

**IN THE NATIONAL COMPANY LAW TRIBUNAL,**  
**KOLKATA BENCH, KOLKATA**

CP (IB) No.1735/KB/2019

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

And

In the Matter of:

Foseco India Limited, having its office at Gate No.922 and 923, Sanasawadi, Taluk Shirur, District Pune, Maharashtra - 412 208.

.....Applicant/Operational Creditor

And

In the Matter of:

Om Boseco Rail Products Limited, having its registered office at Merlin Acropolis, Unit No.9/3, 9<sup>th</sup> Floor, 1858/1, Rajdanga Main Road, Kolkata - 700 017, West Bengal.

.....Corporate Debtor

**Coram:**

1. Shri J inan K.R., Hon'ble Member (J)

Date of Hearing 13<sup>th</sup> March 2020

Order Delivered on 20<sup>th</sup> May 2020

**Parties Present at through Video Conference**

For the Operational Creditor : Mr. Anjan Kumar Roy, FCS

For the Corporate Debtor : 1. Mr. Dharendra Nath Sharma, Advocate  
2. S. Dutta Majumdar, Advocate  
3. Ms. Pubali Sinha Choudury



**ORDER**

**Present Jinan K.R., Member (Judicial)**

The applicant Foseco India Limited, filed this application under Sec.9 of the Insolvency and Bankruptcy Code, 2016 (in short IB Code) for initiation of corporate insolvency resolution process against the corporate debtor, viz., Om Boseco Rail Products Limited for the alleged default in payment of operational debt to the tune of Rs.90,00,919.10 (Rupees Ninety lakh nine hundred nineteen and paise ten only).

2. Brief facts of the case, for our consideration of the application are the following: -

The Operational Creditor is a company engaged inter alia, in the business of manufacturing and supply of chemicals and allied products related to foundry and steel industries, such as, resins, coating for ferrous and non-ferrous foundries, sleeves, fluxes, metal treatment products of foundries. The corporate debtor regularly purchased various foundry and chemicals generally on creditor basis, the credit period being 30 days which was relaxed for another 15 days beyond the usual credit period as mentioned in the invoices. The operational creditor also granted 7 days as transit period for payment by post dated cheques. However, the corporate debtor failed to make any payment against outstanding debt.

3. It appears from the record that the materials supplied to the corporate debtor were retained and used by the corporate debtor. All these are reflected in the invoices, the details of which are provided in Annexure A annexed with the

application. These are as follows:-

Invoice date	Due date	Invoice amount	Balance due
12/3/2018	11/4/2018	28,32,000.00	10,82,000.00
29/3/2018	28/4/2018	28,01,320.00	28,01,320.00
18/5/2018	17/6/2018	26,88,512.00	26,88,512.00
11/7/2019	31/8/2019	12,80,831.00	12,80,831.00

4. The corporate debtor never raised any grievances regarding quality or specification or any other aspects of the material supplied to them by the operational creditor. The corporate debtor has failed to make payments against several invoices raised by the operation creditor from 3/12/2018 to 11/7/2019 against supply of the materials.

5. The total outstanding debt receivable from the corporate debtor as on 31/7/2019 is Rs.90,00,919.10 (i.e. Principal amount of Rs.78,52,663.00 + interest Rs.11,48,256.10) on the basis of which a demand notice was issued. It appears from the record that there have been a series of correspondence between the operational creditor and corporate debtor in respect of the aforesaid debt, copies of which are annexed with the application as Annexure 10A to 10L. It appears from the said correspondences that the corporate debtor has always accepted and agreed to make payment of the outstanding debt and has never raised any dispute whatsoever.

6. The corporate debtor failed to make payment of the relevant debt and, as such, the operational creditor served a demand notice as prescribed under the Rule. The demand notice was served on the corporate debtor on 1/8/2019.



Copies of the demand notice, speed post receipt and proof of delivery of service are annexed with the application as Annexure 12.

7. In response to the said demand notice, the operational creditor has not received any reply from the corporate debtor. The operational creditor further submits that there is no pre existence of any dispute or pendency of any suit or arbitration proceedings filed before by the corporate debtor in relation to any such dispute.

8. Corporate Debtor though was called absent and declared ex-parte, vide order dated 17<sup>th</sup> January,2020 the application CA (IB) No.107/KB/2020 was allowed by setting aside and the ex-parte order with a direction to pay cost of Rs. One lakh and submits reply within 10 days from the date of the order. Despite granting time the CD has chosen not to contest this application for the reason not brought to the notice of this bench. This case was again came up for consideration on 3<sup>rd</sup> February, 2020. On that day also the CD has not chosen to file reply, but paid cost and prays further time to file reply without assigning any valid reason and the matter was posted for hearing on 13.03.2020. When this case was taken up for final hearing, the Ld.Counsel for the CD requested 7 days' time for enabling the CD to settle the matter. However, the matter was heard, giving assurance to the CD that I will not pronounce the orders within 7 days, but reserved the matter for orders. In the meanwhile Corona Virus Pandemic has disrupted the entire working of the country including judicial work and thereby I was unable to pronounce the judgment immediately after 7days or within one month. Till date this bench was not in receipt of any communication from either of the parties that the matter was settled out of the Tribunal. On the other hand I



was in receipt of an email sent by Ld. Advocate Mr. Sushovit Dutt Majumder, addressed to the Kolkata Bench referring two judgments and the mail is silent as to the submission on the side of the CD recorded by me on 13.05.2020. However Ld. Counsel for the CD being represented the CD on today, he was permitted to submit as to the reason for bringing to my notice the Judgments cited below on the day when this matter was listed for pronouncement of orders and not for hearing or for re-hearing.

- i). Sri Munisuvrata Agri International Pvt. Ltd. Vs 1. Bank of Baroda and Ors.[Company Appeal (AT) (Insolvency) No. 84 of 2019]
- ii) Sleepwell Industries Ltd and Ors. [CP (IB) No.615/KB/2018]

9. Referring to the above referred judgments, the late attempt on the side of the CD is that because of the amendment to section 4 of the Code introducing a proviso to Section 4 that *“Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.”* is retrospective in operation and therefore this application after the amendment not maintainable for want of pecuniary jurisdiction of this Tribunal as the amount involved in the matter is less than One Crore. According to him similar amendment to section 10(4) (c) was introduced by the Government wherein I hold in the matter of Sleep Well Industries Ltd. cited above that the operation of 10 (4) (c) is retrospective and therefore, the operation of the above proviso to section 4 of the Code is to be held as retrospective. If so this application is liable to be dismissed. Submitted by the Ld. Counsel Mr. D.N.Sharma.

10. The Central Government by notification dated 24.03.2020 enhanced the minimum amount of default limit from one lack to I crore for initiating CIRP as against small and medium scale industries. So question raised by the Ld. Counsel is that **whether Notification u/s 4 of the Code raising the minimum default limit be applicable to the applications pending for admission?** It is a well-settled law that a statute is presumed to be prospective unless it is held to be retrospective, either expressly or by necessary implication. When the amendment to section 4 of IBC was, inserted a proviso enhancing the pecuniary jurisdiction for filing applications as against small and medium scale industries nowhere in the notification mentioned that its application will be retrospective. Therefore, it appears to me that the amendment shall be considered as prospective and not retrospective. The facts in the cited decisions are not at all similar to the facts in the case in hand and hence not helpful to strengthen the said submission on the side of the CD. In the view of the matter, I do not find any illegality in pronouncing the order on today through VC.

9. This is an application filed under Sec.9 of IB Code for initiation of corporate insolvency resolution process against the company who is dealing with business of manufacturing and supply of chemicals and allied products related to foundry and steel industries, such as, resins, coating for ferrous and non-ferrous foundries, sleeves, fluxes, metal treatment products of foundries.

10. According to the Ld. P CS for the operational creditor, since the corporate debtor failed to pay the amount, it is entitled to claim the amount due to the tune of Rs.90,00,919.10. None of the invoices contains the terms stipulating the corporate debtor to pay interest for the delayed payment of the amount found

due to the operational creditor. The corporate debtor having not disputed its liability, the amount as claimed by the operational creditor towards the material cost less the interest is found due and payable by the corporate debtor.

11. The Ld. P CS for the operational creditor, further submits that despite repeated demands, the corporate debtor failed to pay the operational debt and therefore a demand notice under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority Rules), 2016, was issued and the Corporate Debtor was in receipt of the demand notice. The CD neither sent a reply nor paid the amount found due to the operational creditor and not raised any dispute. The claim is also not barred by the law of limitation. Accordingly, the claim of the operational creditor is found sustainable under the law.

13. In compliance of Sec.9(3) (b) of IB Code, 2016, the applicant has produced an affidavit, and a statement of bank account also seen produced on the side of the operational creditor in compliance of section 9 (3) (c). Therefore, all the requirements are made out in the case in hand. The operational creditor has also proposed the name of Resolution Professional, Shri Amit Choraria, Registration No.IBBI/IPA-001/IP-P01345/2018-2019/12129. Written communication under Form 2 reveals that there is no disciplinary proceedings pending against the proposed IRP. That being so, the operational creditor succeeds in proving that the application under sub-sec.(2) of Sec.9 of IB Code 2016 is complete; that there is no payment of the unpaid operational debt and that there is service of demand notice with invoices. Despite receipt of the demand notice, there is no payment on the side of the corporate debtor, no pre-existing dispute, also alleged or proved. The Ld. Counsel for the CD not raised any dispute at the time of hearing ,other



than his request for time to settle the matter. There is no disciplinary proceedings pending against the RP proposed under sub-sec.(4) of Sec.9 of IB Code, 2016 and accordingly this application is complete and therefore, liable to be admitted.

14. In view of what is stated above, this application is admitted upon the following:-

### **ORDER**

- i. The application filed by the Operational Creditor under section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, Om Boseco Rail Products Limited is hereby admitted.
- ii. We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.
- iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:



- 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 Securitization 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.
- v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.
- vi. The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the

moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

- ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x. Shri Amit Choraria, Registration No.IBBI/IPA-001/IP-P01345/2018-2019/12129, Contact No.9830858715 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.
- xi. The Operational Creditor to deposit a sum of Rs.1,00,000/-(One lakh) in the ESCROW Account in SBI to be operated through the Registrar, NCLT, Kolkata Bench, for the purpose of meeting the preliminary expenses for initiating the CIR Process by the IRP within two week of the date of this order which can be adjusted after constitution of the CoC.
- xii. The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- xiii. Registry is hereby directed under section 9(5) of the I.B.Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

15. List the matter on 30<sup>th</sup> June, 2020 for filing of the progress report.



16. Registry is directed to forthwith serve copy to the parties and to the IRP by way of email.

16. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

**(Jinan KR)**  
**Member (J)**

Pronounced on 20<sup>th</sup> May 2020, through Video Conference.