed an Additional Affidavit on dated 20.02.2019 pursuant to the have granted to the Petitioner vide daily order passed by this tribunal dated 08.02.2019 permitting the Petitioner to file and bring on record all the invoices as listed in secondary Payment Agreement dated 11.10.2017.,
19. The Petitioner submitted that in spite of numerous reminders via emails, the Corporate Debtor defaulted in making payments. Further submitted that the Corporate Debtor had accepted the liability and agreed to pay the same vide email and also in the reply filed by the Corporate Debtor.

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20. The Corporate Debtor filed the Additional Affidavit stating that there is an existence of dispute with respect to breach of warranty claims of the Corporate Debtor. Further the Corporate Debtor submitted the email correspondence dated 12.03.2018 and forwarded on 08.05.2018 stating that there is dispute related to the battery failure and submitted the record for the same.
21. The Petitioner filed written submissions and stated that the supply of the batteries and its acceptance by the Corporate Debtor is not disputed by the Corporate Debtor, even the list of invoices which are due and payable are not disputed by the Corporate Debtor.

FINDING:

22. In the light of the brief facts, it can be said that there were two separate contracts 1) obligation for payment of batteries supplied 2) payment of warranty claims by LCB(holding Company of Petitioner). Further execution of MOU dated 24.09.2015, the Purchase Agreement dated 15.06.2017, Secondary Payment Agreement dated 11.10.2017, the emails of Corporate Debtor admitting the claim dated 4.11.2017, 21.11.2017 and conduct of Corporate Debtor making part payment of USD 39,950.40 towards Invoice no.R65-16013 on 23.11.2017, clearly demonstrate the contractual liability of Corporate Debtor towards the Petitioner being an unpaid seller for the batteries. The claim of warranty is collateral to the main contract of supply of batteries and is a separate contract between the Corporate Debtor and

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LCB. The contract of warranty under sec.13(3) of Sale of Goods Act 1930 postulates as follows:

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

Therefore, Sale of Goods Act, defines the term warranty as a stipulation collateral to the main contract and in the instant case, the warranty claim of the Corporate Debtor is well protected under MOU dated 24.09.2015. The communication regarding warranty claims cannot be set up as a dispute of notice as raised by the Corporate Debtor, the claims of warranty shall separately be considered by LCB. It is pertinent to note that the Corporate Debtor submitted the dispute regarding record of Batteries failure on 12.03.2018 which was after the legal notice. Therefore it can be concluded that the Corporate Debtor has defaulted the terms of payment under the Purchase Agreement dated 15.06.2017 and there is no dispute raised by the Corporate Debtor in terms of Sec.9 of I & B Act and that the Corporate Debtor has admitted its liability of payment of outstanding dues vide emails and in the reply. The objection that the Petitioner is a foreign entity and cannot file the present petition is not tenable in view of Sec 3(23(g) and 25)of I & B code, wherein, the definition of person includes person resident outside India.

23. On perusal of the documents submitted by both sides and hearing them it is clear that Petitioner has supplied batteries to the Corporate Debtor and raised the invoices for the same. The Corporate Debtor further made payment against the

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invoice No.R18-16002 and Invoice No.R65-16013 and failed to make the payment of remaining Invoices total amounting to USD 2,90,260/- which is amounting to Rs.2,10,87,389/- (Two Crore Ten Lakh Eighty-Seven Thousand Three Hundred Eighty-Nine Only), at the rate of 1 USD=Rs.72.65as on 27.09.2018 with interest @12%p.a. therefore, operational debt of more than Rupees One Lakh is due and payable by the Corporate Debtor. Then the Petitioner filed the present Application on 27.09.2018.

24. The Application is complete and has been filed under proper form. Copy of the Demand Notice dated 28.08.2018 along with postal track report reflecting due receipt of Notice by Corporate Debtor and Affidavit in compliance of section 9(3)(b) dated 27.09.2018 stating that the Petitioner has not received any notice of dispute from the Corporate Debtor have been filed with this Bench.
25. The Petitioner has not proposed the name of the Interim Resolution Professional, to carry out the functions as mentioned under I&B Code.
26. The Application under sub-section (2) of Section 9 of I&B Code, 2016 is complete. The existing operational debt of more than one lakh rupees against the corporate debtor and its default is also proved. Accordingly, the Application filed under section 9 of the Insolvency and Bankruptcy Code for initiation of corporate insolvency resolution process against the corporate debtor deserves to be admitted.

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ORDER

This Application filed under Section 9 of I&B Code, 2016, presented by Forever Glory Trading Limited, Operational Creditor / Petitioner against Global Powersource (India) Limited, Corporate Debtor for initiating corporate insolvency resolution process is admitted. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

I. That this Bench as a result of this prohibits:

- 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 property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

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- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. That this Bench appoints Mr. Anand Gopikishan Mundada, a registered insolvency resolution professional having Registration Number IBBI/IPA-001/IP-P01057/2017-2018/11750, Email Id- agmundada@rediffmail.com as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

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27. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. Compliance report of the order by Designated Registrar is to be submitted today.

Sd/-

Suchitra Kanuparthi

Member (Judicial)

03.06.2020

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CORAM: SMT. SUCHITRA KANUPARTHI, Member (Judicial)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL
COMPANY LAW TRIBUNAL ON **03.06.2020**

NAME OF THE PARTIES: Forever Glory Trading Limited

Vs.

Global Powersource (India) Limited

UNDER SECTION 9 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016.

ORDER

1. Petition admitted, vide separate orders.

SD/-

SUCHITRA KANUPARTHI
Member (Judicial)

03.06.2020

/n/