NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI

C.P. (IB)No.14/GB/2021

Coram:
Hon'ble Shri Rohit Kapoor, Member (J): Hearing through
Hon'ble Shri Prasanta Kumar Mohanty, Member (T): Video Conference

ATTENDANCE-CUM- ORDER SHEET OF THE HEARING OF GUWAHATI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 10.12.2021

Name of the Company: M/s. Tata Hitachi Construction Machinery Co. Pvt. Ltd.
V/s
M/s. Berial Engineers Pvt. Ltd.

Section: Under Section 8 & 9 of Insolvency and Bankruptcy Code, 2016

S. NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	MR. VIJAY NATH JHA	Advocate	Petitioner	Present in Video
2.	NONE	-	Respondent	Conference

O R D E R

The Applicant is represented through respective Learned Counsel.

The case is fixed for pronouncement of order.

The Order is pronounced in the open court, through Video Conferencing vide separate sheet.

Sd/-	**Sd/-**
(**Prasanta Kumar Mohanty)**	**(Rohit Kapoor)**
Member (Technical)	**Member (Judicial)**
& Adjudicating Authority	**& Adjudicating Authority**

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2.	NONE	-	Respondent	

Order pronounced on 10.12.2021

O R D E R
[Per se: Shri Prasanta Kumar Mohanty, Member (T)]

1. This Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2019 by Operational Creditor i.e. M/s Tata Hitachi Construction Machinery Co. Pvt. Ltd. to initiate Corporate Insolvency Resolution Process in respect of Corporate Debtor i.e. M/s. Berial Engineers Pvt. Ltd.

2. The Applicant i.e M/s. Tata Hitachi Construction Machinery Company Private Limited, is a Company registered under the Companies Act, 1956, with CIN: U85110KA1998PTC024588, having its Registered Office at "Jubilee Building", 45, Museum Road, Bangalore: 560 025, Karnataka, India and its Regional Office at P.O: Nibra-South, Near Ankurhati Check Post, P.S: Domjur, NH-6, Dist: Howrah: 711409.

3. The Respondent/Corporate Debtor i.e. M/s. Berial Engineers Pvt. Ltd., is a Company registered under the Companies Act, 1956, with CIN: U74210AS1998PTC005530, having its Registered Office at Zoo-Narengi Road, Hatigarh Chariali, District: Kamrup, Guwahati: 781021, Assam.

4. It is submitted by the Applicant/Operational Creditor that:

4.1 The Operational Creditor has been in the business of manufacturing and marketing of Construction, Earthmoving and Mining Equipment and their spare parts and maintenance services through its service networks and dealers and **as such the Applicant Company/Operational Creditor had appointed the Respondent Company/Corporate Debtor as its Authorized Dealer to sell its machines, equipment and spare parts and provide after sale services in the territory vide a "Dealership Agreement" dated 29.07.2008.** A copy of the said "Dealership Agreement dated 29.07.2008 has been annexed.

4.2 **The Operational Creditor as per the orders of the Corporate Debtor supplied various models and categories of heavy machines, equipment and spare parts and raised invoices against the supplies. The Corporate Debtor always made on account part payments against the invoices, thus the account was a running and continuous account.**

4.3 On 30.06.2013, a total amount of Rs. 6,27,60,508.00 (Rupees Six Crores Twenty-Seven Lakhs Sixty Thousand Five Hundred Eight Only) inclusive of interest @ 14.5% p.a. calculated from 01.03.2009 to 30.06.2009 and thereafter @ 14% p.a. w.e.f. 01.07.2009 remained outstanding and payable by the Corporate Debtor to the Operational Creditor. **The Corporate Debtor had acknowledged its liability to pay the outstanding amount vide Balance Confirmation Letter dated 26.07.2013.** However, despite numerous reminders thereafter, the Corporate Debtor failed to make the payment of the outstanding amount. The Operational Creditor has continuously followed up in person, over phone and also by letters for payment of the said dues but without any result. The Corporate Debtor has always assured for payment, never disputed but eventually not paid the outstanding amount.

4.4 On 10.09.2015, a total amount of Rs. 7,08,23,900.00 (Rupees Seven Crores Eight Lakhs Twenty-Three Thousand Nine Hundred Only) after adjustment of all part-payments, credit notes, debit notes, adjustments in the book of accounts and inclusive of interest @ 14.5% p.a. calculated from 01.03.2009 to 30.06.2009 and thereafter @ 14% p.a. w.e.f. 01.07.2009, accumulated as outstanding amount due and payable by the Corporate Debtor.

4.5 Finally, after exhausting all possible ways to recover the outstanding amount, the Operational Creditor invoked the Arbitration Clause under Clause 66 of the Arbitration Agreement, vide claim petition dated 10.09.2015, the same was acknowledged by the Sole Arbitrator on 15.09.2015 and subsequently Arbitration proceeding initiated vide Arbitration Case No. 2/2015 before the Arbitral Tribunal, Bengaluru. **The said Arbitration proceeding was concluded after a thorough trial and an Award was passed by a speaking order on 05.06.2017. As per the said award, the Corporate Debtor was ordered to pay:**

- **i. Rs. 7,08,23,900.00 as the claim amount.**
- **ii. Interest @14% p.a. on the claim amount from 15.09.2015 till realization of the same.**
- **iii. Further Interest @14% p.a. upon non-payment of the clause 1 & 2 above within 30 days of receipt of the Arbitral Award**
- **iv. Cost of Rs. 2,00,000.00 toward the Arbitral Proceedings.**

However, the Corporate Debtor against the said Arbitral Award did not pay any amount to the Operational Creditor.

4.6 The Arbitral Award was passed on 05.06.2017 and the period of 90 days for filing Appeal and or Application u/s 34 of the Arbitration & Conciliation Act, 1996 was over on 03.09.2017. **However, till date The Corporate Debtor has not filed any Appeal and or application under the said**

provision. Thus the award dated 05.06.2017 has become absolute, established and payable by the Corporate Debtor. The operational creditor is entitled to further interest @ 12% till the payment is made by the Corporate Debtor. Therefore, the **Date of Default is 03.09.2017**, being the date on which the Period of 90 Days ends for filing an Appeal and or Application of the Arbitration & Conciliation Act, 1996.

4.7 Since the Corporate Debtor as per the arbitral award failed in making payment of the outstanding sum of Rs. 7,08,23,900.00 along with the Interest Amount and the Imposed Cost of Rs. 2,00,000.00 to the Operational Creditor, the Operational Creditor finally sent **the Statutory Demand Notice dated 29.01.2021 in FORM-3 under Section 8 of IBC, 2016 by Speed Post with A/D on 30.01.2021 to the Corporate Debtor's Registered Office address as mentioned in the MCA Portal as well as to the 2 Directors of the Company namely, Mr. Satyawan Sharma & Mr. Mohan Gogoi. However, the envelopes were returned back with postal endorsements as "Left", "No Such Person in the Address" and "Left" respectively**. **The said Statutory Demand Notice was also sent by Email on 30.01.2021 to the Corporate Debtor's Registered Email ID as mentioned in the MCA Portal as well as to one of the Directors, i.e. Mr. Satyawan Sharma's Email ID. The email sent to the Corporate Debtor's Registered Email ID bounced back and was reported undeliverable by the system. However, the email sent to Mr. Satyawan Sharma's Email ID was successfully served since the email did not bounce back nor was reported undeliverable by the system. Hence the Statutory Demand Notice dated 29.01.2021 was successfully served vide Email dated 30.01.2021.** Copy of the said Statutory Demand Notice dated 29.01.2021 in FORM 3 under Insolvency and Bankruptcy Code, 2016 along with all the documents as well as copies of the postal receipts, returned envelopes and printout of the E-MAIL evidencing service upon Respondent Company have been annexed.

4.8 More than 10 days have elapsed but the Corporate Debtor has neither paid the claimed amount nor has replied to the said demand notice, thereby clear admittance of the claim amount of 7,08,23,900.00 along with the Interest Amount and the Imposed Cost of Rs. 2,00,000.00. The Operational Creditor is entitled to claim interest on outstanding amount by reason of commercial nature of transaction between the parties and considering inter alia the rates of interest charged by the nationalized banks in respect of such transactions.

4.9 The Respondent Company evidently is not in a position to clear its legal debt and has become insolvent. The Respondent Company does not have any defense to the bona fide claim of the Applicant/Petitioner.

4.10 In the circumstances, there is now due and payable by the Respondent Company to the Applicant/Petitioner a sum of Rs. 12,43,49,446.00 (Rupees Twelve Cores Forty-Three Lakhs Forty-Nine Thousand Four Hundred Forty Sic Only) inclusive of interest and imposed cost as per the following:

Particulars	**Amount (In Rupees)**
Principal Amount as per Arbitral Award dated 05.06.2017	7,08,23,900.00
Interest on Rs. 7,08,23,900/- from 15.09.2015 to 29.01.2021 (date of the Demand Notice) calculated @14% p.a. as per Clause 2 of the Arbitral Award	5,33,25,546.00
Cost imposed towards the Arbitral Proceedings as mentioned in the Clause 4 of the Arbitral Award	2,00,000.00
TOTAL	**12,43,49,446.00**

The Applicant/Petitioner is entitled to further interest on the aforesaid amount at the rate of 14% per annum from 29.02.2021 until payment thereof. Copy of the computation sheet of claim amount has been annexed.

4.11 The Respondent Company has become commercially insolvent and is unable to pay its debts to its creditors and therefore, the continued existence of the Respondent Company is a threat to the commercial world. No useful purpose would be served by allowing the Respondent Company to continue its existence.

4.12 No part of the claim of the Applicant/Petitioner is barred by the law of limitation as per the following:

Sl. No.	**Particulars**	**Dates**
1)	Date of Default	03.09.2017
2)	Last Date to file case as per Limitation Period (3 years)	03.09.2020
3)	Exemption of Limitation Period by the Hon'ble Supreme Court in view of the Covid Pandemic Vide Order dated 08.03.2021 in Suo Moto Writ (Civil) No. 03/2020	From 15.03.2020 till 14.03.2021
4)	Extension of Limitation Period granted by the Hon'ble Supreme Court Vide Order dated 08.03.2021 in Suo Moto Writ (Civil) No. 03/2020	90 Days from 15.03.2021
5)	Last Date to file Case as per Limitation allowed by Order dated 08.03.2021 in Suo Moto Writ (Civil) No. 03/2020	13.06.2021

4.13 In the circumstances, it is just and equitable that Corporate Insolvency Resolution process should be initiated against the Respondent Company and it should be adjudicated as insolvent company and the Respondent Company should be wound up.

4.14 In the facts and circumstances, the Applicant / Petitioner, therefore, humbly prays before this Hon'ble Tribunal for the following orders:

a) Directing initiation of Corporate Insolvency Resolution Process of the Respondent Company, namely Berial Engineers Pvt. Ltd.;
b) The Interim Insolvency Resolution Professional and Insolvency Resolution Professional be appointed upon admission of this application to take immediate possession of the assets and properties of the Respondent Company including its bank accounts and hold the same, till the disposal of the application;
c) Sale of Assets and Properties of the Corporate Debtor to liquidate the dues of Operational Creditor;
d) Costs of and/or incidental to this application be directed to be paid out of and/or from the proceeds of the sale of the assets of the Respondent Company;
e) Such further order and/or other order or orders be passed and/or direction or directions be given, as this Hon'ble tribunal may deem fit and proper.

5. **The Bench heard the matter on 30.07.2021, 18.08.2021, 03.09.2021, 16.09.2021, 28.10.2021, 29.10.2021 and 11.11.2021. No one appeared on behalf of the Respondents on any of these dates despite sufficient opportunities to appear.**

6. The Bench vide it order dated 16.09.2021 directed the Applicant/Operational Creditor to serve Substitute Notice of service through Newspaper publication upon the Respondents. Part of the Order dated 16.09.2021 is reproduced below:

> "Learned Counsel Mr. Vijay Nath Jha is present on behalf of the Petitioner. No one is present on behalf of the Respondent.
>
> 2. During the proceedings, the learned Counsel appearing for the Petitioner has requested that his client desires to pursue the matter and he may be allowed to serve notice to the Respondent by way of substitute service through News Paper publication. The Petitioner is allowed for substitute service of notice upon the Respondent through publication in Two Daily News

Papers one in English and the other in Vernacular Language published from Guwahati by giving 14 days' clear notice before the next date of hearing. Publication is to be within 10 days from today and the Petitioner is to file copy of the News Paper publication before the Registry within 3 weeks."

7. The Applicant as per the direction of this Bench vide order dated 16.09.2021, served Substitute Service of notice upon the Respondents by publication in two newspapers – one in English and the other in vernacular language giving clear 14 days' notice to the Respondent to appear. Copy of the same has been submitted to the Registry. The Applicant has filed an Affidavit in this regard on 05.10.2021 stating that the notice has been published in the newspapers on 26.09.2021.

8. The bench on 11.11.2021, while reserving the matter, passed the following order:

"Learned Counsel Mr. Vijay Nath Jha is present on behalf of the Petitioner and he has clarified the points in compliance of our earlier Order dated 29.10.2021.

2. Substitute service of notice upon the Respondent in two Newspapers have been done by the Petitioner. Matter was taken up on 30.07.2021, 18.08.2021, 03.09.2021, 16.09.2021 and 28.10.2021 but the Respondent has not appeared despite sufficient opportunities given. The Counsel for the Petitioner has prayed for admission of the Application."

O R D E R

9. Heard the Learned Counsel of the Applicant at length. Despite giving sufficient opportunities to the Respondent to appear, no one from the CD appeared. The Applicant/Operational Creditor has also published substitute notice in two newspapers on 26.09.2021 but in spite of that, the Respondent failed to appear before this Bench.

10. **The Applicant has succeeded in establishing the debt due to the OC/Applicant has not been repaid and thereby defaulted in repayment of the amount found due to the OC. In view of the above said discussions, this Tribunal is satisfied that the application filed under section 9 of the**

Insolvency & Bankruptcy Code is complete and that the Corporate Debtor has committed default in repayment of debt due to the Applicant. The Applicant has furnished the following in support of its claim:

i. **Dealership Agreement dated 29.07.2008**, **whereby the Applicant Company/Operational Creditor had appointed the Respondent Company/Corporate Debtor as its Authorized Dealer to sell its machines, equipment and spare parts and provide after sale services in the territory;**

ii. **Debt is due, payable and defaulted as per the Arbitral Award passed on 05.06.2017 for Rs. 7,08,23,900.00 plus interest and costs. The total claim amount is Rs. 12,43,49,446.00;**

iii. **Date of Default- 03.09.2017;**

iv. **Application has been filed within the limitation period, as per Hon'ble Supreme Court Order dated 08.03.2021 in Suo Moto Writ (Civil) No. 03/2020, the last date of filing Application was 13.06.2021 but this Application has been filed on 27.04.2021.**

Hence, the present Application is admitted ex-parte with the following directions/observations. The date of admission of this petition is 10.12.2021.

11. The Applicant has not proposed the name of an IRP, therefore, this Bench appoints Mr. Purshotam Gaggar, having registered address at 3rd Floor, Advika, House, number 87, MG Road, Near Sukreshwar Ghat Park, Pan Bazaar, Guwahati, Assam 781001, having IP Registration no. IBBI/IPA-001/IP-P00487/2017-18/10875, Mobile Number: +919864025016 and Email id: purshotamgaggar@hotmail.com, gaggarp@gmail.com, as the Insolvency Resolution Professional of the Corporate Debtor. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016. The same is to be filed by the IRP within 3 days from the date this order is uploaded on NCLT site.

12. The Interim Resolution Professional is further directed to make public announcement of moratorium in respect of Corporate Debtor soon after receipt of an authenticated copy of this order and to act further as per the order/directions issued by this Adjudicating Authority and to follow the provisions under Section 13 and 14 and other relevant provisions of the Insolvency and Bankruptcy Code. The IRP has to submit Assignment Declaration before the Registry within 3 days from the date this order is uploaded on NCLT site.

13. The IRP is hereby advised to adhere to the time limit as stipulated for completion of the Corporate Insolvency Resolution Process ("CIRP") and perform the duties as specified under Section 17, 18, 20 and 21 of I&B Code. The IRP shall perform all his functions contemplated, inter-alia, in Sections 15,17,18,19,20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the 'Code', Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other persons associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the IRP as may be required by him in managing the day-to-day affairs of the Corporate Debtor. In case there is any violation, the IRP would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The IRP shall be under duty to protect and preserve the value of the property of the Corporate Debtor as a part of its obligations imposed by Section 20 of the Code, Rules and Regulations.

14. One of the prime objectives of the Insolvency and Bankruptcy Code, 2016 is to quickly find out a viable Insolvency Resolution Plan for the Corporate Debtor and in order to have a Resolution Plan Viable, feasible and implementation successful, in the era of Minimum Cost of funds-based Lending Rate ("MCLR")/Repo Linked Interest rate/Interest rate falling regime and competitive market condition, the Committee of Creditors (CoC) may explore, while finalizing the Resolution Plan for the Corporate Debtor, the possibility of loading reasonable rate of interest.

15. We direct the Applicant to deposit a sum of Rs. 2 (Two) Lakhs with the Interim Resolution Professional, namely Mr. Purshotam Gaggar, to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

16. Registry is hereby directed to communicate the authenticated copy of this order to the Operational Creditor, Corporate Debtor, the IRP and also to the Registrar of Companies, Guwahati, NER, immediately through speed post/registered post and e-mail, if available. In addition, a copy of the order shall also be forwarded to IBBI for its records.

17. The commencement of Corporate Insolvency Resolution Process shall be effective from the date of this order.

18. **Thus, the present Application CP (IB) 14/GB/2021 filed under Section 9 of the IBC stands admitted ex-parte today i.e. 10.12.2021 with the above observations and directions.**

Sd/-

(**Prasanta Kumar Mohanty)**
Member (Technical)
& Adjudicating Authority

Sd/-

(Rohit Kapoor)
Member (Judicial)
& Adjudicating Authority