

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB)4270/MB/C-IV/2018

Under section 9 of the Insolvency
& Bankruptcy Code, 2016

In the matter of

CT-Technologies ApS

[CVR No: 13688532]

...Operational Creditor

Versus

B. Y. Agro & Infra Limited

[CIN: U01403MH2008PLC188072]

Corporate Debtor

Order pronounced on :26.05.2020

Coram:

Mr. Rajasekhar V.K. : Hon'ble Member (Judicial)
Mr. Ravikumar Duraisamy : Hon'ble Member (Technical)

Appearances:

For the Operational Creditor : Mr. Himanshu Vidhania/w Ms. Sradha Kedai/b Khaitan and Co., Advocates
For the Corporate Debtor : Mr. Sumeet P Bodalkar, Advocate.

ORDER

Per: Rajasekhar V.K., Member (Judicial)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by CT-Technologies ApS (Operational Creditor), a Company incorporated under the laws of Denmark represented by its Director, Mr. Carsten Thorsen, duly authorised by the Board Resolution dated 24.04.2018 is placed as "Annexure III-

C”to the petition at p.70,seeking to initiate Corporate Insolvency Resolution Process (CIRP) against B. Y. Agro & Infra Private Limited(*Corporate Debtor*).

2. The Corporate Debtor is an unlisted public company limited by shares and incorporated on 10.11.2008 under the Companies Act, 1956, with the Registrar of Companies (RoC),Maharashtra, Mumbai.Its Corporate Identity Number (CIN) is U01403MH2008PLC188072. It has its registered office currently at Khasra No. 275, Village Sindhivihiri, Tehsil Karanja (G),Sindhivihiri, Wardha 442203, within the State of Maharashtra.Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 06.11.2018 before this Adjudicating Authorityon the ground that the Corporate Debtor failed to make payment of a sum of ₹1,96,70,419.64 (Rupees one crore ninety-six lakh seventy thousand four hundred and nineteen and paise sixty-fouronly) equivalent to €245,451.00 as principal and ₹79,99,303.56 (Rupees seventy-nine lakh ninety-nine thousand three hundred three and paise fifty-six only)equivalent to €99,816.74 as interestas on 04.01.2016, which is stated to bethe date of default.
4. The case of the Operational Creditor is as follows: -
 - (a) The Operational Creditor entered into a Contract being Contract No.20-02-31 dated 25.03.2012 for designing, delivery and installation of PUF sandwich panels, installation accessories, PRV and doors for fruit and Vegetable Processing Unit with the Corporate Debtor as per specifications specified in the Quotation

No.173.02.12.b dated 16.03.2012.The contract is placed as “Annexure III-E (Colly)” at pp.72-78.The total Contract value was €246,940.00 (for the materials) and €28,470.00 (for installation) (at para 2 pp.8-9 of the Petition).

(b) As per the terms of the Contract, the schedule for delivery of the material was agreed to take place 3-4 weeks after the Corporate Debtor’s approval of the Operational Creditor’s design and receipt of down payment(at para 3 p.9 of the Petition)

(c) The payment under the Contract for the material supplied was to be made in the following tranches as per Clause 4.1 of the Contract:

- (1) 20% - against order;
- (2) 50% - against shipping documents;
- (3) 10% - 60 days after material have arrived on site; and
- (4) 20% - 90 days after finishing installation.

(at para 4 p. 9 of the Petition)

(d) Likewise, the payment for installation of the Material supplied by the Operational Creditor was to be made by the Corporate Debtor as per following schedule as per clause 4.1 of the Contract:

- (1) 30% - Advance payment 2 weeks before planned commencement on site;
- (2) 60% - on fortnightly progress statement;
- (3) 10% - on signing of taking over certificate

(at para 5 pp.9-10 of the Petition)

- (e) The Operational Creditor in compliance with the terms of the Contract and in good faith, delivered and installed the material as per the terms of Contract. The Taking Over Certificate dated 02.03.2013 is duly signed by the Corporate Debtor (at para 6 & 8 pp.10-11 of the Petition).
- (f) The total amount due from the Corporate Debtor to the Operational Creditor was €274,411.00, being €246,941.00 for delivery of material in July 2012, August 2012, September 2012 and October 2012; and €28,470.00 for additional services provided by the Operational Creditor as per the Contract(para 9 p. 11 of the Petition).
- (g) However, in spite of various email and letters from the Operational Creditor for payment of the outstanding amount, the Corporate Debtor has failed to pay the same.
- (h) Pursuant to the above-mentioned transaction, the Operational Creditor had raised Invoice No.84185000 dated 28.05.2012 for €194,103.86. Invoice copy is placed as “Annexure III-G (Colly)” at p.81 of the Petition.
- (i) The Operational Creditor issued a Demand Notice in Form 3 dated 26.02.2018 calling upon the Corporate Debtor to make payment of a total sum of ₹1,92,28,631.00 (€245,451.00) due on 04.01.2016 as stated in the Demand Notice issued u/s 8 of the IBC, which is placed as “Annexure I” at p.30 of the Petition.

- (j) The Corporate Debtor has replied to the Demand Notice vide letter dated 13.03.2018 denying all the allegations in the Demand Notice.
5. Mr.Sumeet P. Bodalkar, Learned Counsel appeared on behalf of the Corporate Debtor and made his submissions.
6. The Corporate Debtor had given an opportunity of filing the reply to this Petition but failed to do so. Therefore, the opportunity to file the reply by the Corporate Debtor was closed *vide* order dated 15.07.2019.However, the Corporate Debtor chose to file a compilation of judgments relied upon by it, which are considered in the subsequent paragraphs. The Ld. Counsel also drew our attention to clause 8.1 of the Contract dated 25.03.2012 regarding jurisdiction to entertain any dispute arising out of the Contract. The Ld. Counsel for the Corporate Debtor submitted that in terms of clause 8.3 thereof, the law which is to apply to the contract in Swiss Law, and the contract has to be construed in accordance with Swiss Law. Further, in terms of clause 8.2, the dispute should be referred for settlement in the court of Arbitration in Switzerland.
7. The Operational Creditor has filed itsWritten Submissions dated 30.08.2019, the contentions raised by the Operational Creditor are as follows:
- (a) As far as the factual background of the case is concerned the submissions made by the Operational Creditor broadly mirror the contents of the Petition.
- (b) The Operational Creditor submits that as far the question of default on part of the Corporate Debtor is concerned, the

Operational Creditor has supplied and installed the materials as per the terms of the Contract and the same has been duly acknowledged by the Corporate Debtor in the provisional installation certificates issued from time to time. The Operational Creditor further states that the provisional installation certificates specifically provided that, *“by giving a signature, hereby we confirm that above have been completely installed and accepted for payment.”* The Provisional Installation Certificates are placed as “Annexure III-H(Colly)” at pp.97-112 of the Petition.

- (c) The Operational Creditor submits that the payment became due and payable upon the signing of the Taking Over Certificate on 02.03.2013 at the foot of the aforesaid Taking Over Certificate specifically provided that, *“We hereby confirm that the job has been performed as per above mentioned contract and has been taken over as of today.”* The said certificate bears the signature of the Corporate Debtor, further cementing the fact that the Operational Creditor had fulfilled all its obligations under the Contract, without there being any sort of complaints or grievance on part of the Corporate Debtor.
- (d) The Operational Creditor submits that the Corporate Debtor *vide* its letter dated 15.06.2013 acknowledged and admitted its debt towards the Operational Creditor to the tune of €246,940.70 and also stated that the amount could not be paid inspite of their best efforts and promised to release at least €10,000.00 every month starting from September 2013 towards payment of their

outstanding dues. The acknowledgment letter is placed as “Annexure III-J” at p.114.

- (e) The Operational Creditor submits that inspite of various request and reminders made by it to the Corporate Debtor for payment through various emails dated 09.10.2015, 11.02.2017 and 29.10.2017 the Corporate Debtor has failed to make the payments.
- (f) The Operational Creditor further submits that as on 06.11.2017, the Corporate Debtor has paid a total amount of €29,960.00 *videthree* parts payments of €5,000.00, €5,000.00, and €19,960.00 on 09.06.2015, 28.07.2015 and 04.01.2016 respectively, (at p. 4 of the Written Submission).
- (g) Thus, the Corporate Debtor had only made a part payment of €29,960.00 till date and the same has been accepted by the Corporate Debtor in its reply dated 02.01.2018 to the Legal Notice of the Operational Creditor.

- 8. Bank statements are also attached as Annexure ‘V’ at pp. 146-167.
- 9. The Operational Creditor has filed an affidavit under section 9(3)(b) of the IBC to the effect that there is no notice given by the Corporate Debtor relating to a dispute of the unpaid operational debt. Further the Operational Creditor stated that there is no dispute with respect to operational debt. (at p. 174 of the petition).

Findings

- 10. We have heard the arguments of the Learned Counsel for the Operational Creditor and perused the records. We have also

considered the citations submitted by the Learned Counsel for the Corporate Debtor, in spite of the fact that no reply has been filed by the Corporate Debtor.

11. The contract was submitted by the Operational Creditor dated 16.03.2012. The Taking Over Certificate filed by the Operational Creditor dated 02.03.2013.
12. Therefore, the Bench took up the issue of applicability of the Limitation Act, 1963 at the outset.
13. Section 19 of the Limitation Act, 1963 provides that where a party, on account of an outstanding debt, makes payment prior to the expiration of the prescribed period of limitation, a fresh period of limitation shall be computed from the time when the payment was made. Reliance in this regard is also placed on the judgment of the National Company Law Tribunal, Chandigarh Bench, in *M/s RPG Industrial Product Private Limited V. M/s Sahil International Private Limited*, CP (IB) No. 121/Chd/Pb/2018, wherein it was held that:

“..... The last payment of ₹ 2,00,000/- was made by the respondent on 04.05.2015 as per ledger entry at page 46 of the paper book. So, on making part payments from time to time a fresh period of limitation would begin for limitation purposes. The instant petition was filed on 16.04.2018 which is well within limitation. The contention of the respondent-corporate debtor that the petition is barred by limitation, therefore, cannot be sustained and this issue is also found in favour of the petitioner-operational creditor and against the respondent-corporate debtor.”
14. Similar view has been taken by the National Company Law Tribunal, Hyderabad Bench in *Smart Card IT Solutions Limited V.*

M/s. Hippocampus Infotech Pvt Ltd., CP(IB) No. 185/HDB/2018,
wherein it was held that;

“The Corporate Debtor filed second counter alleging that there are defects in Petition. In this second counter Corporate Debtor claimed that debt is barred by limitation. The last part payment was on 11.04.2017. The petition was filed on 26.02.2018. Thus, the petition is ‘within limitation and the claim is not barred by limitation.’”

15. It is observed that the Corporate Debtor has acknowledged the debt of €2,46,940.70 *vide* its letter dated 15.06.2013 placed at p. 114 of the Petition. Periodic payments have been made on 09.06.2015 (€5000.00), 28.07.2015 (€5000.00) and last payment has been made on 04.01.2016 (€19960.00), which are reflected from the Bank Statement of the Operational Creditor placed at p.157 of the Petition. Therefore, in terms of section 19 of the Limitation Act, 1963, a fresh period of limitation starts to run from each payment date.
16. In the light of the position of section 19 of the Limitation Act and the orders of coordinate benches of this Tribunal, the limitation period for filing the present claim, as calculated from the date of last payment, that is, 04.01.2016, will end on, 03.01.2019, whereas the present Petition was filed before this Bench on 06.11.2018. Therefore, the claim made in the Petition is not barred by the limitation.
17. It is noticed from the petition that there is unequivocal admission of liability on the part of the Corporate Debtor in its Letter dated 15.06.2013 (Annexure ‘III-J’ of the petition at p. 114).

18. The Ld. Counsel for the Corporate Debtor has not disputed the liability of the Corporate Debtor in the present proceedings but has chosen to rely on clause 8 of the Contract at p.74 of the petition, regarding Venue and Applicable Law for determination of disputes arising from the Contract dated 25.03.2012. This was his only line of defence. He has relied on the following judgments in this regard:-

(a) Hakam Singh vs Gammon (India) Limited (1971) 1 SCC 286;

(b) A.B.C Laminart Private Limited vs A.P Agencies Salem (1989) 2 SCC 163

(c) Angile Insulations vs Davy Ashmore India Limited & another (1995)4 SCC 153

(d) Polycab Wires Private Limited vs ETA Engineering Private Limited 2014 SCC OnLine Bom1731

(e) Modi Entertainment Network and Anr vs W.S.G Cricket Pte. Ltd (2003) 4 SCC 341.

19. We have considered the submissions made in this regard. Firstly, the IBC's jurisdiction stems from the situs of the Registered Office of the Corporate Debtor, as per sec 60(1) of the IBC, which reads as follows:-

“(1) The Adjudicating Authority in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof, shall be the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located.”

20. The IBC is a complete Code in its itself, and sec 60(1) thereof is not subject to contract between parties so as to dispossess this Bench of its territorial jurisdiction. Therefore, the objections raised in this behalf by the Corporate Debtor in oral submission are untenable and

therefore rejected. The judgments cited by the Ld. Counsel for the Corporate Debtor pertain to the period prior to commencement of the IBC and involve situations where more than one court has jurisdiction. In such cases, any agreement between parties that only one of them shall have jurisdiction, shall have to be given due cognisance. However, such is not the case here, and sec 60(1) of the Code is unambiguous that it is the situs of the Registered Office of the Corporate Debtor alone that would confer jurisdiction on the NCLT. The Registered Office of the Corporate Debtor is situated within the State of Maharashtra, over which this Bench has jurisdiction, and therefore, the sole objection of the Corporate Debtor on the issue of *forum non-conveniens* should be repelled.

21. No defence has been raised by the Corporate Debtor *vis-à-vis* the merits of the case, in spite of many opportunities given in this regard.
22. The application made by the Operational Creditor is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount of one lakh rupees that was the limit stipulated under section 4(1) of the IBC at the relevant point of time. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.
23. The Operational Creditor has not proposed the name of any Interim Resolution Professional (IRP) in the matter.
24. It is, accordingly, hereby ordered as follows: -

- (a) The petition bearing CP(IB) 4270/MB-IV/2018 filed by CT-Technologies ApS, the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against B.Y. Agro & Infra Limited [CIN:U01403MH2008PLC188072], the Corporate Debtor, is admitted.
- (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
- (i) 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;
 - (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - (iii) 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 (SARFAESI) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium,-

- (i) 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;
- (ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the 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.
- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (f) The Operational Creditor has not proposed the name of any Interim Resolution Professional (IRP) in the matter. Therefore, this Adjudicating Authority hereby appoints Mr. Hajari Lal Saini [Reg IBBI/IPA-001/IP-P01553/2019-2020/12494] having office at No.704, "A" Wing, N.G. Sterling, Opposite Queen Mary High School, Old Golden Nest, Mira-Bhayander Road, Mira Road (East), Thane-401107, Maharashtra [Mobile: 99870-35237; EmailID: cahlsaini@rediffmail.com] as the IRP. The fee payable to IRP or, as the case may be, the RP shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP/RP

shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the IBC.

- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. 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 a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (h) The Operational Creditor shall deposit a sum of ₹3,00,000/- (Rupees three lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims etc. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) The IRP/RP shall file periodical reports with this Adjudicating Authority regarding the progress of the CIRP.
- (j) The Registry is directed to communicate this Order to the IRP, Operational Creditor and the Corporate Debtor by Speed Post, email and WhatsApp immediately, and in any case, not later than two days from the date of this Order.
- (k) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, 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.

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV

CP (IB) 4270/MB/C-IV/2018

Sd/-

Ravikumar Duraisamy
Member (Technical)

26.05.2020

Sd/-

Rajasekhar V.K.
Member (Judicial)