



BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

COURT- III

IB-415/ND/2020

U/S. 9 of the IBC, 2016 and Rule 6 of the
Insolvency and Bankruptcy (Application to
Adjudicating Authority), Rule, 2016

IN THE MATTER OF

WIPRO ENTERPRISES PRIVATE LIMITED

Registered office at:

Block – C, CCLG Division

Doddakannelli, Sarjapur Road,

Bangalore - 560035

...Operational Creditor

Versus

NTPC BHEL POWER PROJETS PRIVATE LIMITED

RegisteredOffice at:

Block No. 3rd , 6th , 7th , 8th Floor,

C.G.O Complex, Lodhi Road,

New Delhi - 110003

...Corporate Debtor

Delivered on: 03.01.2023

Coram:

Shri BachuVenkatBalaram Das

Hon'ble Member (Judicial)

Dr. Binod Kumar Sinha

Hon'ble Member (Technical)



Appearances:

Operational Creditor : Adv. Anjali Sharma

Corporate Debtor : Adv. VaibhavDabas, Adv. AshimVachher

ORDER

Per: Bachu Venkat Balaram Das, Member (Judicial)

1. The instant application bearing IB-415/ND/2020 has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditors, M/sWipro Enterprises Private Limited is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/sNTPC BHEL Power Projects Private Limited, declare moratorium and appoint Interim Resolution Professional (hereinafter referred as 'IRP'). The Corporate debtor is registered with ROC, NCT of Delhi & Haryana and is therefore, within the jurisdiction of this Adjudicating Authority.

2. The Operational Creditor/Petitioner has averred as follows: -

- a. It is submitted that, The Operational Creditor entered into a contract for the supply of material and supervision of erecting and commissioning of water system (DM Plant, ETP and CW Treatment System) with the Corporate Debtor.



- b. It is submitted that, Operational Creditor performed its obligations under the contract between the parties, but the Corporate Debtor defaulted in part, in making payment for the same. The gross billing by the operational creditor in terms of the contract between the parties was for a sum of Rs. 7,63,36,750/-. The corporate debtor however processed the operational creditor's bills to the tune of Rs.7,45,06,614/-, and released payments aggregating to Rs. 5,78,56,044/- (Rupees Five crores, seventy eight lakhs, fifty six thousand and forty four only). A series of emails was issued by the operational creditor on 13thJune, 2019.
- c. It is further submitted that,The corporate debtor addressed an email to the operational creditor to the effect that subsequent to reconciliation of its accounts the corporate debtor had concluded that a sum of Rs. 87,01,843/- is payable by it to the operational creditor against its claim.
- d. It is averred that thereafter,on 13.06.2019 Operational creditor issued a notice of demand to the corporate debtor and on 16.09.2019 Operational creditor then issued a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code to the corporate debtor. Corporate debtor also responded to the Demand Notice



e. It is further submitted that, a sum of Rs. 87,01,843/- admitted by the corporate debtor as payable to the Operational creditor. Corporate debtor has failed to repay the disputed amount.

3. Notice was issued by this Adjudicating authority to the Corporate Debtor on 03.02.2021. Corporate debtor has also filed their reply to the captioned petition.

4. We have heard the arguments advanced by Ld. Counsels appearing for Operational creditor as well as for the Corporate debtor and also perused the record.

5. The Operational Creditor's claim is based on the facts that, The total amount of debt in default is Rs. 1,84,80,706/- out of the aggregate amount in default, the sum acknowledged by the corporate debtor as payable to the operational creditor, is a sum of Rs. 87,01,843/-.

6. Per contra, Corporate debtor has mainly raised contention based on pre-existing dispute. The Corporate debtor has mainly submitted that there is a 'Pre-existing dispute' between the parties with regard to the transactions on the basis of which the operational creditor has made the instant claim.

7. It is crucial at this stage to refer Section 8(2)(a) of the Code, before we get into the details of the case,

(2) The Corporate Debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor (a) existence of a dispute, if any, or record of the



pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices in relation to such dispute;’.

Thus, This section is restrictive in nature for filing an application under Section 9 of the Code i.e. if a valid existence of dispute or record of pendency of suit or arbitration proceedings which existed before the issuance of demand notice, is shared with the Operational Creditor, within 10 days, it is presumed that there exists a pre-existing dispute between the parties with respect to the goods or services rendered by the Creditor.

8. The Hon’ble Supreme Court, in the matter of **‘Mobilox Innovative Private Limited v. Kirusa Software Private Limited’**, held as follows:

“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from



the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

9. The word ‘dispute’ as defined under Code includes suit or arbitration proceedings relating to the existence of the amount of debt; the quality of goods or services; or the breach of a representation or warranty. It is true that the definition must fit under the parameters as defined under the code but at the same time it must stand on a test as laid down in the recent judgment of the Hon’ble Supreme Court in ***M/s S.S. Engineers Vs Hindustan Petroleum Corporation Ltd. &Ors., Civil Appeal No. 4583 of 2022*** whereby the following has been held:

“31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor. 32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC,



it is patently clear that Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.”

10. Therefore, the Corporate Debtor is required to establish that a dispute over the quality of the goods or services existed prior to the filing of the demand notice under Section 8 so as to ensure that CIRP is not initiated against it. While in order for the Operational Creditor to be successful in its Application under Section 9 of the Code, it must prove that the Corporate Debtor has not complied with Section 8(2)(a) of the Code.

11. While perusing the records, we found that operational creditor sent demand notice on 16.09.2019 to the Corporate debtor. Corporate debtor failed to give reply within 10 days as per the stipulated timeline provided under Section 8(2)(a) of the Code. Operational creditor in this instant petition has successfully proved that Corporate debtor has not complied with Section 8(2)(a) of the Code. Further, true copy of the corporate debtor's email dated 9th January, 2019 marked as Annexure – 7 is also available on record wherein Corporate debtor itself



acknowledged that asum of Rs. 87,01,843/- is payable to Operational creditor.

The true copy of e-mail is reproduced below for reference:-

From: Ashok Gupta
To: sonu.garg3@wipro.com
Cc: Ravichandran BABATHAN ARJYUR; ncep.oms
Subject: Fwd: FW: [Fwd: 2194 - NBPPL Outstanding Payments of INR 1.84 Cr to Wipro Water]
Date: Wednesday, January 9, 2019 2:35:28 PM
Attachments: [Wipro-2071 reco as on 09.01.18.xlsx](#)

Annexure-7
(call)
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** This mail has been sent from an external source. Treat hyperlinks and attachments in this email with caution**

Dear sir,

Sorry for inconvenience , trailing email sent inadvertently.

Please find enclosed summary of the reconciliation statement for the PO-2071.

As per reconciliation statement the payable amount is Rs. 87,01, 843/- as against your claim of Rs. 1.84 crs.

Rs. 4.82 lacs shall be released on receipt of E1/E2 Forms at Mannavaram , C Form scanned copy has sent today .

Regards,

Ashok Gupta

12. In view of the aforesaid email it is amply clear that the Corporate Debtor has admitted that it is liable to pay Rs. 87,01,843. The instant Application is filed on 03.01.2020, therefore the threshold limit of Rs 1 Lakh shall be applicable to it.



13. Though the Respondent had disputed the quantum of debt payable to the Operational Creditor, however, in our considered view this Adjudicating Authority is not a debt determining authority. The moment this Adjudicating Authority is satisfied that there is a debt subsisting of more than the threshold limit, it need not indulge itself in calculating the exact quantum of debt.

13. In the light of the admission made by the Corporate Debtor of more than Rs. 1 Lakh, we are satisfied that there is existence of debt and default. In view of the above we are inclined to admit the Application.

14. In the light of findings of the present petition, when we consider the submissions of the Operational Creditor for the claims towards the goods and services supplied to the Corporate debtor it appears to us that the same shall also fall within the ambit of the definition of Operational debt and the applicant will qualify as an Operational Creditor in terms of section 5(20) of the Code. The averments of the applicant stating that there is a 'debt' which the corporate debtor was liable to pay but failed to do so have not been rebutted by the Corporate debtor by placing suitable evidence. Therefore, this Adjudicating Authority admit the Corporate Debtor into CIRP under the provisions of the Code.

13. The Operational Creditor has not proposed the name of the IRP, therefore this Adjudicating Authority hereby appoints Mr. Varun Sethi having Regn. No. IBBI/IPA-002/IP-N01106/2021-2022/13634 E-mail – ID



ca.varun.sethi.81@gmail.com (Mob. No. 9899766487) as IRP from IBBI list. Consent and valid AoA of the IRP must be filed within three days of passing this order. The said IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

14. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely:

- 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's 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.

e. The explanation below section - 14 (1) also stipulates “that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period”.

15. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. However, The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.



16. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.

17. The Operational Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., with respect to said project and make compliance with this order as per the provisions of IBC, 2016.

18. The Operational Creditors are directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect. Further operational creditor shall provide initial finance to the tune of Rs. 2,00,000/- to the aforesaid Interim Resolution Professional within a weeks' time from the date of this order as advance towards initial cost and expenses of CIRP process. The said advance of Rs. 2,00,000/- shall be adjustable as CIRP cost by the Committee of Creditors immediately after its constitution by the IRP.


A handwritten signature in green ink, appearing to be 'A. S. R.', located below the main text.

A handwritten signature in blue ink, appearing to be 'R. S.', located below the main text.



19. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA site of Ministry of Corporate Affairs for information of all concerned.

20. The order is pronounced by this Adjudicating Authority in Virtual Hearing.


(Binod Kumar Sinha)
Member (Technical)


(Bachu Venkat Balaram Das)
Member (Judicial)