

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

CP(IB)/36(CHE)/2021

*(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

*In the matter of **M/s.Effimax Engineers Private Limited***

Mr. Narendra Sakariya

Prop.Of. M/s. Madras Steels & Tubes
No.45 (old No.21),Halls Road,
Kilpauk
Chennai – 600010.

... Operational Creditor

-Vs-

M/s. Effimax Engineers Private Limited,

Flat No.3, Plot No.1051,
"I" Block, 18th Main Road, Anna Nagar West,
Chennai – 600040.

... Corporate Debtor

Order pronounced on 15th December 2021

CORAM

**JUSTICE (RETD) S.RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

For Operational Creditor : J. Lenin, Advocate

For Corporate Debtor : S.A. Inbavadivu Advocate

ORDER

Per: Justice(Retd) S.RAMATHILAGAM, MEMBER (JUDICIAL)

This is an Application filed by **NARENDRA SAKARIYA**
(hereinafter referred to as "**the Operational Creditor**") against

M/s. EFFIMAX ENGINEERS PRIVATE LIMITED (hereinafter referred to as "**the Corporate Debtor**") under Section 9 of the Insolvency & Bankruptcy Code, 2016, seeking thereof to initiate the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. From Part-I of the Application, it is seen that the Operational Creditor is a Proprietorship firm. From Part-II of the Application, it is seen that the Corporate Debtor is a Private Limited Company incorporated on 12.12.1995 and the registered address of the Corporate Debtor as per the Application is stated to be situated at Flat No.3, Plot No.1051, "I" Block 18th Main Road, Anna Nagar West, Chennai - 600040 . From Part-III of the Application, it is seen that the Operational Creditor has not proposed the name of the Interim Resolution Professional and left it to the discretion of this Tribunal to appoint the IRP.

3. From Part-IV of the Application, it is seen that the Operational Creditor has claimed a sum of Rs.1,32,04,740/- towards the principal amount and Rs.64,71,272/- towards interest calculated at 24% p.a therefore the total outstanding amounts to Rs.1,96,76,012/- which is due from and payable by the Corporate Debtor. From Part-V of the Application, it is seen that the

Operational Creditor has enclosed the list of documents, records and evidence of default.

4. The Learned Counsel for the Operational Creditor submitted that the Operational Creditor has supplied Iron and Steel materials to the Corporate Debtor on various dates based on the purchase orders placed by them. It was submitted that the Corporate Debtor has not yet paid the sum which was outstanding as against the said invoices. The Corporate debtor has not disputed the invoices, e-mails and demand notices sent by the Operational Creditor which clearly proves that the Corporate Debtor having admitted the liability but has not made the payment.

5. It was submitted by the Learned Counsel for the Operational Creditor that since no payment was forthcoming from the Corporate Debtor, the Operational Creditor has issued a Ist Demand Notice under Section 8 of IBC, 2016 to the Corporate Debtor on 11.02.2020, Further, the Operational Creditor has also filed an Affidavit as mandated under Section 9(3)(b) of IBC, 2016 stating that the Corporate Debtor after the receipt of the Demand Notice has failed to pay the unpaid 'operational debt'. The Corporate Debtor has filed the reply notice for the same seeking extension 90 days of time period for the payment.



5.1 The Corporate Debtor has filed counter on 02.03.2020 by admitting the liability of the principal amount of Rs.1,32,04,740/- under various invoices and regrets the claim amount of Rs.42,88,178 being the interest amount at 24% p.a accruing and rising each day from dates of default to 11.02.2020.

5.2 The rejoinder has been filed by the operational Creditor on 18.03.2020 thereby rejecting the request for extension of time period of 90 days and waiver of interest during the period of default. Further the Operational Creditor issued IInd Demand notice on 04.11.2020 seeking the payment of outstanding amount. For which no reply been filed by the Corporate debtor; under such circumstances, the Operational Creditor has filed the present Application before this Tribunal on 02.02.2021 seeking initiation of CIRP as against the Corporate Debtor.

6. The Learned Counsel for the Corporate Debtor submitted that the present Application is not maintainable in view of law and fact of the case. The Corporate Debtor states that the filing of application for Insolvency Resolution Process for the supply made on 11.02.2020 with leverage of 90 days payment which falls very well before the Covid-19 period which commenced on 23.03.2020 and extended up to 31.12.2020. But the application was filed on 02.02.2021 which shows the cruelty of the Operational Creditor.

Further Corporate Debtor submits that one of its directors Mr. Vincent Ferer Babu died on 26.02.2021 due to road accident. Hence this application is not legally maintainable. Under such circumstances, the Learned Counsel for the Corporate Debtor prayed for the dismissal of the present Application.

7. Heard the submissions made by the Learned Counsel for both the parties. The first issue raised by the Learned Counsel for the Corporate Debtor that the proprietorship cannot file an Application seeking initiation of CIRP in relation to the Corporate Debtor seeking covid-19 exclusions. However, the averment made in para 2 of the reply statement is incorrect, since the date of issue of demand notice is 11.02.2020 not the date of last supply. As the date of invoice of the last supply made was 07.08.2019, it does not fall under the sec 10(A) of IBC which is as follows:

10A. Notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified² in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

8. In relation to the second issue raised by the Corporate Debtor as the initiation of the CIRP against the corporate debtor is

not maintainable as there exists only one Director in the Company due to demise of the other director. The Hon'ble Tribunal states as per Section 161 (4) of the Companies Act 2013:

"the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board"⁵[which shall be subsequently approved by members in the immediate next general meeting]

Thus, the defence raised by the Corporate Debtor in respect of the same is to be set aside.

9. The very fact that the Corporate Debtor has admitted their liability to the tune of Rs.1,32,04,740/- proves that there is a 'default' on the part of the Corporate Debtor. Further, the said default is also in excess of a sum of Rs.1 Crore, which was prevalent at the time of filing of the Application i.e. on 02.02.2021. Further, it is also pertinent to note that the default arising in the present Application is much prior to the advent of the Covid-19 pandemic and hence the Corporate Debtor also cannot seek shelter under Section 10A of IBC, 2016. Under the said circumstances, this Tribunal, is left with no other option than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor.

10. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition, as filed by the Operational Creditor, is required to be admitted under Section 9(5) of the IBC, 2016. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period between July 2021–December 2021 appoints **MR. T SIVAGURUNATHAN**, with Reg. No. IBBI/IPA-001/IP-P-01343/2019-2020/12524(email id: ca.sivagurunathan@gmail.com) as the “Interim Resolution Professional” subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.



11. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

- a. *The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
- d. *The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the respondent.*

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

12. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

13. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

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.

14. The Operational Creditor is directed to pay a sum of Rs.1,00,000/- (*Rupees One Lakh Only*) to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

15. Based on the above terms, the Application stands **Admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be

also furnished with copy of this Order forthwith by the Registry,
who will also communicate the initiation of the CIRP in relation to
the Corporate Debtor to the Registrar of Companies concerned.

-Sd-

B. ANIL KUMAR
MEMBER (TECHNICAL)

-Sd-

Justice (Retd.) S. RAMATHILAGAM
MEMBER (JUDICIAL)