

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, NEW DELHI
COURT-III

Item 118

IN THE MATTER OF:

IB-3210(ND)/2019

UPI POLYMERS PVT LTD

Versus

.... *Operational creditor*

SPML INFRA LTD

.... *Corporate debtor*

SECTION
U/s 9 IBC code 2016

Order delivered on 05.03.2021

CORAM:

CH. MOHD. SHARIEF TARIQ, MEMBER (JUDICIAL)
SHRI NARENDER KUMAR BHOLA, MEMBER (TECHNICAL)

PRESENT:

For OC : Mr. Somanadri Gaud K (Advocate)
For CD : Mr. Pradeep Gupta (Advocate)

ORDER
(Through Video Conference)

1. The Ld. Counsel for the Operational Creditor is present. The Ld. Counsel for the Corporate Debtor is present.
2. Under Consideration is CP (IB)-3210(ND)/2019 filed under Section 9 of the IBC, 2016 with the prayer to initiate CIR Process against the Corporate Debtor viz, *M/s. SPML Infra Limited*, declare the Moratorium and appoint the Interim Resolution Professional, on the ground of non-payment of the outstanding debt.
3. It is submitted by the Ld. Counsel for the Operational Creditor that an amount of Rs.2,67,41,116.96/- (invoices) plus Rs.1,73,91,761.95/- (interest amount) is due and payable by the Corporate Debtor.

4. It is submitted that the Operational Creditor is engaged in the business of manufacturing and supply of HDPE/MDPE Pipes and during the course of business, the supply has been made to the Corporate Debtor from 01.08.2015 to 24.12.2015 and invoices were raised. The CD had issued three Purchase orders i.e., first order dated 01.08.2015, second order dated 16.09.2015 which was amended on 22.09.2015 and third order dated 05.11.2015, as per which the supply of the material was made by the operational creditor to the CD.

5. The Operational Creditor has sent the legal notice on 06.04.2018 wherein the demand was made for an amount of Rs.2,67,41,116.96/- along with interest of Rs.1,73,91,761.95/-. However, there is no reply from the Corporate Debtor to the legal notice. Subsequently, the demand notice in Form 3 & 4 was sent on 13.08.2019 raising the demand of Rs.2,67,41,116.96/- plus interest of Rs.1,73,91,761.95/- the total of which is Rs.4,41,32,878.91/- to which the reply was given by the Corporate Debtor on 01.10.2019 after the delay of 46 days.

6. It is stated in the reply that owing to good commercial relationship the Corporate Debtor took an opportunity to convene a meeting with the Operational Creditor and sought the proof of earlier bills along with proof of completion of performance and other formalities to reconcile accounts in the course of the proposed meeting. However, it is submitted by the counsel for the Operational Creditor on instructions that their offices approached to CD but there was no response. The Operational Creditor has also filed affidavit in compliance of Section 9(3)(b) dated 21.08.2020 wherein under Para 4 it is stated that as per requirement of Section 9(3)(b) of the Code, it is affirmed that no notice was given by the Corporate

Debtor about any pre-existing dispute with respect to the unpaid operational debt. The Operational Creditor has also placed on record the details of the cheques dated 09.08.2016 issued by the Corporate Debtor, the detail of which is given below; -

- I. Cheque No.753684 for Rs.1,13,23,270/-.*
- II. Cheque No.753686 for Rs.52,67,584/-.*
- III. III Cheque No.753687 for Rs.2,26,68,938/-*

7. However, it submitted stated while providing the above cheques, the Corporate Debtor promised to open the Letter of Credit in favour of the Operational Creditor for releasing the balance payment. It is noted that the cheques were issued for security against existing payments for the supply made to the Corporate Debtor at KUIDFC Project, Karnataka. In the same communication, it was also requested to return the expired cheques on the receipt of new cheques. Further, it is submitted by the Ld. Counsel for the Operational Creditor that three cheques were presented but two cheques got bounced. The certificate of the bank is placed on record.

8. It is submitted by the Ld. Counsel for the Operational Creditor that some part payments have been made by the Corporate Debtor on 18.04.2017 through cheques for an amount of Rs.25,00,000/- and amount of Rs. 14,40,152.40/- and Rs.14,48,638.15/-was paid through LCs on 16.06.2017.

9. It is also submitted by the Ld. Counsel for the Operational Creditor that detail of the calculation can be seen at Page 10 under Para 16 of the rejoinder. The payments made have been adjusted. The Ld. Counsel for the Operational Creditor drew our attention to Para 16 of the rejoinder wherein it is stated that the Corporate Debtor failed to pay and breached the terms and conditions for Purchase Orders.

The last payment received from the Corporate Debtor was on 16.06.2017. The Corporate Debtor has only paid a total amount of Rs.4,69,40,162/- till date against the goods supplied by the Operational Creditor in total worth of Rs.7,36,81,270.96/-, thereby an amount of Rs.2,67,41,116.96/- is liable to be paid by the Corporate Debtor.

10. The Corporate Debtor has filed the reply in the main petition and stated that the Operational Creditor has approached with unclean hands and deliberately concealed the existence of "dispute" in terms of the provisions of the IBC, 2016. It is further stated that the alleged claim is no longer due, as it is time barred and the bills were never presented to banks for payment through letter of credit due to non-submission of required and mandatory documents/non-fulfilment of terms of letter of credit and quality issues and the same has now been claimed in the present petition first time with *malafide* intention and which is hopelessly time barred.

11. It is alleged that the Operational Creditor with *malafide* intention is trying to extract money from the Corporate Debtor by invoking the provisions of the IBC,2016 and amount has already been received through letter of credit and now once again trying to claim through demand notice under the provisions of the IBC, 2016.

12. It is further submitted that there is breach of the terms of purchase orders by the Operational Creditor which failed to supply material within agreed time frame. Therefore, there was a short supply of material. It is further contended that time frame was agreed for 100% quantity dispatched within 2-3 months from the date of manufacturing clearance and the Corporate Debtor/Respondent forced to levy liquidated damages as per the agreed terms of the purchase orders and procured remaining quantity of martial from various other vendors at much higher rates causing huge financial losses.

13. It is further stated that in Para 16 of the reply that there is an existence of dispute between the parties with regard to the quality of material supplied, for this reason the Operational Creditor/Applicant failed to submit their bills to Bank despite of lapse of more than 4 years and prior to the issuance of the Section 8 Notice of the Code. The factum of the dispute was also brought to the knowledge of the Operational Creditor/Applicant from time to time by the Corporate Debtor/Respondent. In the premise, it is prayed that the application be dismissed as not maintainable.

14. It is submitted by the Ld. Counsel for the Corporate Debtor that the Operational Creditor has first time demanded payment for supply made w.e.f., 09.11.2015 to 28.12.2015 and failed to file with the bank the requisite documents: -

- a. *Copy of commercial invoice.*
- b. *Copy of bill of exchange.*
- c. *Debit Note for usance Interest.*
- d. *Copy of Lorry Receipt.*
- e. *Copy of Dispatch Clearance issued by SPML.*
- f. *Copy of Guarantee certificate.*

15. Further, it is stated by the Ld. Counsel for the Corporate Debtor that apart from 94 bills, the amount of which is time barred, the rest of the amount has been cleared through LCs and cheques to the Operational Creditor. It is noted that there are three purchase orders. The query was raised by this Authority as to whether the Corporate Debtor is in a position to demonstrate that the amount of 94 bills stated to be in default is pertaining to any particular purchase order. The counsel for the corporate debtor fairly admitted that he cannot answer it. However, the counsel for the Operational Creditor stated that the mode of payment as recorded under clause 8 of PO No: SPML/KUIDFC/B085-90/PO 011/2015-16 is 100% payment by 60 days PDC, therefore, there is no question to make payments by LCs, as claimed by the corporate debtor. It is

further submitted by the Ld. Counsel for the Operational Creditor that the terms of the payment had been modified by the Corporate Debtor through letter dated 11.08.2016 wherein 3 PDCs were given as security against existing dues for the supply made and assured that CD will open LCs in favour of the Operational Creditor.

16. The Ld. Counsel for the Operational Creditor rebutted the arguments that the debt is time barred by reiterating that part payments have been made by the Corporate Debtor on 18.04.2017 through cheques for an amount of Rs.25,00,000/- and amount of Rs. 14,40,152.40/- and Rs.14,48,638.15/- was paid through LCs on 16.06.2017 and whereas the petition has been filed on 13.11.2019, which is within the period of limitation. Therefore, the issue that the debt is time barred is decided in favour of the operational creditor against the corporate debtor.

17. The Ld. Counsel for the Corporate Debtor as last leg of his arguments submitted that the statutory notice under Section 8 of the IBC is defective as the signatory has no authority to sign on behalf of the Operational Creditor. However, the Ld. Counsel for the Corporate Debtor has referred to the Board Resolution dated 09.08.2019 that provides that Mr. J.K. Rajesh Singh Vice Chairman & Managing Director of the company was authorized to engage any Advocate/Solicitors/Consultants and to submit Vakalatnama, Statements, Documents, Evidences, Declarations, issue notices/forms under prevailing law before the appropriate Authorities/Court and/or the Police Authorities for and on behalf of the company as and when required and to enter into any compromise, settlement of case as may be considered appropriate in the interest of the company. Therefore, the signatory has the proper authority through the board resolution, which empowers Mr. J.K. Rajesh Singh to engage Advocate /Attorney on behalf of the Operational Creditor. In view of it, the objection raised by the Counsel for the Corporate Debtor stands **rejected**.

18. It is pertinent to note that the Ld. Counsel for the Corporate Debtor, when asked about the plea of the CD of pre-existing dispute, he failed to substantiate the same with any documentary evidence. Therefore, the same is mere bluster and stands rejected.

19. Therefore, all the legal requirements are fulfilled by the operational creditor, the application filed under Section 9 is **admitted**, and the commencement of the CIRP is ordered against the corporate debtor viz., SPML Infra Ltd, which ordinarily shall be completed within 180 days, reckoning from the day this Order is passed.

20. 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 any of its 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.

21. The supply of essential goods or services of the Corporate Debtor shall not be terminated, suspended, or interrupted during moratorium period. The provisions of

Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.

22. The Operational Creditor has not proposed the name of any Resolution Professional for appointment as Interim Resolution Professional ('IRP'), therefore, ***Mr. Rahul Jain, registered with IBBI having Registration No.: IBBI/IPA-001/IP-P02078/2020-2021/13219; Email: ca.rahuljain.2005@gmail.com Mobile No. 9871552902*** is hereby **appointed** as IRP. The IRP is directed to take charge of the CD's management immediately including Bank accounts. The IRP is directed to cause public announcement as prescribed under Section 15 of IBC, 2016 within three days from the date the copy of this Order is received, and call for submissions of claim by the creditors in the manner as prescribed.

23. We hereby direct the Operational Creditor to pay a sum of Rs. 2,00,000/- to the IRP upon filing necessary declaration Form, to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

24. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of the Code. The Directors of the Corporate Debtor, its Promoters or any person associated with the management of the Corporate Debtor are/is directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 for the purpose of discharging his functions under Section 20 of the IBC, 2016.

25. The Ld. Counsel for the Operational Creditor and the Registry are directed to send the copy of this Order to the IRP with immediate effect, so that he could take charge of the CD's assets etc., and make compliance with this Order as per the

provisions of IBC, 2016.

26. The IRP is directed to communicate this Order to the Operational Creditor, the Corporate Debtor, and the concerned RoC.

27. The Order is dictated and pronounced in open court through video conferencing in the presence of Ld. Counsels for the Operational Creditor and the Corporate Debtor.



**NARENDER KUMAR BHOLA
MEMBER (TECHNICAL)**



**CH. MOHD. SHARIEF TARIQ
MEMBER (JUDICIAL)**

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