

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

CP (IB) No. 1797/MB/2018

[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]

IN THE MATTER OF:

PREMIUM TRANSMISSION PRIVATE LIMITED

[CIN:U01119PN1983PTC133199]

Registered Office: Premium House

Mumbai Pune Road, Chinchwad,

Pune-411019 Maharashtra

...Operational Creditor

VERSUS

GACTEL TURNKEY PROJECTS LTD

[CIN:U40101MH1995PLC088439]

RegisteredOffice:Gammon House,

Veer Savarkar Marg,

Prabhadevi, Mumbai-400025

Maharashtra

...Corporate Debtor

Order Pronounced on: 27.03.2024

CORAM:

HON'BLE MS. REETA KOHLI, MEMBER (JUDICIAL)

HON'BLEMS. MADHU SINHA, MEMBER (TECHNICAL)

Appearances : Hybrid mode

Operational Creditor: Adv. Amit Singh

Corporate Debtor :Adv. PradnyeshSabnis

ORDER

[Per:REETA KOHLI, MEMBER(JUDICIAL)]

1. Background

- 1.1 This Petition bearing C.P.(IB) No.1797/MB/2018 was filed by Premium Transmission Private Limited, the Operational Creditor on 16.05.2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Gactel Turnkey Projects Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is engaged in the business of manufacture, sale and supply of gear boxes. The Corporate Debtor is engaged in the business of construction of cooling towers and cooling systems.
- 1.3 The Corporate Debtor raised a purchase order dated 15.11.2011 on the Operational Creditor for the purchase of Gear Boxes. The Operational Creditor supplied goods to the Corporate Debtor on various dates and raised invoices. Out of the invoices so raised by the Operational Creditor, six invoices aggregating to Rs.40,89,691/- remained unpaid as on 04.03.2015.

- 1.4 Out of Rs.40,89,691/-, the Corporate Debtor paid Rs.11,06,925/- to the Operational Creditor including last payment of Rs.10,30,125/- made on 18.05.2015. Therefore, the balance amount of Rs.29,82,766/- (Twenty-Nine Lakhs Eighty-Two Thousand Seven Hundred Sixty-Six Rupees) represents the outstanding operational debt due and payable by the Corporate Debtor to the Operational Creditor which has not been paid.
- 1.5 The date of default in Part-IV of the Application is not clearly mentioned and is stated to be 04.03.2015, i.e., the date on which the last invoice was issued. Despite issuance of Demand Notice dated 04.04.2018 by the Operational Creditor to the Corporate Debtor as required under Section 8 of the Code, the Corporate Debtor failed to make payment of aforesaid amount of operational debt due and payable to the Operational Creditor. This led to the filing of the present Application by the Operational Creditor seeking initiation of CIRP in respect of the Corporate Debtor.

2. Averments of the Operational Creditor

- 2.1 The Operational Creditor submits that the Corporate Debtor issued a purchase order dated 15.11.2011 for the purchase of Gear Boxes. Following this order, the Operational Creditor provided the goods and multiple invoices were subsequently issued which were received by the Corporate Debtor.

- 2.2 The Operational Creditor states that in accordance with the terms and conditions of the purchase order, it had shipped and delivered goods to MB Power (Madhya Pradesh) Ltd. at the address provided by the Corporate Debtor. It is also stated that *vide* emails dated 20.03.2017 and 24.03.2017, MB Power(Madhya Pradesh) Ltd. had explicitly acknowledged and agreed to have received 45 gear boxes supplied by the Operational Creditor.MB Power (Madhya Pradesh) Ltd. also confirmed that the gear boxes had been commissioned and were in use.
- 2.3 The Operational Creditor submits that it maintained a running account of the Corporate Debtor in its books of account. As per the Operational Creditor's books of account, the amount due and payable by the Corporate Debtor to the Operational Creditor is Rs.29,82,766/- as on 04.04.2018.
- 2.4 The Operational Creditor contends that no notice was given by the Corporate Debtor regarding any dispute over the amount claimed to be in default. In view of non-payment of the amount in default, the Operational Creditor issued a Demand Notice under Section 8 of the Code to the Corporate Debtor on 16.05.2018. However, the Corporate Debtor neither responded to the Demand Notice nor made any payment in favour of the Operational Creditor till the date of this Application.

3. Contentions of Corporate Debtor

- 3.1 At the outset, it is pertinent to mention that though the present Application was filed in 2018, the Corporate Debtor failed to submit any reply thereto. Consequently, the Adjudicating Authority *vide* order dated 22.06.2021 forfeited the right of the Corporate Debtor to file reply. Thereafter, the Corporate Debtor filed an IA No.1515/2021 seeking recall of above order. The IA was allowed *vide* order dated 13.09.2023 subject to payment of costs and the Corporate Debtor was permitted to file its reply.
- 3.2 The Corporate Debtor in its Affidavit-in-Reply has denied all allegations and contentions of the Operational Creditor and opposed the present Application on various grounds. It is argued that the Application is not maintainable due to its being time-barred. The last invoice dated 04.03.2015 is beyond the three-year limitation period. The Application was filed on 10.06.2018 and there is no explanation whatsoever in the Application as to how the alleged claim is within limitation. The Operational Creditor acknowledges that the payment dated 18.05.2015 was for a different invoice. According to established law, each invoice must be considered separately for limitation purposes under Section 9 of the Code and Article 1 of the Limitation Act does not apply. Even if the date of 18.05.2015 is considered, the Application filed on 10.06.2018 is still barred by limitation. In the present case, there is

a single purchase order and there is no indication of a running account in this case. Therefore, each invoice is to be treated separately and they are all beyond the period of the date of filing of the Application.

3.3 The Application is also deemed not maintainable since the Operational Creditor has initiated a civil suit to recover alleged contractual dues which are the very subject matter of the present Application. Referring to the judgment of the Hon'ble NCLAT in **KK Ropeways Ltd.v. Billion Smiles Hospitality Pvt. Ltd. 2023 SCC Online NCLAT 271** and **GRI Towers India Pvt. Ltd. v. Inox Wind Ltd.** [judgment dated 20.10.2023 in Company Appeal (AT)(Insolvency)No.106 of 2023], it is argued that filing an IBC petition for the same cause of action reveals an intention to use insolvency proceedings for recovery of contractual dues, which is legally impermissible.

3.4 The Corporate Debtor contends that the Application lacks proper transaction details and a clear description of the goods for which the alleged amount is claimed. The purported amounts are not acknowledged dues and the documents do not demonstrate any admitted liability. Additionally, the absence of evidence of satisfactory work under the time-bound contract as evidenced by the failure to supply goods as per the Purchase Order suggests that the Operational Creditor has no valid claim. There are number

of discrepancies which require further probe and inquiry in a civil court. The Operational Creditor has not substantiated its claim regarding the supply of alleged Gear Boxes with authenticated documents or communications showing the delivery of goods to the Corporate Debtor. It is contended that the civil court has already held in the summary suit that there are triable issues involved in the case. It is submitted that since the civil court has recorded a finding that the claim is not one which can be decreed summarily and it required adjudication in a trial, it is not open to this Hon'ble Tribunal to overrule the said findings.

- 3.5 The Corporate Debtor submits that its right to file a reply is not extinguished simply due to its failure to reply to the Demand Notice under Section 8 of the Code, as held by Hon'ble NCLAT in ***Brand Realty Services Ltd. v. Sir John Bakeries India Pvt. Ltd.*** judgment dated 10.03.2022 in Company Appeal (AT)(Insolvency)No. 958 of 2020].

4. Rejoinder by Operational Creditor:

- 4.1 In its rejoinder dated 16.10.2023, the Operational Creditor submits that the present Application is not barred by limitation. The Corporate Debtor made a partial payment towards the total outstanding debt amount on 18.05.2015, as evidenced in the Ledger Account. This partial payment serves as an acknowledgment of the Corporate Debtor's liability. It is well settled

that when part payment is made before the expiry of the limitation period, fresh period of limitation shall start from the date when part payment is made in terms of Section 19 of the Limitation Act. The Operational Creditor filed the current Application not on 10.06.2018 but on 16.05.2018, as evident from the stamp affixed by the Registry of this Tribunal on the filing praecipe dated 16.05.2018 with diary No.16872. Therefore, it cannot be said that the Application is barred by limitation.

4.2 The Operational Creditor initiated a Summary Suit before the Hon'ble City Civil Court, Mumbai under Order XXXVIII of the Code of Civil Procedure on 04.06.2018 which was subsequent to the filing of the present Application. This Summary Suit was later transformed into a regular Commercial Suit No. 722 of 2021 after the dismissal of the Summons for Judgement on 27.09.2021. Notably, the court acknowledged in its order that the Operational Creditor had taken action against the Corporate Debtor under the Code before filing the suit, contradicting the Corporate Debtor's claim that the Application was filed on 10.06.2018. Further the Corporate Debtor initiated Notice of Motion No. 3624 of 2022, seeking the dismissal of the suit under Order VII Rule II of the Code of Civil Procedure. However, the Hon'ble City Civil Court *vide* its order dated 06.02.2023 dismissed the Notice of Motion. The court observed that the Corporate Debtor had failed to establish

that the suit was barred by limitation thereby affirming that the limitation period commenced from 18.05.2015. Consequently, the court ruled that the suit is not barred by limitation.

4.3 The Operational Creditor has referred to the judgment of the Hon'ble NCLAT in the matter of ***Mukul Agarwal v. Royale Resinex Pvt. Ltd. 2022 SCC Online NCLAT 255*** wherein it had upheld the decision of this Tribunal admitting a Section 9 petition in which civil suit was decreed in favour of operational creditor and execution petition was pending. The Hon'ble NCLAT held that even if the suit is decreed, it does not affect the transaction out of which the amount fell due and the same will still remain an 'operational debt'. Nor does it in any manner affect the maintainability of the Application filed by the operational creditor under Section 9 of the Code.

4.4 The Operational Creditor submits that the payments of Rs.10,00,000/- and Rs.30,125/- made on 06.04.2015 and 18.05.2015 respectively were adjusted against invoice no.85931043. A balance of Rs.9,39,750/- (Nine Lakhs Thirty-Nine Thousand Seven Fifty Rupees) remained due for invoice no. 85931043 along with other pending invoices mentioned in the Application. Regarding the Corporate Debtor's contention about the quality of goods and services, it is submitted that these were raised for the first time in the reply. The Corporate Debtor failed to

acknowledge the delivery challans attached to the Application, specifically challan no. 3491 received by the Corporate Debtor on 15.03.2015. The acknowledged delivery challan duly stamped and signed by the Corporate Debtor confirms the receipt of goods. Hence, there is no dispute that the Corporate Debtor received the goods and any disagreement about the quality and quantity is baseless as invoices and delivery challans prove that the goods were supplied as per the Purchase Orders raised by the Corporate Debtor.

- 4.5 The Corporate Debtor has raised a superficial plea of pre-existing dispute whereas no grievance regarding alleged delay in delivery of goods or non-supply of goods was raised by the Corporate Debtor before the filing of Reply. The contention of the Corporate Debtor is spurious and nothing more than mere bluster which is devoid of merit and liable to be rejected.

5. Analysis and Findings

- 5.1 Upon due consideration of the pleadings as well as written submissions along with the materials available on record and hearing the Counsel for the Operational Creditor and the Corporate Debtor, our findings in the matter are as under:-
- 5.2 The first question that arises for consideration pertains to the Application being barred by limitation as contended by the Corporate Debtor. We note that the Operational Creditor has

submitted the filing praecipe clearly indicating that the Application was filed on 16.05.2018 and not on 10.06.2018, as contended by the Corporate Debtor. The Registry of this Hon'ble Tribunal has affixed the acknowledgment stamp on 16.05.2018. Moreover, it is noticed from the record that the last payment was made by the Corporate Debtor on 18.05.2015. Section 19 of the Limitation Act, 1963 states that a fresh period of limitation starts from the date when part payment is made. Therefore, considering the limitation period of 3 years commencing from the last date of payment, we find that the present Petition filed on 16.05.2018, is well within the limitation period. It is also noteworthy that the Civil Court in a Notice of Motion filed by the Corporate Debtor under Order 7 Rule 11 of CPC seeking rejection of the plaint on the ground of limitation concluded *vide* its order dated 06.02.2023 that the suit is not barred by limitation and rejected the motion. Therefore, the plea raised by Corporate Debtor based on the ground of limitation is found to be untenable and rejected.

- 5.3 Additionally, the Corporate Debtor has pleaded that the pendency of the civil suit bars the jurisdiction of this Adjudicating Authority to proceed with the present Application. In this connection, it is pertinent to mention that Section 238 of the Code clearly stipulates that "*the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time*

being in force...". It is well-settled that the pendency of civil suit or even pendency of execution of decree of a civil court does not in any manner affect the maintainability of the application under section 9 of the Code filed by an operational creditor.

5.4 It is noticed that the judicial decisions cited by the Corporate Debtor in this regard are distinguishable on facts and also in the context of the issue in question. For instance, in ***K.K. Ropeways Ltd.*** (supra), the question involved was whether the main Company Petition was per se maintainable for the purpose of executing an ex-parte Arbitral Award against which an appeal had been filed in terms of Section 34 of the Arbitration and Conciliation Act, 1996. We find that no such issue arises in present case. Again, in the case of ***GRI Towers India Pvt. Ltd.*** (supra), the issue arising for consideration was whether application filed by the appellant under Section 9 was barred by the limitation and whether the appellant was entitled for exclusion of period under Section 14 of the Limitation Act, 1963 during which the suit filed by the appellant was pending in the Civil Court. Obviously, no such issue is involved in the instant case.

5.5 We find from the record that the debt in question arises from supply of goods by the Operational Creditor to the Corporate Debtor and, therefore, the said amount clearly represents an 'operational debt' within the meaning of Section 5(21) of the Code.

The Operational Creditor has placed on record necessary documentary evidences so as to establish the existence of unpaid operational debt due and payable by the Corporate Debtor. We also find that the Corporate Debtor has defaulted in payment of the said operational debt in so far as no payment has been made even after the delivery of the statutory Demand Notice dated 04.04.2018 issued under Section 8 of the Code.

5.6 On the question whether this is a case of a pre-existing dispute, we find that the Operational Creditor submitted that no grievance was raised by the Corporate Debtor on the supply of goods before the filing of the Reply to the Application. It is also observed that in the emails dated 20.03.2017 and 24.03.2017 annexed by the Operational Creditor to its rejoinder, the Corporate Debtor had acknowledged the receipt of the goods and not raised any dispute concerning the quality or quantity of the goods. Thus, the Corporate Debtor has failed to demonstrate and substantiate the existence of a dispute. Reliance placed by the Corporate debtor on the judgment of Hon'ble NCLAT in **Brand Realty Service Ltd.**(supra) will be of no avail, because the Corporate Debtor has failed to bring relevant materials before the Adjudicating Authority to establish a pre-existing dispute subsisting between the parties.

5.7 From the above discussion, it is evident that there was a default on the part of the Corporate Debtor in the payment of undisputed

operational debt to the Operational Creditor, exceeding Rs.1,00,000/- (One Lakh Rupees), being the threshold monetary limit under Section 4 of the Code prevailing on the date of filing of the present Application. Thus, this Application under Section 9 of the Code, preferred by the Operational Creditor, is found to be maintainable, notwithstanding the pendency of civil suit filed by the Operational Creditor. In this regard, we are also fortified by the judgment of Hon'ble NCLAT referred to in Para 4.3 above. We find that the Application is complete and has been filed in the prescribed form. There is no payment of the unpaid operational debt subsequent to the service of the Demand Notice. No notice of dispute was received from the Corporate Debtor in response to the Demand Notice. In view of the above, we find that all requisite conditions necessary to trigger CIRP in respect of the Corporate Debtor are satisfied and the matter is fit for admission under Section 9(5)(i) of the Code.

ORDER

This Application bearing C.P.(IB) No.1797/MB/2018 filed under Section 9 of the Code by Premium Transmission Private Limited, the Operational Creditor, for initiating CIRP in respect of Gactel Turkey Projects Limited, the Corporate Debtor is **admitted**.

We further declare moratorium under Section 14 of the Code with consequential directions as follows:

- a) There shall be a moratorium under Section 14 of the IBC.
- b) The order of Moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicatory Authority approves the resolution plan under sub-section (1) of Section 31 of the IBC or passes an order for liquidation of the Corporate Debtor under Section 33 of the Code, as the case may be.
- c) That public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, and other Rules and Regulations made thereunder.
- d) That this Adjudicatory Authority hereby appoints **Mr Kumar Raghavan**, a registered Insolvency Professional having the Registration Number- **IBBI/IPA-001/IP-P01433/2018-2019/12336** and email- rkumar56ip@gmail.com as the Interim Resolution Professional (IRP), having valid Authorisation for Assignment up to 19-09-2024, to carry out the functions under the Code in terms of Regulation 7A of the Insolvency and Bankruptcy Board of India (IBBI) (Insolvency Professional) Regulations, 2016.

- e) The fee payable to IRP/RP, shall be in accordance with such Regulations, Circulars and Directions as may be issued by the IBBI. The IRP shall carry out his functions as contemplated under the provisions 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 Sections 17 and 25 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/IP within a period of one week from the date of receipt of this Order, and shall not commit any offence punishable under Chapter VII of Part II of the Code violation of which coercive steps will follow.
- g) The IRP/IP shall submit to this Adjudicatory Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) In exercise of the powers under Rule 11 of the NCLT Rules, 2016, the Operational Creditor is directed to deposit a sum of Rs.2,00,000/-(Two Lakh Rupees) with the IRP to meet the initial CIRP cost arising out of issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the Operational Creditor on priority upon the funds becoming available with IRP/RP from the

Committee of Creditors(CoC). The expenses, incurred by IRP out of this fund, are subject to approval by the CoC.

- i) The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the IRP by way of Speed Post and email and WhatsApp.
- j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.
- k) The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the IRP including by way of email and WhatsApp.
- l) Besides, a copy of this order shall also be forwarded by the Registry of this Tribunal to the IBBI for their record.
- m) **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-
MADHU SINHA
MEMBER(TECHNICAL)

Sd/-
REETA KOHLI
MEMBER (JUDICIAL)

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