

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III

29.I.A. 2479/2021

I.A. 2477/2021

I.A. 1836/2021

In

C.P.(IB)-3198(MB)/2019

CORAM: SHRI H.V. SUBBA RAO, MEMBER (J)

SHRI CHANDRA BHAN SINGH, MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL
COMPANY LAW TRIBUNAL ON **04.05.2022**

NAME OF THE PARTIES: Total Global Pvt Ltd

V/s

Gopinath Engineering Co Pvt Ltd.

SECTION 9 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

ORDER

Counsel for the Resolution Professional, Ms. Rubina Khan a/w Mr. Nikhil Rajani, counsel for the Applicant, Mr. Manoj Harit and counsel for the Respondent, Mr. Shyam Kapadia are present through virtual hearing.

I.A. 1836/2021

Heard both sides. The above I.A. is allowed. Detailed order will follow.

I.A. 2477/2021 & I.A. 2479/2021

In view of allowing I.A. 1836/2021, the above I.As. 2477/2021 and I.A. 2479/2021 have become infructuous and stands disposed of.

Sd/-
CHANDRA BHAN SINGH
Member (Technical)
//Rajeev//

Sd/-
H.V. SUBBA RAO
Member (Judicial)

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

I.A. 1836/2021

In

C.P. No. (IB) 3198/MB/2019

Under Section 60(5) of Insolvency & Bankruptcy Code, 2016

Filed by

Gopinath Engineering Co Pvt Ltd
Through its Director
Raju Gopinath Nair

...Applicant/Corporate Debtor

Vs.

Totale Global Pvt Ltd

...Respondent/Operational Creditor

In the matter of

Totale Global Pvt Ltd

...Operational Creditor

Versus

Gopinath Engineering Co Pvt Ltd

...Corporate Debtor

Order delivered on: 04.05.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

Appearance:

For the Applicant: Mr. Mr. Manoj Harit, Advocate

For the Respondents: Mr. Shyam Kapadia, Advocate

Per: Shri H.V. Subba Rao, Member (J)

ORDER

1. The above I.A. is filed by the Applicant, Mr. Raju Gopinath Nair, Resolution Professional under section 60(5) of the IBC, 2016 for the following reliefs:
 - a. *To exercise its inherent powers under Rule 11 of the NCLT Rules, 2016 r/w Section 60(5) of the IBC and grant an appropriate order in the interest of justice and to prevent abuse of process under IBC with respect to the Order dated 10/08/2021 for the reasons stated in the application;*
 - b. *To permit withdrawal of the Petition on terms and conditions of settlement mutually arrived at, in furtherance to the payment already made by the Applicant (Corporate Debtor), under the aegis of this Hon'ble Tribunal;*
 - c. *To give any other direction, just and proper order in the interest of justice and equity.*

The brief submissions of the Applicant are as follows:

2. The above I.A. 1836/2021 has been filed by Mr. Raju Gopinath Nair, Resolution Professional under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking necessary order against the Respondent to seek an appropriate order in the interest of justice and to prevent abuse of process under the IBC with respect to the Order dated 10.08.2021, passed in the Original Petition.
3. The Order can be traced to non-representation of the Applicant during the effective hearing of the petition and lack of proper communication to this Tribunal, by the parties. The fact that the Applicant is a solvent and going-on concern, the fact that a sum

of Rs. 20,00,000/- representing 50% of the dues had already been paid on 07.08.2021, through RTGC vide bank of Maharashtra Cheque No. 00137500 dated 07.08.2021, was not effectively communicated to this Tribunal. It was also not communicated that the remaining dues will be paid within a period of 10 days. As a result, there has arisen a situation akin to gross abuse of the IBC, 2016 provisions which would not only be *per se* unjust but also an affront to the objectives of IBC, 2016. Therefore, a suitable order u/s 60(5) of IBC, 2016 r/w Rule 11 of the NCLT Rules is required to be passed to meet the ends of justice.

4. The Applicant (Corporate Debtor) could not be represented on the first and only effective hearing, held in the matter, on 27.07.2021. During the said hearing, the Advocate for the Respondent (Operational Creditor) sought time as his Senior was not available. Upon which this Hon'ble Tribunal directed that reserved for order on 10.08.2021. In the meanwhile, on 07.08.2021, the applicant paid 50% (Rs. 20,00,000/- out of total Rs. 41,30,000/-) of the dues, through RTGS vide Bank of Maharashtra Cheque NO. 00137500 dated 07.08.2021. He also tried to communicate the fact to the Hon'ble Tribunal but could not do so effectively as he was not represented by an Advocate. Consequently, the order of admission came to be pronounced on 10.08.2021. Thus, effectively, the order dated 10.08.2021 has - admitted the petition and directed commencement of CIRP against the Applicant (Corporate Debtor) - a Company that is not just solvent but employs more than 200 workforce, including professional Engineers, even as on date, and has an ongoing service contract with Oil & Gas Navratna PSU viz. HPCL, worth Rs. 13.35 Crore.

5. The reason for effective hearing not being held even after nearly two year of filing the Original Company Petition is as under:
- a) As the negotiation for settlement continued from the days prior to the filing of Original Petition, the first few hearing was adjourned on request of both parties and subsequently since 20.03.2020 the matter suffered from Lockdown;
 - b) After half-hearted (post lockdown) resumption of the proceeding on 14.02.2021, it was the Respondent (Corporate Debtor) who was present, not the Petitioner (Operational Creditor). Thereafter, on two successive dates the Board got discharged. Finally on 29.07.2021, for the first time the Petitioner (OC) could not be represented as the Advocate, Ms. Heena Kapoor for the Corporate Debtor had withdrawn herself from the matter.
6. The Applicant is not just a solvent Company but a going concern with employability, even as on date, executing performance contract with a Navratna PSU viz, HPCL. The performance contract is worth Rs. 13.35 crore, out of which Rs. 2.10 Crore is receivable by the Applicant in about a week's time. Beside, the Applicant has also submitted two bids for the same HPCL, a Navratna PSUs of Oil and Gas sector and is, therefore, on the cusp of getting another contract with promising financial outcomes for the Applicant company and delivering immense Technical Values to the recipient i.e. HPCL.
7. Not exercising the powers under section 60(5) of the IBC, 2016 r/w Rule 11 of the NCLT Rules the Applicant would suffer irreparable damage, and at the same time doing so would cause

no inconvenience to the Respondent, as they have already got 50% of the claim amount and balance would be paid to them within a week from the date of allowing the present applicant. This submission may be treated as undertaking by the Applicant to the Hon'ble Tribunal.

FINDINGS

8. The above Application was filed by the Corporate Debtor M/s Gopinath Engineering Co. Pvt. Ltd represented through its Director Mr. Raju Gopinath Nair under section 60(5) of the IBC, 2016 read with Rule 11 of the NCLT rules, 2016 praying this Bench to withdraw the CIRP order dated 10.08.2021 passed against the Corporate Debtor on the ground that even before passing the CIRP order, the Corporate Debtor has paid an amount of Rs. 20 lacs out of the total of Rs. 41,30,000/- claimed in the Company Petition to the Operational Creditor and he would pay the balance amount of Rs. 21,30,000/- within 10 days from 07.08.2021. Since, CIRP order has already been passed against the Corporate Debtor, this Bench directed the Corporate Debtor to get an appropriate withdrawal application filed through IRP under section 12A of the Code and not by way of the present I.A.
9. Aggrieved against the inaction of this Bench in not disposing of the above I.A. 1836/2021, the Corporate Debtor approached the Hon'ble NCLAT complaining that no order was passed in their application despite settlement, for which the Hon'ble NCLAT vide its order dated 21.01.2022 directed the IRP to file appropriate withdrawal application before this Bench within 10 days from 21.01.2022 which was not done by Resolution Professional. Therefore, the Corporate Debtor once again approached the

NCLAT at the inaction of the IRP in not filing 12A application despite direction given by the NCLAT. The Hon'ble NCLAT once again on 07.03.2022 directed the IRP to file appropriate withdrawal application before the Adjudicating Authority within 2 weeks from 07.03.2022 with a further direction to this Adjudicating Authority to dispose of withdrawal Application if filed by IRP within one week from the date of filing. Accordingly, the matter was listed from time to time on board on 15.03.2022, 25.03.2022, 21.04.2022. As there was no representation on behalf of the IRP on 21.04.2022, this Bench passed certain adverse remarks against the IRP and adjourned the matter to 26.04.2022. ON 26.04.2022 the counsel appearing for the IRP submitted that he has already filed an application under section 12A of the Code along with Form FA which is yet to be numbered and listed on board. Therefore, the matter was once again listed on board on 29.04.2022. However, due to paucity of time the matter did not reach on 29.04.2022 and accordingly adjourned to today i.e., 04.05.2022. Today also the counsel appearing for the IRP is singing the same song by saying that they have filed an application before Registry which is yet to be numbered by registry.

10. Therefore, under these circumstances, this Bench was left with no option except to allow the present application filed by the Corporate Debtor as there was deliberate inaction on the part of the IRP in filing appropriate withdrawal application under section 12A of the Code despite repeated directions given by the NCLAT in view of the settlement entered into between the parties.
11. One of the Financial Creditors of Corporate Debtor viz. DCB Bank Ltd through their counsel Mr. Shyam Kapadia opposed

withdrawal of the CIRP order against the Corporate Debtor in the above application contending that DCB Bank Ltd has already filed another Company Petition against the same Corporate Debtor in CP bearing No. 1263/2021 on the file of NCLT Mumbai Bench Court No.2 and they could not continue the proceedings in view of the moratorium granted in the present Company Petition. Since, moratorium would discontinue after withdrawing CIRP order against the Corporate Debtor, DCB Bank Ltd has every right to continue their Company Petition before Court No.2 and therefore, the above objection is not legally tenable.

12. For the aforesaid reasons, this Bench is compelled to allow the above I.A. 1836/2021. Accordingly, the above I.A. is allowed. CIRP order passed against the Corporate Debtor is withdrawn and the Corporate Debtor is released from all rigours of moratorium.
13. In view of allowing the above I.A. other remaining I.As. 2477/2021 and I.A. 2479/2021 have become infructuous and stands disposed of.
14. Registry is hereby directed to communicate the above order to the chairman, IBBI, New Delhi for initiating appropriate disciplinary proceedings against the IRP Mr. Suresh Chandra Jena, Registration No. IBBI/IPA-001/IP-P01540/2019-2020/12473, email id- suresh.jena58@gmail.com.

Sd/-

CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)