IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH
KOLKATA

C.P (IB) No.64/KB/2019

In the matter of

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

And

In the matter of:

M/s Tata Hitachi Construction Machinery Company Private Limited , having its Registered office at "Jubilee Building", 45, Museum Road, Bangalore, 560025, Karnataka, India .

... Operational Creditor

Versus

In the matter of:

M/s Seven Hills Project Private Limited , having its registered office at 197, Prince Anwar Shah Road, Kolkata, 700033, West Bengal.

...Corporate Debtor

Date of hearing :07/04/2022

Order Pronounced on : 24/05/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)
Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

1. Mr. Vijay Nath Jha, Adv.] For Operational Creditor

O R D E R

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.

2. This petition under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,2016 has been filed by **M/s Tata Hitachi Construction Machinery Company Private Limited,** through its Regional Director-East namely Mr. Sanjay Kumar Prasad, vide Authorisation Letter dated 26/12/2018 (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect of **M/s Seven Hills Project Private Limited,** having its registered office at 197, Prince Anwar Shah Road, Kolkata, 700033, West Bengal, (hereinafter referred as the Corporate Debtor).

3. It is submitted that the Corporate Debtor placed Purchase Order dated 09/09/2016 for supplying various machinery parts/items at the prices mentioned therein on the Operational Creditor as per the agreed terms and conditions.

4. It is submitted that the Operational Creditor, as per the Purchase Order, supplied the said materials at the desired delivery address and raised two invoices being invoice No. 38678950 dated 15/09/2016 for Rs.2,77,028.22 and Invoice No.38679036 dated 16/09/2016 for Rs.15,33,135.41, total being Rs.18,10,163/- as per the agreed terms.

5. It is submitted that the said goods and the tax invoices were duly accepted by the Corporate Debtor without raising any objection whatsoever. The last of such supplies was made on 16/09/2016.

6. It is further submitted that the said goods, as per the Purchase Order, were supplied to the Corporate Debtor at their Dhansar Colliery Site at Dhanbad. The said goods were duly received by the Corporate Debtor.

7. It is submitted that the Corporate Debtor did not pay any amount, not even a single paisa against the said supplied goods as per the said two invoices. The total invoice amount of Rs.18,10,163/- still remains due and payable by the Corporate Debtor as on 16/09/2016.

8. It is submitted that the Corporate Debtor had also got issued from the Commercial Taxes Department, Government of Jharkhand, one permit no. 200310916007565 dated 20/09/2016 in form Sugam (G) towards receipt of the said goods. The said form clearly mentions all the details like details of the dealer in whose name the permit is issued, details of the Consignor, place of dispatch and Destination, Transporter details with Truck/Lorry registration number details, consignment details, and invoice details. The invoice details mentioned the said Permit Form Sugam (G) clearly reflects the invoice value of the supplied goods as Rs.18,10,163/-

9. It is submitted that the Corporate Debtor duly consumed the goods, never raised any objection to the quality or quantity of the goods but did not pay the amount. Hence, the outstanding amount of Rs.18,10,163/- is undisputed and a confirmed outstanding. The Corporate Debtor had also issued one cheque bearing no.001722 dated 25.10.2016 for Rs. 18,10,415/- drawn on Kotak Mahindra Bank in favour of the Operational Creditor. However, the Operational Creditor on the request of the Corporate Debtor did not deposit the cheque in their bank for clearance. The Corporate Debtor kept on asking for time and in the process the cheque lost its validity period for deposit. Nevertheless, it is an established law that issuance of cheque is a clear admittance of liability. Hence, the claimed amount is further admitted

and a confirmed and undisputed liability. Hence, there is no dispute with regard to the claimed amount from the Corporate Debtor.

10. It is submitted that the Operational Creditor repeatedly called upon the Corporate Debtor to make payment of the outstanding dues. The Corporate Debtor from time to time assured for payment but failed and neglected to pay the admitted outstanding amount of Rs. 18,10,163/-

11. It is submitted that the Operational Creditor through its advocate finally sent the statutory demand notice dated 30/05/2019 in Form-3 under Section 8 of the IBC, 2016 by Speed Post with A/D on 31/05/2018 which was returned with postal endorsement "Left". The Operational Creditor again forwarded the said same Demand Notice on 28/08/2018 by speed post with A/D at all other known offices and also to all the Directors of the Corporate Debtor which were also returned unserved. The Operational Creditor however, once again attempted delivery of the said same Demand Notice in person at its registered office which was duly serviced and acknowledged with seal and signature by the Corporate Debtor on 07/09/2018. It is submitted that more than 10 days have elapsed but the Corporate Debtor has neither paid the claimed amount nor has replied to the said demand notice, thereby clear admittance of the claim amount of Rs.18,10,163/-

12. It is submitted that the Operational Creditor is entitled to claim interest on the said outstanding amount @ 9% p.a. from 16.10.2016 till payment. The Operational Creditor is entitled to such interest by reason of commercial nature of transaction between the parties and considering inter alia the rates of interest charged by the nationalized banks in respect of such transactions. The Operational Creditor is entitled to a further interest till the payment is made of the outstanding amount. Copies of computation sheet of outstanding amount, Purchase Order, relevant Tax Invoices, Copy of Permit of Commercial Tax Department of Government of Jharkhand, Ledger/ Statement of Account

are annexed to this petition.

13. It is submitted that Rs.18,10,163/- is the debt due as on 16/09/2016 on account of Principal amount and Rs.3,52,981/- as on account of interest @ 18% p.a. calculated from 16.10.2016 till 15/12/2018, thus being total Rs.21,63,144/-

14. The Operational Creditor has placed on record, copies of various documents in support of its claim, which are as under:-

i. A Calculation Sheet containing the details of the amount due and payable,
ii. Purchase Order, Relevant Tax Invoice Copies (02 nos.)
iii. Statutory Demand Notice dated 30.05.2018 in Form-3 along with postal receipt and returned envelope with postal remarks “Left” and service copy in person with seal and signature with date of Corporate Debtor.

15. It is submitted that the Operational Creditor had raised two invoices as per the agreed terms. The date of last invoice dated 16/09/2016, the total value of the two invoices was Rs.18,10,163/-The Corporate Debtor did not make any payment against the said two invoices and the total invoice value is outstanding till date, due and payable by the company to the Operational Creditor.

16. It is submitted that there has been lots of follow up for payment over phone and personal visits by the Operational Creditor. The Operational creditor. The Operational Creditor served upon the Corporate Debtor follow up letters/ demand letters dated 07/07/2017, 18/08/2017, 29/09/2017, 17/10/2017, 15/11/2017, and 15/12/2017 all duly received by the Corporate Debtor with seal and signature with date. The Corporate Debtor has always assured for payment and never disputed but eventually not paid.

17. It is submitted by the Operational Creditor that the Corporate Debtor after receipt of the said Demand Notice has neither paid the demanded outstanding amount nor has replied to the said statutory demand notice dated 30/05/2018, thereby has once again confirmed the outstanding amount.

18. It is further submitted by the Operational Creditor that more than 10 days elapsed from the date of receipt of the said statutory notice of demand by the Corporate Debtor, but, the Corporate Debtor failed to make any payment of its outstanding dues/debt to the Operational Creditor, thereby admitted and confirmed the demanded outstanding due amount. There is also no suit or Arbitration filed by the either party or pending in any court.

19. **In reply** to the petition, the Ld. Counsel for the Corporate Debtor through its Director namely Pankaj Singh, submitted that the Corporate Debtor issued various purchase orders pursuant to the first purchase order. The Corporate Debtor duly made payments throughout. The Corporate Debtor had been maintaining a running account with the Operational Creditor and had been making payments. Copy of the said running accounts is annexed as Annexure R-2.

20. It is submitted that unfortunately, it was discovered that the spare parts and other consumables received from the Operational Creditor pertaining to the aforementioned Invoices were severely defective, damaged and unusable. As a result, most of the supplies accepted from the Operational Creditor could not be used.

21. It is submitted that as a part of the Sub Contract Agreement between the Corporate Debtor and M/s Oriental Structural Engineers Pvt.Ltd. , the Corporate Debtor raised bills to the tune of Rs.97,95,32,526/-.Bills raised by the Corporate Debtor against M/s Oriental Structural Engineers Pvt.Ltd. is tabulated, annexed as Annexure R-3 (Colly.).

22. It submitted that the Sub-contract agreement between the Corporate

Debtor and Oriental Structural Engineers Pvt.Ltd. was abruptly terminated, unilaterally by the latter. It is submitted that political turmoil was cited as one of the major reasons for such termination. As a result of such termination, Tata excavators in the possession of the Corporate Debtor were taken back by M/s Oriental Structural Engineers Pvt.Ltd. It is submitted that the dues accrued in the course of business between the Corporate Debtor and M/s Oriental Structural Engineers Pvt.Ltd. have till date remained unpaid. The liability of Oriental Structural Engineers Pvt.Ltd. to make over the consideration money to the Corporate Debtor for the Sub contract work order is existing and unpaid. The Corporate Debtor, as a result, was constrained to send a demand notice to M/s Oriental Structural Engineers Pvt.Ltd. seeking payment for the works done pursuant to the Sub Contract Work Order.

23. It is submitted that the purpose for which the spare parts and other materials were purchased from the Operational Creditor since,2014 was due to the subsisting contract between the Corporate Debtor and M/s Oriental Structural Engineers Pvt.Ltd. Such contract of purchase of spare parts and other materials had to be entered into between the Corporate Debtor and the Operational Creditor because the machines purchased by M/s Oriental Structural Engineers Pvt.Ltd. were manufactured by the Operational Creditor. Thus, such spare parts and other materials were purchased in order to complement the already existing contract between the Corporate Debtor and M/s Oriental Structural Engineers Pvt.Ltd., constituting an integral part of the same transaction.

24. It is submitted by the Ld. Counsel for the Corporate Debtor that any liability and/or dues that may have arisen in the course of the aforementioned transaction would thus be the sole liability of M/s Oriental Structural Engineers Pvt.Ltd.

25. It is submitted that with regard to the statement made in paragraph 9 of Part IV of the application under Form-1, the Corporate Debtor denied and disputed that any demand made by the Operational Creditor is a correct

demand. The outstanding as being alleged is not a debt rather a disputed claim which further consorts to the performance of a third party company who are still the owners of the said 13 excavators and the entire purchase order from where this alleged debt is a subject matter of, was for maintenance under the said contract. The maintenance could not be completed as because the supplies made by the Operational Creditor was substandard and also in the maintenance contract sole beneficiary being M/s Oriental Structural Engineers Pvt.Ltd. did not make any payment of the corporate debtor's bills/ or invoices under the said contract.

26. It is submitted that with regard to the statement made in paragraph 11 of Part IV of the application, It is denied and disputed that amount is outstanding against the operational creditor herein. The computation sheet is a document of the operational creditor's creation and the figures appearing therein have not been reflected through documentary evidence.

27. It is submitted that with regard to the statement made in paragraph 12of Part IV of the application, it is denied and disputed that issuance of cheque is a clear admittance un law. The corporate debtor had given a post dated cheque as was required under the business relation between the parties under the purchase order, and also it is a fact that the corporate debtor had duly informed the operational creditor that only when payment from the original beneficiary is received by the corporate debtor that such cheque could be encashed subject to the essence of the purchase order remaining complied that supply for the maintenance contract would be of good quality so that the corporate debtor can fulfill their obligation under the maintenance contract for which the materials were being procured from Tata Hitachi.

28. It is submitted that with regard to the statement made in paragraph 13 of Part IV of the application, it is denied and disputed that any assurances/ represented at the time of giving orders to the Operational Creditor that the Corporate Debtor would make payment against the supplied goods even if the said goods were inferior in quality and also that payment would be released

even when beneficiary had not paid the Corporate Debtor for the maintenance contract.

29. It is submitted that the Corporate Debtor could not reply to the demand notice because the registered office is situated in Kolkata while the corporate or operating office has entirely shifted to Nagpur. In such regards, the corporate debtor did not get a chance to give a reply within the statutory 10 days period, and soon thereafter this application had already been served upon the corporate debtor. In such regards, the corporate debtor herein denies and disputes all allegations and/or averments and/or accusations as has been made by the Operational Creditor herein and therein the demand notice under section 8 of the Insolvency and Bankruptcy Code, 2016. Further, it is denied and disputed that any outstanding debt is payable to the Operational Creditor. The claim under the Purchase Order has not arisen because the dues from the maintenance contract for whose performance the said purchase order was issued has not concluded, because the dues of the corporate debtor are still pending payments from M/s Oriental Structural Engineers Pvt.Ltd.

30. It is denied and disputed that the corporate debtor is not in a position to clear its debt or it has become insolvent. It is also denied that the corporate debtor does not have any defence to the alleged claim of the operational creditor. The corporate debtor submits that the operational creditor does not have any outstanding debts against the corporate debtor but numerous disputes exists between the two parties which emanate from the non-performance of the original beneficiary and owner of the excavators for which the materials under the Purchase Order was being procured as under the umbrella of the maintenance contract with M/s Oriental Structural Engineers Pvt.Ltd.

31. It is submitted that on 16/09/2019 a sum of Rs.19,10,163/- has become due or payable to the operational creditor. The said sum is in dispute and its payment is subject to the corporate debtor receiving payment from

M/s Oriental Structural Engineers Pvt. Ltd., who is the sole beneficiary of the said contract which was for maintenance of excavators bought from Tata Hitachi, the operational creditor herein.

32. In the **rejoinder** the Operational Creditor has denied each and every allegation of the Corporate Debtor averred in the reply to the main petition and save and except what are matters of record and specifically admitted by the Operational Creditor.

33. It is submitted by the Ld.Counsel for the Operational creditor that debt in default is outcome of direct transaction with the Corporate Debtor on account of supply of construction machineries and their spare parts against Purchase Order dated 09.09.2016 issued by the Corporate Debtor. It is submitted that the materials were supplied against permit in form Sugam-G of the department of commercial taxes of the Government of Jharkhand issued in the name of the Corporate Debtor.

34. It is submitted by the Ld. Counsel for the Operational creditor that it is not involved in any way with the principal Contractor of the Corporate Debtor M/s Oriental Structural Engineers Pvt. Ltd. nor is a party to the agreement between the Corporate Debtor and its Principal M/s Oriental Structural Engineers Pvt. Ltd. All the transactions have been directly between the Corporate Debtor and the Operational Creditor.

35. It is submitted by the Operational Creditor that the Corporate Debtor has fruitlessly tried to create a concocted story of sub-standard quality of goods in their Reply. It is stated that the goods were in fact fully consumed and now in order to confuse the case, the Corporate Debtor is creating after though and vague dispute without furnishing a single piece of contemporaneous document. Any dispute raised after service of Demand Notice without backup of any contemporaneous document is not tenable under IBC, 2016.

36. **During the course of argument, Ld. Counsel for the Operational Creditor** submitted that The Registered Office of the Corporate Debtor is registered at ROC Kolkata, hence the instant CP is within the jurisdiction of this Bench. (Master Data - Annexure B: Page 69-69.

37. It is further submitted that the Operational Creditor deals in manufacture, sales and distribution of heavy construction equipments, machineries and maintenance services thereof. The Corporate Debtor deals in the business of constructions, mining, land projects and infrastructure development and as such for their business requirement, the Corporate Debtor had placed a purchase order dated 09.09.2016 upon the Operational Creditor for supply of heavy construction and mining machineries. The Operational Creditor accordingly supplied the required machineries and had raised 2 Invoices amounting to Rs.18,10,163/- as per the agreed terms and the said invoices reflected in Form Sugam (G). The date of last supply was made on 16.09.2016, hence the claim of the Operational Creditor is within the Limitation and is not Time barred.

38. It is submitted that the Corporate Debtor has clearly admitted the issuance of purchase order, the outstanding 02 tax invoices and the outstanding amount by annexing its own statement of account reflecting the claimed outstanding amount in its Affidavit in Reply.

39. It is further submitted that the Corporate Debtor against such supplies also issued a cheque bearing no. 001722 dated 25.10.2016 for Rs.18,10,163/- drawn on Kotak Mahindra Bank in favour of the Operational Creditor, which however eventually lost its validity period due to the Corporate Debtor's requests not to deposit the said cheque and wanting more time to pay the outstanding amount. Nevertheless it is an established law that issuance of cheque is a clear admittance of liability. Hence the claimed amount is admitted and undisputed liability.

40. It is submitted that thereafter the Operational Creditor continuously followed up for payment in person, over phone and a series of demand letters,

which were all duly received by the Corporate Debtor against which the Corporate Debtor had always assured for payment and never disputed but eventually failed to pay the outstanding amount.

41. It is submitted that the Operational Creditor had finally sent the statutory demand notice in Form-3 under IBC, 2016 dated 30.05.2018, to the Corporate Debtor at its Registered Office Address by Speed Post with A/D on 31.05.2018 demanding payment of the outstanding amount of Rs.18,10,163/- (Rupees Eighteen Lakhs Ten Thousand One Hundred Sixty Three) only within 10 Days. However, the envelope returned back with postal endorsement "Left". It was again forwarded to the company and all directors on 28.08.2018 but again returned back with postal endorsement Door closed / Left. Though the postal endorsement door closed /Left is deemed good service, the Operational Creditor once again attempted delivery of the said same demand notice in person at the registered office of the Corporate Debtor, which was duly served and acknowledged by seal and signature dated 07.09.2018, hence the demand notice was duly served. The Corporate Debtor after receipt of the said Statutory Demand Notice in Form-3 neither replied back nor made the payment of the confirmed outstanding due. The Corporate Debtor has also not raised any objections or disputes with regard to service of the Statutory Demand Notice its Affidavit in Reply. Thus the claimed outstanding amount is confirmed and undisputed.

42. It is submitted that in reference to the Affidavit in Reply filed by the Corporate Debtor and the Rejoinder by Affidavit filed by the Operational Creditor, it is clearly mentioned that the Operational Creditor has neither been involved in any way with the principal Contractor of the Corporate Debtor M/s Oriental Structural Engineers Pvt. Ltd. nor is a party to the agreement between the Corporate Debtor and its Principal M/s Oriental Structural Engineers Pvt. Ltd. All the transactions have been directly between the Corporate Debtor M/s Seven Hills Project Pvt. Ltd. and the Operational Creditor. **(Para 5 : Page 4 of the Operational Creditor's Rejoinder by Affidavit).**

43. It is submitted that there is also no suit or Arbitration filed by either party or pending in any court. Thus, the Corporate Debtor has failed to make payment of the confirmed and undisputed outstanding dues/debt of Rs. 18,10,163/- (Rupees Eighteen Lakhs Ten Thousand One Hundred Sixty Three) only to the Operational Creditor and as evident from the facts and circumstances, the Corporate Debtor is not in a position to clear its legal debt and has become commercially insolvent and therefore, the continued existence of the Corporate Debtor is a threat to the commercial world and be admitted for CIRP and subsequently for liquidation if CIRP fails.

44. After going through all the pleadings and other records submitted by the parties and after hearing both Ld. Counsel at length, we are convinced that the Operational Creditor has a valid claim against the Corporate Debtor, which the Corporate Debtor has failed to discharge, by committing default which is proved on record. The Corporate Debtor has failed to prove any pre-existing dispute or any payment having been made to the Operational Creditor, within 10 days of receipt of the Statutory Notice under Section 8 of the Code. The Corporate Debtor has however, tried to make out a false case of pre-existing dispute which cannot be entertained. In these circumstances, we pass the following orders:-

R D E R S

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix) The Operational Creditor has not proposed name of any Insolvency Resolution Professional. Therefore, as per the provisions of Section 16(3) (a) of the IBC, so, we appoint **Mr. Subodh Kumar Agrawal, IRP** having Reg. No. **IBBI/IPA-001/IP-P00087/2017-18/10183**, email subodhk@gmail.com act as Interim Resolution Professional (IRP). She shall file Form-2, and that no disciplinary proceedings are pending against him with the Board.

x) **Mr. Subodh Kumar Agrawal IRP,** is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xii) The Operational Creditor/Applicant is directed to deposit **Rs1,00,000/- (Rupees One lac only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

45. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

46. List the matter on **11/07/2022** for filing of **Progress Report**.

47. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

HARISH CHANDER SURI Digitally signed by HARISH CHANDER SURI Date: 2022.05.24 16:19:49 +05'30'

ROHIT KAPOOR Digitally signed by ROHIT KAPOOR Date: 2022.05.24 15:37:43 +05'30'

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on the 24th day of May, 2022

PJ