

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)

CP (IB) No.100/BB/2023
U/s. 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

M/S VASAVI POWER SERVICES PVT.LTD

405, 4th Floor, Golden Edifice,
Khairtabad, Hyderabad – 50004,
Telangana

... Petitioner/Operational Creditor

Versus

M/S PROMAC ENGINEERING INDUSTRIES LTD.

Off Kanakpura Road,
Alahalli, Anjanapura Post,
Bangalore – 560108
Karnataka

... Respondent/Corporate Debtor

Order delivered on: 31st January, 2024

Coram: Hon'ble Shri. K. Biswal, Member (Judicial)
Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Shri Sriranga, Sr Counsel with Amir Bavani,
Ms. Rishika Kumar, Ms Sriraja S
For the Respondent : G Sudhakar

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present Company petition is filed on 17/04/2023, under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity IB Code), r/w. Rule 6 of the I&B (Application to Adjudicating

Authority) Rules 2016, by Vasavi Power Services Private Limited. (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Process against M/s. Promac Engineering Industries Ltd (hereinafter referred as 'Corporate Debtor/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. 2,43,48,930/- (Rupees Two Crores Forty Three Lakhs, Forty Eight Thousand, Nine Hundred and Thirty Only). The date of default mentioned in the Part IV of Form 5 is 07/09/2019.

- 2.** Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner are as follows:
- i. The Corporate Debtor awarded a Work Order dated 03/09/2016 for 'Electrical, Instrumentation and Automation' (EIA) system erection and assistance in Commissioning work for 1x125MW TPP & 225 kV evacuation switchyard in Sendou, Senegal to the Operational Creditor, for a total estimated value of Rs.5,44,31,372/- and for a total period of 12 months.
 - ii. Thereafter, Corporate Debtor amended the work order by awarding additional work of EIA systems on 12/10/2017. Moreover, on 29/12/2017, a Work Order pertaining to ESP rectifier transformer oil filtration for 125MW Sendou Power Plant project in Senegal, Africa was also placed by the Corporate Debtor, which was to be paid in 100% at the site after completion of work.
 - iii. The Work Order which was supposed to be completed in 12 months was completed in 29 months due to civil, material, engineering and payment delays by Corporate Debtor.
 - iv. The invoices for the said work Order were raised from time to time from year 2016 to 2019 by the Operational Creditor, which were duly recognised by the Corporate Debtor vide an email dated 06/08/2019, wherein Corporate Debtor provided a Finance Statement acknowledging that part- payment from March 2017 to May 2019 was made to the tune of

Rs.6,57,91,521/- and therefore, balance to be released stands at Rs.66,47,006/-. It is submitted that against the Running Account Bills 10% Retention Money was also acknowledged by the Corporate Debtor amounting to the tune of Rs 68,38,830/-

- v. A joint meeting was held on 07/09/2019, wherein the representatives of Corporate Debtor and Operational Creditor were present to discuss upon the dues payable. Accordingly, a summary statement of the outstanding was prepared, which included certain additional invoices as well as certain deductions for damaged and lot items, and the same was duly accepted and acknowledged by Corporate Debtor. The Operational Creditor herein vide emails dated 24/09/2020 and 06/04/2021, requested the Corporate Debtor to clear the outstanding amount.
- vi. On 23/02/2023, the Operational Creditor was constrained to issue Demand Notice under section 8 of the IBC as under Form 3 towards the Corporate Debtor and the same was delivered to the Corporate Debtor at his registered office address. On 17/03/2023, the Operational Creditor received a reply seeking 25 days to make a detailed response and verify the correctness of the claims of Operational Creditor. Thereby, the Operational Creditor has preferred the instant Petition under Section 9 of the Code.

3. The notice to the Respondents in the present case was issued on 08/08/2023. The Respondent filed its statement of objection, vide Diary No: 5032 dated 03/10/2023 and written submissions vide Diary No: 6446, dated 20/12/2023, in which it is contented as under:

- i. The alleged “Operational Debt and the present application” are both barred by the law of limitation. In Part – IV (2) in Form-5 filed by the operational creditor, the date of default is mentioned as 07/09/2019, so the limitation period expires on

07/09/2022, hence, the present application ought to be dismissed in *limine*.

- ii. Even as per the Supreme Court Decision(SUO MOTO WRIT PETITION (C) NO. 3 OF 2023) IN PARA III of the apex court decision, it is clearly stated that “in case where the limitation would have expired during the period between 15/03/2020 till 28/02/2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01/03/2022. In the event the actual balance period of limitation remaining, with effect from 01/03/2022 is greater than 90 days that the longer period shall apply”. In the present case the actual limitation expires on 07/09/2022 for the operation debt claimed by the operational creditor, hence there is no applicability of exclusion and extension of limitation even as per Hon’ble Supreme Court Decision.
- iii. It is further stated that the application ought to be dismissed on merits also since there was no ‘operational debt’ which was ‘due’ and ‘payable’ in this case. The sum of Rs. 2,43,48,930/- was never claimed prior to the issue of notice in Form 3 dated 23/02/2023. Moreover, the Corporate Debtor already paid 90% of the outstanding amount excluding the retention money. The retention money was to be adjusted only after the debit note and liquidated damages etc., had been adjusted against the retention money. The Applicant itself has sent an attachment with email dated 24/04.2019 showing an amount of Rs 58,47,237/- as debit to the Petitioner’s account.
- iv. The Respondent further refers to the earlier correspondences to aver that the alleged debt is disputed i.e there was a Pre-existing dispute. A claim of Rs. 1,22,50,058/- was not approved by the Finance Department of the Respondent and many of the bills were not certified. Moreover, the workmen deployed by the Petitioner were frequently on strike for non-

payment of the wages, resulting in violation of the work-order. The Liquidated damaged chargeable as a consequence was therefore to be deducted from the payables, therefore the amount is liable to be altered accordingly.

4. The Ld Counsel for the Petitioner have filed Rejoinder vide Diary No 5473, dated 30/10/2023 and contended as under:

i. In the joint meeting held on 07/09/2019, between the Operational Creditor and Corporate Debtor, wherein the Corporate Debtor duly acknowledged the dues owed to the Operational Creditor.

ii. The Applicant has excluded the period from 15/03/2020 to 28/02/2022 (715 days) on account of order dated 10/01/2022 passed in Misc. Application No. 21 of 2022 in *Suo Moto Writ Petition (C) No. 3 of 2020* by Apex Court for the purpose of computing limitation period. Therefore, the present application having been filed on 10/04/2023 is well within 3 years of limitation period, since 3 years limitation would now end on 22/08/2024. The Petitioner has relied on following judgements for the same;

M/s Essajy Ericsson Pvt. Ltd v M/s Frontline (NCR) Business Solutions Pvt Ltd, CA (AT)(Ins) No 936 of 2021

Aditya Khaitan & Ors v IL & FS Financial Services Limited, Civil Appeal Nos. 6411-6418 of 2023.

iii. The Corporate Debtor in order to avoid its own mistakes has levelled bald allegation regarding the pre-existing dispute; whereas there was no such dispute.

5. On 09/10/2023 this Tribunal directed that the date of default and limitation issue needs clarification. The petitioner filed memo vide Diary No. 5295 dated 16/10/2023 and Diary No 5368 dated 19/10/2023 to explain the limitation for which reliance is placed on the Supreme Court's Decision in Misc. Application No. 21 of 2022 in *Suo Moto Writ Petition(C) No. 3 of 2020*. The calculation given by the Petitioner is detailed herein:

PARTICULARS	DATE
Date of Default	07/09/2019
3 years of Limitation ends on	07/09/2022
Suo Moto Order of Hon'ble Supreme Court excluding covid affected period	(15/03/2020 to 28/02/2022 i.e 715 days)
Now the 3 years Limitation period would end on	22/08/2024
Company Petition filed on	10/04/2023 (e filed) 17/04/2023 (physically filed)

6. Further pursuant to the Order dated 11/12/2023, the Petitioner have filed a brief written Submissions vide Diary No 6354, dated 18/12/2023 and Respondents vide Diary No 6446 dated 20/12/2023. The same is taken on record.
7. We have heard the learned counsel for both the parties and have perused the material available on record.
8. The first issue to be considered in this petition is whether the present Petition is filed within the prescribed limitation period of of 3 years from the Date of Default. As per the Part IV Form 5 of the Petition, the Date of Default mentioned in 07/09/2019. The period of Limitation would have expired on 06/09/2022. However, it is the contention of the Petitioner that the said period is covered by the Order of Hon'ble Supreme Court in Sua Moto Writ Petition No. 03/2020 for extending the period of limitation from 01.03.2022, and hence the 3 years Limitation period would end on 22/08/2024.
9. For Convenience sake, Para II & III of the Order of **Hon'ble Supreme Court in Sua Moto Writ Petition No. 03/2020** is being reproduced below;

“II. Consequently, the balance period of limitation remaining as on 03/10/2021, if any shall become available with effect from 01/03/2022.

III. In cases where the limitation would have expired during the period between 15/03/2020 till 28/02/2022, notwithstanding the actual balance period of limitation remaining, all persona shall have a limitation period of 90 days from 01/03/2022. In the even the actual balance period of limitation remaining, with effect from 01/03/2022 is greater than 90 days, that longer period shall apply.”

10. Considering the balance period left in the original limitation from 01/03/2022 to 06/09/2022, evidently the said period is greater than 90 days and hence, as per the Order of the Hon'ble Supreme Court the said longer period shall apply for computation of Limitation period. Hence the petition ought to have filed latest by 06/09/2022. It is seen that the petitioner filed the Company Petition CP (IB) No, 100 of 2023 on 17/04/2023 which falls outside the allowed period of Limitation.

11. Accordingly, this Tribunal is of consideration opinion that this petition is not a fit case for admission, since the Limitation for filing the same has already expired. Therefore, the petition **CP (IB) No. 100 of 2023** is hereby **dismissed**. However, this order shall not preclude the petitioner from pursuing other remedies in accordance with law, if so advised.

Sd/-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

Sd/-

**(K.BISWAL)
MEMBER (JUDICIAL)**