

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

CP(IB)/304(CHE)/2021

*(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

In the matter of V A Tech Wabag Limited

A.S. Constructions

No.19, Nehru Nagar West Street,
8th Street, Kalapatti Road,
Coimbatore – 641 014.

... Operational Creditor

Vs.

V A Tech Wabag Limited,

No.17, 200 Feet Thoraipakkam,
Pallavaram Main Road,
SunnambuKoalathur,
Chennai – 600 117.

... Corporate Debtor

Order Pronounced on 22st July 2022

CORAM:

**JUSTICE (RETD) S.RAMATHILAGAM, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

For Operational Creditor : Mr.Swarnam J Rajagopalan, Advocate

For Corporate Debtor : Mr.Neeraj Kumar, Advocate

Mr.Ramasamy Meyyappan, Advocate

ORDER

Per: SAMEER KAKAR, MEMBER (TECHNICAL)

This Application has been filed by one **A.S.Constructions**
(hereinafter referred to as 'Operational Creditor') on 25.11.2021
under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B
Code) r/w Rule 6 of the Insolvency and Bankruptcy (Application to
Adjudicating Authority) Rules, 2016, against **V A Tech Wabag**

Limited (hereinafter referred to as 'Corporate Debtor'). The prayer made is to admit the Application, to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional (IRP).

2. From Part-I of the Application, it is seen that the Operational Creditor is a firm having its registered address as No.19, Nehru Nagar West Street, 8th Street, Kalapatti Road, Coimbatore - 641 014.

3. Part II of the Application lays down the details of the Corporate Debtor. It can be seen that the Corporate Debtor is a private limited company incorporated under the Companies Act, 1956 on 17.02.1995 with CIN:L45205TN1995PLC030231 registered office of the Corporate Debtor is situated at No.17, 200 Feet Thoraipakkam, Pallavaram Main Road, Sunnambu Koalathur, Chennai - 600 117.

4. From Part-III of the Application, it is seen that the Operational Creditor has not proposed the name of the Interim Resolution Professional (IRP).

5. From Part-IV of the Application, it is seen that the Operational Creditor has claimed a sum of Rs.2,53,670,46/- consisting of Principal Rs.1,64,21,889/- and interest of

Rs.89,45,157/- are due and payable by the Corporate Debtor and the date of default is mentioned as 01.12.2020.

6. Part V of the application describes the particulars of Operational Debt, documents, records and evidence of default.

7. It was submitted by the Learned Counsel for the Operational Creditor that the Corporate Debtor had sub-contracted the following works of "45 MLD TTRO Plant at Koyambedu" to the Operational Creditor.

i) Civil work for construction of Treated Water Storage Tank and allied works at Oragadam for TTRO Plant Koyambedu.

ii) Civil work for Construction of Pumping Stations and allied works at Vallam Vadagal for TTRO Plan at Koyambedu.

iii) Civil Work for construction of Pumping Stations and allied work at Pallipakkam for TTRO Plant at Koyambedu

iv) Construction of compound wall.

8. It was further submitted that the entire work given to the Operational Creditor was completed by December 2019, owing to the inaugural preparations the Corporate Debtor has belatedly sent the purchase orders, which delayed the Operational Creditor to raise the bills from their end.

9. It was further submitted that the above said Plant was commissioned on 29.11.2019, but the purchase orders and some amendments to the purchase orders were issued only after April

2020. Subsequently, the Operational Creditor raised respective RA bills.

10. It was further submitted that from the beginning the Corporate Debtor caused an immense delay in certification of the bills and thereafter delayed in making payments to the bills. Consequently, the Operational Creditor through various letters and e-mails requested the Corporate Debtor to pay the bills.

11. It was further submitted that in the meeting dated 14.03.2020 the Corporate Debtor has stated that it has some pending work i.e. Performance Guarantee Test Run (PGTR) in the above-said plant, only after the completion it will get money from the Principal Contractor and assured that it will pay the outstanding to the Operational Creditor once it received its payment from the Principal Contractor.

12. It was further submitted that even after completion of the PGTR the Corporate Debtor failed to honour the payment of the Operational Creditor. In turn, the Operational Creditor caused a demand notice dated 01.09.2021 to the Corporate Debtor. In the reply to the demand notice the Corporate Debtor denied its liability and sought protection under Section 10A of Insolvency and Bankruptcy Code, 2016 that the default has occurred after 25.03.2020.

13. In the above said position, Ld. Counsel of the Operational Creditor argued that the occurrence of default to be considered at the time of completion of the work by the Operational Creditor viz., November 2019. Further, argued that the deliberate delay on the part of the Corporate Debtor to issue purchase orders handicapped the Operational Creditor to raise bills in early. Based on the above submissions the Operational Creditor sought initiation of CIRP against the Corporate Debtor.

14. On behalf of the respondent, much emphasis has been laid on the submission that the debts claimed by the Operational Creditor were hit by Section 10A of the IBC, 2016 and most of the invoices were raised by the Operational Creditor were after 23.03.2020. If those invoices are removed from the default amount debt amount will not meet the threshold limit prescribed in Section 4 of IBC, 2016. Further, contended that upon knowing the above position the Operational Creditor has filed this application and sought to dismiss the application in *limine*.

15. Heard the Learned Counsels of both the parties. As per the memo dated 29.04.2022 the Corporate Debtor the details of the invoice raised by the Operational Creditor for the alleged purchase orders are as detailed below.

INVOICES RAISED AFTER 23rd MARCH 2020 (Pg -404)		
S.No	Date of Invoice	Amount due as per Invoice
1	6.06.2020	1,367,460
2	6.06.2020	4,786,110
3	18.06.2020	3,648,729
4	18.06.2020	3,224,343
5	2.08.2020	1,196,244
6	16.10.2020	1,458,673
7	16.10.2020	1,650,482
8	16.10.2020	2,249,787
9	16.10.2020	455,820
	TOTAL	20,037,647

16. It is pertinent to note that the Operational Creditor in its plea had admitted that the purchase order was issued after 23.03.2020 and the respective bills were raised thereafter.

17. Noting the above position, we may now turn to the relevant provisions of IBC, 2016.

"Section 3(12):

"default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1[Paid] by the debtor or the corporate debtor, as the case may be;"

reading the above provision clarifies that the act is considered to be default only when non-payment of the debt which due and payable and in the present case the debt is due and payable only when the bills were raised.



18. And, Section 10A reads as follows

"Section 10A. Suspension of initiation of corporate insolvency resolution process:—Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation.—For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

the relevant Notifications reads as follows

"Notification No. S.O. 3265(E), dated 24-9-2020: In exercise of the powers conferred by section 10A of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) [as inserted by section 2 of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 (17 of 2020)], the Central Government hereby notifies further period of three months from the 25th September, 2020 for the purposes of the said section.

Notification No. S.O. 4638(E), dated 22-12-2020: In exercise of the powers conferred by section 10A of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies further period of three months from the 25th December, 2020, for the purposes of the said section."

It is clearly understood from the above provision and the notifications that there is an explicit bar for initiating CIRP for any default arising on or after 25th March, 2020 till 24th March 2021.



19. Moreover, in **Ramesh Kymal Vs. Siemens Gamesa Renewable Power Pvt Ltd.** decided as follows

"25. Section 10A does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the Covid-19 pandemic. Parliament has stepped in legislatively because of the widespread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies (this as we have seen was referred to in the recitals to the Ordinance), which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern. This would go against the very object of the IBC, as has been noted by a two-Judge bench of this Court in its judgment in **Swiss Ribbons (P) Ltd. v. Union of India**. Speaking through Justice Rohinton F Nariman, the Court held as follows:

"27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the

development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] at para 83, fn 3)."

Hence, the embargo contained in Section 10A must receive a purposive construction which will advance the object which was sought to be achieved by enacting the provision. We are therefore unable to accept the contention of the appellant."

20. Considering the facts of the case with the above legal position, we are of the considered opinion that this application is liable to be rejected.

21. In view of the above discussion this application CP(IB)/304(CHE)/2021, stands **dismissed**.

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SAMEER KAKAR
MEMBER (TECHNICAL)

-sd-

JUSTICE (RETD) S.RAMATHILAGAM
MEMBER (JUDICIAL)

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