

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO.1, MUMBAI BENCH

C.P. (IB)No.4087/NCLT/MB/2018

Under Section 9 of the I&B Code, 2016

In the matter of

Supreme Hydra Engineering Private Limited

...Operational Creditor/Petitioner

Versus

Dolphin Offshore Enterprises(India)Limited

...Corporate Debtor/ Respondent

Order Delivered on: 16.07.2020

Coram:

Hon'ble Member (Judicial), Smt. Suchitra Kanuparthi

Hon'ble Member (Technical), Shri V. Nallasenapathy

For the Petitioner: Adv. Nimay Davea/w Adv. Tripti Sharma i/b Bose & Mitra & Co.

For the Respondent: Adv. Shubham Agrahari a/w Adv. Nishant Bhatia i/b Anoma
Law Group LLP.

Per: Suchitra Kanuparthi, Member (Judicial)

ORDER

1. This is an application being C.P. (IB) No. 4087/NCLT/MB/2018 filed by Supreme Hydro Engineering Private limited, the Operational Creditor/Petitioner, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Dolphin Offshore Enterprises (India) Limited, the Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).
2. The Application is filed by Mr. Keith Joseph Drego, authorized signatory of Operational Creditor, claiming a total default amount of Rs.1,77,52,663.52

(Rupees One Crore Seventy-Seven Lakh Fifty-Two Thousand Six Hundred Sixty-Three and Paise Fifty-Two Only) including interest @2% p.a. plus GST@18% on Interest amount.

The case of the Petitioner:

3. The Corporate Debtor executed a Subcontract Agreement (Agreement) dated 09.04.2018 in favor of the Petitioner to provide equipments and personnel to the Corporate Debtor. The petitioner raised invoices for the same upon the Corporate Debtor. The details of Invoices are as follows:

Sr. No.	Invoice No.	Invoice Amount	Undisputed claim	Due Date
1	DOEL/SAT/02/1819	95,94,787/-	60,01,775/-	17.08.2018
2	DOEL/SAT/03/1819	1,12,04,720.50	1,12,04,720.50	05.07.2018
			1,72,06,494.50	

4. The Petitioner submits that between 04.06.2018 to 13.08.2018 several emails were exchanged between the Corporate Debtor and Petitioner, wherein the Corporate Debtor has admitted and accepted the undisputed portion of invoices as due and payable. The email communication between the petitioner dated 12.08.2018 and reply by Corporate debtor dated 13.08.2018 regarding the bouncing of cheque and seeking more time to release payment due to anticipated cash inflow took time to realize goes to show that the corporate Debtor admitted the liability of payment due under the postdated cheques.

5. The Petitioner submitted that even after repeated request through emails, the Corporate Debtor failed to make payment. The Petitioner served a Demand Notice in Form 3 dated 29.08.2018 to the Corporate Debtor in terms of section 8 of the IBC.
6. The Corporate Debtor in reply dated 17.09.2018 to said Demand Notice sought to dispute the liability raising certain issues of transit rates charged by the Petitioner.
7. The Petitioner also submitted the copy of statements of accounts issued by ICICI Bank dated 05.10.2018 confirming that there is no payment of the relevant unpaid operational debt by the Corporate Debtor during the period from 05.06.2018 to 05.10.2018.
8. The Petitioner has filed an affidavit under section 9(3)(b) of the IBC to the effect that there is no notice given by the Corporate Debtor relating to a dispute of the unpaid operational debt. Further the Petitioner states that there is no dispute with respect to operational debt.
9. Petitioner submitted that even after repeated request for payment due the Corporate Debtor failed to make the payment thereafter the Petitioner filed the current Application on 22.10.2018 before this tribunal.

Reply of the Corporate Debtor

10. The Corporate Debtor filed a reply dated 06.06.2019 that there is a pre-existing dispute with respect to the invoice raised by the Petitioner. The Corporate Debtor wrote an email dated 04.06.2018 regarding dispute related to the Invoice No. DOEL/SAT/02/1819 dated 03.05.2018 pointing out the Transit rate charged till

18.04.2018 and operational rate charged for the period between 18.04.2018 and 02.05.2018 are contrary with the agreed terms and conditions of the agreements. Further the Corporate Debtor submitted that they started operating the equipment from 29.04.2018 and not from 18.04.2018, therefore operational charges claimed by the Petitioner in its invoice for the period during which the equipment was not in operation and was strongly disputed by the Corporate Debtor.

11. The Corporate Debtor further submitted same dispute with regard to the Invoice No. DOEL/SAT/03/1819 which was stated in email dated 12.06.2018 sent by the Corporate Debtor. Further Corporate Debtor submitted that the said dispute was raised in Emails dated 04.06.2018 and 16.06.2018 were remained unresolved even after repeated request by the Corporate Debtor.

Rejoinder by Petitioner:

12. The Petitioner filed a rejoinder dated 17.06.2019 to the Reply filed by the Corporate Debtor stating that the claimed amount was undisputed, admitted and accepted by the Corporate Debtor, in writing by the various emails exchanged between the Petitioner and the Corporate Debtor on 07.08.2018 and 13.08.2018. Further the Petitioner submitted that the Corporate Debtor has not denied that the Corporate Debtor is liable to make payments for the admitted undisputed portion of the claim and has not denied its liability or its obligation under the said agreement to make payment to the Petitioner.
13. The Petitioner submitted that the current Application is limited to claiming of amounts that have been admitted by the Corporate Debtor and therefore there is no pre-existing dispute between the Petitioner and the Corporate Debtor. Further

the Petitioner submitted that the Corporate Debtor sent an email dated 10.07.2018 stating that a) the payment towards undisputed amount of SHEPL invoice No. DOEIL/SAT/02/1819 dated 03.05.2018, will be released by 20.07.2018. b) the payment towards undisputed amount of SHEPL invoice No. DOEIL/SAT/03/1819 dated 01.06.2018 will be released by 30.07.2018.

FIRST INVOICE: INVOICE NO. DOEL/SAT/02/1819

14. In terms of the Subcontract Agreement and further to the provision of the services provided to the Corporate Debtor, the Petitioner raised the Invoice No. DOEL/SAT/02/1819 ("First Invoice") dated 03rd May 2018 for a sum of INR 97,78,867/- which was subsequently amended to INR 95,94,787 and reissued to the Respondent/Corporate Debtor on 11th July 2018.
15. The applicable rates in terms the Corporate debtor were as follows:
 - a. Transit Rate/Standby Rate of INR 1,95,000/- per day was applicable from 13 April 2018 to 29 April 2018 (till 2:00pm) i.e. for a period of 15.58 days amounting to INR 30,38,100/-
 - b. Operational Rate of INR 2,92,500 per day applicable from a period of 29 April 2018 to 03 May 2018 i.e. for a period of 3.92 days amounting to INR 11,46,600/-
 - c. Day rate of personnel applicable from 14 April 2018 to 02 May 2018 for a sum of INR 29,31,500/-
 - d. Total Amount Due: 71,16,200 (excluding GST)

16. However, in contrast to the above position, it was the case of the Petitioner that the following amounts were due and payable:

- a. Transit Rate/Standby Rate of INR 1,95,000/- per day was applicable from 13 April 2018 to 18 April 2018 (till 4:00pm) i.e. for a period of 5.17 days amounting to INR 10,08,150/-
- b. Operational Rate of INR 2,92,500 per day applicable from a period of 18 April 2018 (4 pm) to 03 May 2018 i.e. for a period of 14.33 days amounting to INR 41,91,525/-
- c. Day rate of personnel applicable from 14 April 2018 to 02 May 2018 for a sum of INR 29,31,500/-
- d. Total Amount Due: 81,31,175/- (excluding GST)

17. According to Corporate Debtor's own admission, Transit/Standby Rate was applicable for a minimum period of 5.17 days (i.e. $5.17 \times 1,95,000 = 10,08,150/-$) and Operational Rate was applicable for a minimum period of 3.92 days (i.e. $3.92 \times 2,92,500 = 11,46,600/-$). The Corporate Debtor did not raise a dispute with regard to the Day Rate of Personnel and accepted the rate of INR 29,31,500/-. It was therefore the Corporate Debtor's own case that a sum of INR 50,86,250/- (i.e. $10,08,150 + 11,46,600 + 29,31,500$) was due and payable to the Petitioner.

SECOND INVOICE: INVOICE NO. DOEL/SAT/03/1819

18. Pursuant to the Subcontract Agreement the Petitioner further provided the Corporate Debtor the Sat Diving Equipment and Personnel for the Barge Falcon Warrior. Accordingly, the Petitioner raised an Invoice No. DOEL/SAT/03/1819

("Second Invoice") dated 01 June 2018 for a sum of INR 1,12,04,720/-. The Corporate Debtor thereafter raised some comments on the calculation of the quantum payable vide their email dated 12th June 2018. The Petitioner responded to the said email and provided an explanation for the calculation of the total invoiced amount. Pursuant to receiving the explanation, the Corporate Debtor on 23rd July 2018 responded to the Petitioner's email correspondence, accepting the methodology, calculation and quantum of INR 1,12,04,720/- as raised in the Second Invoice.

19. It is submitted that due to the Corporate Debtor's failure to repay the Operational Debt as stated above, the Petitioner served a Demand Notice vide email dated 29th August, 2018 under Section 8 of the Insolvency and Bankruptcy Code, 2016 and thereafter also served the said Demand Notice by hand on the Respondent/ Operational Debtor on 30th August, 2018, calling upon the Corporate Debtor to make payment of the Operational Debt, or provide a notice of existence of a dispute prior to the receipt of the Notice, or provide proof of repayment of the Operational Debt prior to the receipt of the Demand Notice, within 10 days thereof.

Findings of the Adjudicating Authority

20. We have heard the arguments of both sides and perused the records.
21. The Corporate Debtor in its reply has admitted that the Petitioner provided equipment and personnel to the Corporate Debtor. There is no doubt that the Petitioner has provided the equipment and personnel in accordance with the directions of the Corporate Debtor and within terms and conditions of the said Sub contract Agreement dated 09.04.2018. The Corporate Debtor is liable to make

payments for the admitted undisputed portion of the claim and has not disputed its liability or its obligation under the said agreement to make payment to the Petitioner. There has been an exchange of emails between the petitioner and Corporate Debtor regarding the transit rates dated 12.06.2018, 13.06.2018, 14.06.2018, 15.06.2018 and 21.06.2018 clarifying the issues regarding the transit rates.

22. The Corporate Debtor disputed the invoices with respect to the transit rate and operational charges. The Petitioner sent an Demand Notice dated 29.08.2018 and 17.09.2018, claiming an amount of Rs.1,77,53,663.52 which is undisputed amount. Merely disputing a claim cannot be a ground, as held by Hon'ble Supreme Court decided on 31.08.2017 in *Innoventive Industries Ltd. V. ICICI Bank and Anr*(CIVIL APPEAL NO. 8337-8338 OF 2017)wherein it is observed that "claim means a right to payment even if it is disputed.
23. Further it is pertinent to note that the current Application filed by the Petitioner is with respect to claiming undisputed amount which was clearly admitted by the Corporate Debtor in emails dated 10.07.2018, 07.08.2018 and 13.08.2018 sent by Corporate Debtor. The conduct of issuing cheques and seeking more time for payment by the corporate debtor demonstrates that they are liable to pay the outstanding sum dues under the pending invoices. The Corporate Debtor is liable to pay the said sums to the petitioner, under the Sub-Contract dated 9th April, 2018 in completion of scope of work/tasks as contemplated under the agreement.
24. The emails sent by Corporate Debtor admitting the date of payment of the said monies/outstanding dues are extracted below for ready reference. Upon perusal of

the said emails, it can be said that the corporate Debtor is liable to pay all the undisputed outstanding dues as claimed by the Petitioner.

A. Email dated July 10, 2018

"Dear Sir,

The payment towards undisputed amount of SHEPL invoice no.: DOEIL/SAT/02/1819 dated 03 May 2018 will be released by 20 July 2018.

The payment towards undisputed amount of SHEPL, invoice no.: DOEIL/SAT/03/:1819dated 01June 2018 will be released by 30 July 2018,

The postdated cheque was given as a payment security and the cheque amount is more than double of what is owedby DOEIL. Hence, request not to deposit the said cheque.

Thanks and Regards

Kurian Augustine

Dolphin Offshore Enterprises (India) Ltd.

Mumbai"

B. Email dated August 1, 2018

"Dear Mr Keith,

My apologies for the delay in my response as I was tied up with some urgent meetings throughout the day,

As I had mentioned earlier we are expecting receipt of our Inflows from one of our foreign clients and have even received confirmation of the money being received by the corresponding bank here in India. For the past 7 days we have been waiting and chasing up with the banks for the money to be transferred from the corresponding bank to our account which has not yet happened.

We are still following up and trying to have the money remitted and upon immediate receipt of the same we will clear your pending amounts.

Apart from the aforementioned receipt we are also expecting our balance payment from LTHE in the coming week.

I sincerely regret the inconvenience caused and request you to bear with us for a few more days till we resolve the matter and remit your payment.

Best Regards,

Rohan Singh

Business Development & Marketing Manager

Dolphin Offshore Enterprises (India) Ltd."

C. Email dated August 7, 2018

"Dear Keith,

Firstly we appreciate the patience from your end for remittance of this payment.

We have been speaking to the bank for the remittance of our dues as mentioned in my trailing mails.

Yesterday they have asked for a few balance documents in order to release the money. The matter is nearly resolved now and we expect the payment to hit our account by Thursday evening/ Friday morning.

Kindly request to bear with us for these few days more and we shall clear all the pending payment owed to you.

Best Regards,

Rohan Singh

Business Development & Marketing Manager

Dolphin Offshore Enterprises (India) Ltd."

25. Therefore, the application made by the Petitioner is complete in all respects as required by law. It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of minimum amount of one lakh rupees stipulated under section 4(1) of the IBC. Therefore, the default stands established and there is no reason to deny the admission of the Petition. In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.
26. The Operational Creditor has not proposed the name of any Interim Resolution Professional (IRP) in the matter.
27. The petition bearing C.P. (IB) No. 4087/NCLT/MB/2018 filed by Supreme Hydro Engineering Private limited, the Operational Creditor/Petitioner, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against Dolphin Offshore Enterprises (India) Limited, [CIN: L11101MH1979PLC021302], the Corporate Debtor, is admitted. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:
- I. That this Bench as a result of this prohibits:
1. 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;
 2. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

3. 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;
 4. the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to
- a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator;
 - b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. That this Bench appoints Mr. Vinit Gangwal a registered insolvency resolution professional having Registration Number IBBI/IPA-002/IP-N00091/2017-18/10235, Email Id- ip.vinitgangwal@sudharman.in as Interim Resolution Professional to carry out the functions as mentioned under I&B Code, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.

- VII. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email or WhatsApp. Compliance report of the order by Designated Registrar is to be submitted today.

SD/-

V. Nallasenapathy
Member (Technical)
16.07.2020

SD/-

SuchitraKanuparthi
Member (Judicial)