IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court No. II)

C.P (IB) No.76/KB/2021

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.

In the matter of:

ABB Power Products and Systems India Limited
(**CIN** U40101DL2000PTC261308)

... Operational Creditor

Versus

Sigma-C Infrastructure Private Limited (**CIN** U45400WB2012PTC186379)

...Corporate Debtor

Date of hearing: 02 January, 2023
Order Pronounced on: 08 February, 2023

<u>Coram</u>:
Ms. Bidisha Banerjee, Member (Judicial)
Mr. Balraj Joshi, Member (Technical)

Counsels appeared through Video Conference/Physical hearing

For the Operational Creditor	: Mr. Soorjya Ganguli, Adv.
	: Mr. Prithwish Ray Chaudhury, Adv.
	: Ms. Kiran Sharma, Adv.
For the Corporate Debtor	: Mr. Joy Saha, Sr. Adv.
	: Mr. Ishaan Saha, Adv
	: Mr. Prashant Kumar Tripathi, Adv

O R D E R

Per: Bidisha Banerjee, Member (Judicial)

1. The Court is convened *via* hybrid mode.

2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ***("Code")***. seeking to initiate Corporate Insolvency Resolution Process ***("CIRP")*** under the Insolvency and Bankruptcy Code, 2016 ***("Code")*** against Sigma-C Infrastructure Private Limited ***("Corporate Debtor").*** The application is preferred by one by Mr. Debabrata Basu, working for gain at ABB Power Products and Systems India Limited ***("Operational Creditor"),*** who claims to be duly authorized by virtue of Specific Power of Attorney No.89/04.12.2020[1].

3. The present petition was filed on 26 February, 2021 before this Adjudicating Authority to urge that the Corporate Debtor failed to make a payment of a sum of Rs.10,10,88,798/- (Rupees Ten Crore Ten Lakh Eighty Eight Thousand Seven Hundred Ninety Eight only) *[Principal – Rs.7,32,51,745/-; Interest – Rs.2,78,37,053/-],* interest calculated @18% p.a., payable to Operational Creditor.

4. In part II of the Petition the authorized share capital of the Corporate Debtor is shown as Rs. 15,00,00,000/- (Rupees Fifteen Crore only) with subscribed share capital of Rs. 10,00,00,000/- (Rupees Ten Crore only). While Part – IV of the Petition deals with the Particulars of the Operational Debt.

5. Submission of learned Counsel appearing for the Operational Creditor

i. The ABB Power Products and Systems India Limited is a Company registered under the provisions of the Companies Act, 2013, having its registered office at 8th Floor, Brigade Opus 70/401, Kodigehalli Main Road, Bengaluru – 560092. It is represented by Mr. Debabrata Basu. While Sigma-C Infrastructure Private Limited, the Corporate Debtor, is a Company registered under the provisions of the Companies Act, 1956, having its registered office

[1] Pages 27 - 28 of the Petition.

at 52A, Shakespeare Sarani, Kolkata - 700017

ii. That, the Corporate Debtor issued six purchase orders in the name of ABB India Limited for supply of GIS and other ancillary equipment meant for utilization at Princep Street Substation of the CESC Limited.

iii. However, 03 (three) purchase orders placed upon ABB India Limited were amended from time to time. These purchase orders were related to the power grid business and the dues arising there from are payable to the Operational Creditor. Details of the purchase orders are as follows;

Sr. No.	***P.O. Details***	***Date***
1.	SCIPL/ABB/160831 and amendment P.O. No.SCIPL/ABB/180125	31.08.2016 & 25.01.2018
2.	SCIPL/ABB/170331/B and amendment P.O. No.SCIPL/ABB/180515/1	31.03.2017 & 15.08.2018
3.	SCIPL/ABB/170119 and amendment P.O. No.SCIPL/ABB/180515/II	19.01.2017 & 15.05.2018

iv. Thereafter by a scheme of demerger, as approved by Co-ordinate Bench, NCLT Bangalore, *vide* order dated 27 November, 2019, the power grid business of ABB India Limited demerged into the business of the Operational Creditor *[Annexure- C]*. The equipments were duly received by the Corporate Debtor from the Operational Creditor, without any dispute or demur.

v. As per the terms of the Purchase Orders, 10% of the contract value was to be paid in advance after submission of proforma invoice. And balance 90% of the contract value along with the entire amount taxes and duties was to be paid by the Corporate Debtor within 90 (Ninety) days of submission of the invoices by the Operational Creditor.

vi. The ABB India Limited, whose power grid business demerged into the business of the Operational Creditor, submitted invoices for a sum of Rs.8,13,85,345/- (Rupees Eight Crore Thirteen Lakh Eighty Five Thousand Three Hundred Forty Five only) to the Corporate Debtor.

vii. Against the purchase orders, being SCIPL/ABB/160831 and amendment P.O. No.SCIPL/ABB/180125, SCIPL/ABB/170331/B and amendment P.O.

No.SCIPL/ABB/180515/1, and SCIPL/ABB/170119 and amendment P.O. No.SCIPL/ABB/180515/II, the Operational Creditor has only received a total amount of Rs.81,33,600/- (Rupees Eighty One Lakh Thirty Three Thousand Six Hundred only) *[As an advance Rs.66,33,600/- and a sum of Rs.15,00,000].* No other amount has been paid by the Corporate Debtor. As such the Principal sum of Rs.7,32,51,745/- still remains due.

viii. Upon repeated communications of ABB India Limited and thereafter by the Operational Creditor to the Corporate Debtor to make payments, the Corporate Debtor, while admitting its debt to the Operational Creditor, repeatedly sought extension of time to make such payment. However, the Corporate Debtor failed to make payment by the committed date on one after another frivolous excuse *[Annexure – F]*.

ix. At last, the Operational Creditor issued a Demand Notice dated 26 October, 2020 under Section 8 of the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor by way of an email, claiming payment against the aforementioned outstanding operational debt. However, the Corporate Debtor has not even bothered to reply to the said Demand Notice till date *[Annexure – G]*. Hence, this application.

6. Per contra, it is alleged on behalf of the Corporate Debtor that,

i. The Application has been filed in gross abuse of the process of law and the same is liable to be rejected *in limine.*

ii. The petition is not filed in accordance with the forms prescribed under the Code and the various Rules, Regulations and Forms framed.

iii. There is no record of default with the information utility against the Corporate Debtor. This also shows there is no default on the part of the Corporate Debtor.

iv. This Application has been filed on an excerpt of a board resolution dated 22 November, 2019. From such board resolution it appears that Mr. Ajay Singh, Chief Financial Officer and Mr. Poovanna C. Ammatanda, Company

Secretary were appointed as constituted attorneys. The deponent in this Application is not at all authorized by the Board of Directors. From the General Power of Attorney, it appears that Mr. Poovanna C. Ammatanda was appointed as constituted attorney of the Operational Creditor and not the deponent.

v. The specific power of attorney at page 27 of the Petition depicts that Mr. Poovanna C. Ammatanda has purportedly authorized the deponent Mr. Debabrata Basu to act as a power of attorney holder of the Operational Creditor. However, no reliance can be placed on such power of attorney as the same purports sub-delegation of the alleged authority impermissible in law.

vi. No proof of service for demand notice dated 26 October, 2020 has been disclosed in the Petition. Neither there is any postal receipt nor is track report annexed to the Petition.

vii. The Corporate Debtor has placed several work orders for supply of 145kV 9 Bays DBB GIS Board required for CESC's Princep Street Substation, for installation and commissioning of two sets of 'D' type RTUs at CESC Distribution Substation and for testing commissioning of six sets of 'D' type RTUs required for various substation of CESC. CESC limited and not the Corporate Debtor was the end user with respect to such work orders.

viii. The work executed by the Operational Creditor was defective; there was delay and default committed. There is existence of dispute as to the quantity and quality of materials supplied and services rendered by the Operational Creditor. Such dispute rose long before issuance of the purported demand notice.

ix. That, no provision for interest has been made in the work orders by the Corporate Debtor in favor of the Operational Creditor or its predecessor. The Operational Creditors' claim for interest is therefore baseless and misconceived.

x. That, the tax invoices relied by the Operational Creditor are not enough to prove that the materials as ordered under the supply contract have been supplied by the Operational Creditor. There are no supporting documents to prove dispatch of the consignment. In the absence of such supporting documents, the purported petition cannot be admitted.

xi. That, from page 63 of the Petition, it appears that the Advocates advising the Operational Creditor are also not convinced about the The Operational Creditors' purported claim due to lack of supporting documents.

xii. That, the Operational Creditor has relied on a few correspondences in support of its alleged demand; however, there is no acknowledgement receipt of such purported documents by the Corporate Debtor.

xiii. That, there is an arbitration clause in the work order and hence any dispute and differences arising out of alleged breach of the terms and condition of the contract are to be adjudicated by an Arbitral Tribunal.

xiv. That, the Operational Creditor has suppressed material facts and has failed to show existence of any debt or occurrence of default. Thus, It has approached this Adjudicating Authority with ulterior motive and mala fide intention.

7. ***As a Rejoinder to the Reply filed by the Corporate Debtor, the Operational Creditor would submit, the following;***

i. That, as per the order dated 16 March, 2022 of this Adjudicating Authority, the Reply was to be filed by the Corporate Debtor within one week from the date of the Order i.e., by 23 March, 2022. However, in complete disregard to such directions ordered by the Adjudicating Authority the Corporate Debtor has filed its Affidavit in Reply on 25 April, 2022.

ii. The contention of the Corporate Debtor that there has been no service of the demand notice under section 8 of the Code is not true. The Operational Creditor has served the demand notice and the Application through e-mail. There is no truth in the allegation that the Corporate Debtor received Section 9 Application but did not received the demand notice under the Code.

iii. That, the demand notice and the application were sent to the e-mail ID appearing on the website of the Ministry of Corporate Affairs. Also, it is a trite law that service of the demand notice by way of email to the registered e-mail address of the Corporate Debtor, as it appears on the website of the Ministry of Corporate Affairs, is a good service.

iv. That, due to inadvertence, the proof of service of the demand notice was not annexed to the Application. However, the same was brought on record by way of a supplementary affidavit dated 20 June, 2022.

8. We heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Corporate Debtor and perused the documents on record.

Analysis and Findings

9. Legal Propositions*: the only question that arose for consideration was whether this petition has been duly signed and verified by a competent person?*

i. As held by the Hon'ble Supreme Court in ***Dale and Carrington Invt. (P) Ltd. and Ors. v. P.K. Prathapan and Ors.***[2] *"A company is a juristic person and it acts through its Directors who are collectively referred to as the Board of Directors. An individual Director has no power to act on behalf of a company of which he is a Director unless by some resolution of the Board of Directors of the Company specific power is given to him/her. Whatever decisions are taken regarding running the affairs of the company, they are taken by the Board of Directors. The Directors of companies have been variously described as agents, trustees or representatives, but one thing is certain that the Directors action behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company. They are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company. In a limited sense they are also trustees for the*

[2] MANU/SC/0748/2004, Civil Appeal Nos. 5915, 5916, 5917 and 5918 of 2002, Decided On : 13 September, 2004

shareholders of the company."

ii. The Hon'ble Apex Court in ***United Bank of India v. Sh. Naresh Kumar And Ors.***[3] held *that "Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.*

It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company.

* * *

as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. <u>A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual.</u> In absence thereof and in cases where pleadings have been signed by one of it's officers a Corporation can ratify the said action of it's officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by it's officer."

(Emphasis Added)

[3] 1996 (6)SCC 660 (18 September 1996)

iii. In ***Janki Vashdeo Bhojwani and Anr.*** v. ***Indusind Bank Ltd. and Ors.***[4], albeit in a different context, Hon'ble Apex Court overruled a judgment of the Bombay High Court in ***Pradeep Mohanbay v. Minguel Carlos Dias***[5], inter alia opining as follows:

> *'**7.** Order 3 Rules 1 and 2 Code of Civil Procedure empowers the holder of power of attorney to 'act' on behalf of the principal.'*

iv. Further, in ***A.C. Narayanan and Ors. v. State of Maharashtra and Ors.***[6]it was held by the Hon'ble Supreme Court that *"<u>whether the power of attorney holder will have the power to further delegate the functions to another person will completely depend on the terms of the general power of attorney. As a result, the authority to sub-delegate the functions must be explicitly mentioned in the general power of attorney.</u> Otherwise, the sub-delegation will be inconsistent with the general power of attorney and thereby will be invalid in law. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.'*

(Emphasis Added)

10. ***Analysis and Findings :***

i. With respect to the allegation of the Corporate Debtor that the deponent in this Application is not at all authorized by the Board of Directors. It is noticed that as per the Board Resolution dated 22 November, 2019[7], Mr. Ajay Singh, the Chief Financial Officer and Mr. Poovanna C. Ammatanda, Company Secretary were appointed as 'constituted attorneys' for the Operational Creditor, with requisite powers "*to do, execute and perform all or any of the following acts, deeds, matters and things, in connection with the Company's business and as permissible under the laws*". They were expressly and in explicit terms authorized by virtue of the Power of Attorney *[at pages 22-25 of*

[4] MANU/SC/1030/2004 : 2005 (2) SCC 217
[5] MANU/MH/0485/1999 : 2000 (1) Bom. L.R. 908
[6] MANU/SC/0934/2013
[7] Annexure – B, at page 21 of the Petition.

the Petition], even, *'To delegate to any one or more of the senior officers and executive officers of the Company and/or Group companies jointly and severally with such limitations and conditions and in such terms and as the said attorney may think fit all or any of the powers and authorities hereby conferred and for this purpose to execute under his own hands such Powers of Attorneys, Letters of Authorisation and other documents delegating the powers and authorities aforesaid to such senior officers and executive officers and to revoke or vary the same from time to time in full manner as the said attorney may think fit.'*

ii. The aforesaid clause contains no rider that such authorisation and sub-delegation by the Constituted Attorney has to be further approved by the Board. It is explicit therefore that in view of the powers conferred upon the constituted attorneys Mr. Poovanna C. Ammatanda, a specific power of attorney was executed by Mr. Poovanna C. Ammatanda in favor of Mr. Debabrata Basu to act as a true and lawful attorney, prima facie to represent in fact and in law the Operational Creditor.

iii. It is noted that Mr. Debabrata Basu describes himself as the territory Sales Manager, East Zone and, he is fully aware of all the facts and circumstances of the case and otherwise competent to make the affidavit on behalf of the Operational Creditor.

11. In view of the discussion above, prima facie we do not find any infirmity with the present petition, which is filed by Mr. Debabrata Basu on behalf of the Operational Creditor. Further, it is evident that the petition is within limitation and we are satisfied that the present petition made by the Operational Creditor is complete in all respects as required by law. The contention taken by the Corporate Debtor about the existence of the pre-existing dispute has not been validated by the Corporate Debtor with any documents.

12. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of tim*e.*

Further, as envisaged under section 9(3)(b) of the Code, an affidavit has also been filed by the Operational Creditor.

13. In the aforesaid backdrop, we would order as follows:-

a. The application bearing ***CP (IB) No. 76/KB/2021*** filed by Mr. Debabrata Basu, ABB Power Products and Systems India Limited, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Sigma-C Infrastructure Private Limited, is ***admitted***.

b. There shall be a moratorium under section 14 of the IBC.

c. 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.

d. Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

e. ***Mr. Ashish Giria,*** registration number ***IBBI/IPA-001/IP-P01193/2018-2019/11918,*** email***: ashishgiria@gmail.com,*** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

f. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the Code. 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 one week from the date of receipt of this Order, in default of which coercive steps will follow.

g. The IRP/RP shall submit to this Adjudicating Authority periodical reportswith regard to the progress of the CIRP in respect of the Corporate Debtor.

h. The Operational Creditor shall deposit a sum of ***Rs.3,00,000/- (Rupees Three Lakh only)*** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

i. In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

j. Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means 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.

14. ***CP (IB) No. 76/KB/2021*** to come up on ***14 March, 2023*** for filing the periodical report.

15. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The order is pronounced on 08^{th} day of February, 2023

SA [LRA]