राष्ट्रीय कंपनी विधि अधिकरण
National Company Law Tribunal
अमरावती न्यायपीठ
Amaravati Bench

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT HYDERABAD

*** *** ***

TCP (IB) No. 76/9/AMR/2019
IN
CP(IB) No.754/HDB/2018

Petition 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
AND

In the matter of
M/s. EMPEE SUGARS AND CHEMICALS LIMITED

Between

M/s. Global Coal Ventures Private Limited,
No.3, Nathan Street, 2nd Floor,
Harington Road, Chetpet,
Chennai, Tamilnadu -600 031.

... Operational Creditor

AND

M/s. Empee Sugars and Chemicals Limited,
Registered Office at: Ayyapreddipalem,
Naidupet Mandal, Nellore District,
Andhra Pradesh – 524 126.

... Corporate Debtor

<u>Orders pronounced on: 24.02.2022</u>

<u>CORAM</u>:

Justice Telaprolu Rajani, Member Judicial

Appearance:

For Operational Creditor : Mr. T.V.P.Sai Vihari, Advocate.

For Corporate Debtor : Mr.Challa Gunaranjan, Advocate

ORDER

1. This Application is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (referred to as "Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s. Global Coal Ventures Private Limited ("hereinafter referred to as Operational Creditor") seeking initiation of Corporate Insolvency Resolution Process (CIRP), granting moratorium and appointment of Insolvency Resolution Professional (IRP) in respect of M/s. Empee Sugars and Chemicals Limited ("hereinafter referred to as Corporate Debtor") alleging that the Corporate Debtor committed default in making payment of Rs.4,63,19,366/- towards invoices raised against the goods supplied.

2. The facts as put forth in the Petition are that, the Corporate Debtor (CD) is a Company Limited by shares and is engaged in the business of manufacture of sugar and generation of power. The Operational Creditor (OC) is in the business of trading of imported steam coal. The Operational Creditor entered into multiple purchase orders and high seas agreements, where by

the Operational Creditor supplied coal to the Corporate Debtor vessels and the supplies have been completed in the month of October, 2016. A total outstanding amount of Rs.3,79,47,945/- is due from the Corporate Debtor. The Corporate Debtor created mortgage by deposit of title deeds in favour of Operational Creditor as a first charge, over the immovable property as security for the debt. Operational Creditor requested for payment of the debt repeatedly, but no payments were made. The Corporate Debtor thereafter, issued 5 cheques which were dishonoured. The Operational Creditor issued notice under Section 8 of IBC, 2016, on 23.10.2018 demanding the payment of the outstanding dues. Since the Corporate Debtor did not clear the outstanding dues, this Company Petition is filed seeking for initiation of CIRP.

3. The Corporate Debtor filed counter, denying the averments made in the Petition and further contending that, to file an Application under Section 9 of IBC, 2016, it is mandatory that the demand notice under Section 8 of IBC, 2016 has to be served on the Corporate Debtor at its registered office, but such demand notice was not served in this case. Though the demand notice annexed to the Petition is addressed to the registered office of the Corporate Debtor, there are neither postal receipts evidencing that the Operational Creditor had sent any

communication to the Corporate Debtor, nor does the alleged tracking report state that any document has been delivered. Neither any bill of lading nor any delivery orders have been issued to the Corporate Debtor. All the alleged invoices annexed to the Petition bear the same date as that of the purchase order. The debit notes annexed to the Petition do not constitute any operational debt, as they do not form part of the purchase orders and do not come within the meaning of goods or supply. Neither the invoices/bill of lading nor debit notes are served on the Corporate Debtor.

The National Company Law Appellate Tribunal (NCLAT) in ***CA (AT) (Ins.) No.31/2018 between Ramco Systems Vs. Spicejet Ltd.,*** held that *"there is nothing on the record to suggest that the invoices dated 23.07.2014 were forwarded or received by the Respondent. The Adjudicating Authority has rightly refused to entertain application under Section 9 which requires strict proof of debt and default."*

The NCLAT in ***CA (AT) (Ins.) No.1354/2019*** *between* ***Neeraj Jain vs. Cloudwalker Streaming Technologies Private Limited and Anr.,*** held that "*as per* proforma of Form-III, the Operational Creditor has to attach the documents with the notice, to prove the existence of Operational Debt and the amount in default."

The demand notice has not been served, and the documents establishing supply of goods have not been annexed to the Petition. Hence this Petition is liable to be dismissed.

4. The Operational Creditor filed rejoinder, contending that the Operational Creditor has sent the notice through Registered Post (RP), and the same was delivered on 26.10.2018 as per the consignment No.RT175567720IN. The notice was served at the registered office and administrative office of the Corporate Debtor. In the communication, dated 01.12.2017 there is a clear admission of supply of goods to the Corporate Debtor. They never raised any dispute over the goods earlier and they are raising it now for the first time. The debit notes which are filed along with the Company Petition, constitute the Operational Debt.

5. Heard counsel for the Operational Creditor and for the Corporate Debtor. Written submissions are filed by Counsel for the Corporate Debtor.

Though in the written submissions it was not mentioned anything with regard to the validity of the authorization given to the authorized signatory on the Company Petition, the Counsel for the Corporate Debtor raised it in the oral arguments. He contends that the authorization given to the authorized signatory is not in respect of initiating CIRP under Section 9 of IBC, 2016. The authorization, however, authorises the authorized signatory to sign and submit proof of claims along with such affidavits, representations and various documents electronically and/or physically and to make applications, communications, representations, modifications or alterations and may submit supplementary documents or clarifications in support of the claim and other relevant documents on behalf of the Company as and when required and act as authorized signatory of the Company on all the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, matters or to delegate these powers in favour of any other person. It is true that the said authorization does not specifically authorize filing of Petition under Section 9 of IBC, seeking to initiate CIRP. However, the Operational Creditor filed an authorization dated 24.01.2022 ratifying all the acts/deeds inclusive of filing TCP (IB) No.76/9/AMR/2019 before the NCLT, Amaravathi Bench. Since, the said resolution ratifies the action of the authorized signatory in filing this Application, the Application can be considered as being filed by an authorized signatory. I am of the considered opinion that the absence of authorization as on the date of filing of the Application is a curable defect and hence, the ratification of the signing of the application by the Authorized Signatory would overcome the defect if any.

6. The Counsel for the Corporate Debtor relies on a judgment of the NCLT, Mumbai Bench in the matter of ***Softwareone India Private Limited Vs. Magnamious System Private Limited dated 11.03.2019,*** wherein, the NCLT relied on an order passed by the NCLAT in the matter of ***Palogix Infrastructure Private Limited Vs. ICICI Bank***, wherein, it was held that since, on the date of issuance of Section 8 notice under IBC the Petitioner was not authorized for the initiation of CIRP, by implication of the judgment of the Supreme Court of India, by ratification of Board Resolution, notice under Section 8 of IBC cannot be validated. The NCLAT did not hold that ratification of the acts of the Authorized Signatory is bad. It only considered that the authorization was only given for initiation of CIRP and hence, the notice which is mandatory and which is given without authorization becomes invalid. With the above it can be concluded that the Company Petition was filed with proper authorization.

7. So far as, validity of Section 8 notice is concerned, the ratification in this case is done in respect of all the acts/deeds inclusive of filing the CP which means that the giving of section 8 notice by the Authorised Signatory is also validated by the said resolution. Apart from that, the earlier authorization is very widely worded which gives authorization to make applications, communications etc., Hence, I am inclined to hold that the notice given under Section 8 of the IBC and the Application filed under Section 9 of the IBC are under proper authorization.

Though a question was raised with regard to the service of notice on the proper address the same was not agitated further. In the rejoinder it is specifically mentioned that the notice was delivered at the registered office of the respondent and proof of service is also filed before the Tribunal. In ***Alloysmin Industries Vs. Raman Casting Private Limited,*** the NCLAT, New Delhi held that rejection of the application on a wrong presumption that demand notice is to be served on the registered office of the Corporate Debtor and not the Corporate Office is an error. It was held that if demand notice under Section 8(a) was served on the Corporate Debtor either on its registered office or its Corporate Office it should be treated to be a valid service.

8. The second aspect which the Counsel raises is with regard to the non-filing of invoices along with the notice. He relies on the judgment of National Company Law Appellate Tribunal (NCLAT) dated 08.05.2019 in ***CA (AT) (Ins.) No.31/2018 between Ramco Systems Vs. Spicejet Ltd,*** wherein it was held that there was nothing on record to suggest that the invoices dated 23.07.2014 were forwarded and received by the Respondent. Therefore, the demand noticed issued on 24.04.2017 as relates to invoice dated 23.07.2014, though it cannot be held it is barred by limitation, but in the absence of specific evidence relating to invoices actually forwarded by the Applicant and there being a doubt we hold that the Adjudicating Authority had rightly refused to entertain an Application under Section 9 of IBC which requires strict proof of debt and default. But however, the said judgment is not placed before this Tribunal. So also the judgement in ***Neeraj Jain VS. Cloudwalker Streaming Technologies Limited and another*** rendered by NCLAT. However, the Counsel for the Petitioner relies on a judgment rendered by the NCLAT, New Delhi 21.01.2019 between ***Alloysmin Industries Vs. Raman Casting Private Limited*** wherein it was held that the Respondent has not disputed that the claim of the Appellant is outstanding from the Respondent as per the ledger account maintained by the

Appellant. It is also not disputed that inspite of repeated requests the Corporate Debtor failed to make payment and thereby defaulted. The Corporate Debtor has not taken any plea that there is an existence of dispute and in view of the foresaid facts the NCLAT found fault with the Adjudicating Authority in rejecting the Application. In this case there is a clear admission of debt, there are exchange of letters between the parties. In letter dated 18.04.2017 which is addressed by the Operational Creditor to the Corporate Debtor it was intimated that the cheques presented by the Corporate Debtor were dishonoured and the outstanding amount of Rs.3,79,47,945/- has become overdue. In reply to the said notice, a mail was sent by the Corporate Debtor stating "regarding your outstanding dues the management would like to settle the same in eight equal instalments from July, 2017. You may please contact us to take it forward. The outstanding amount will be reconciled and finalized". A letter dated 21.06.2017 is issued in response to the said E-mail, calling upon the Corporate Debtor to issue eight post-dated cheques in case they would like the Operational Creditor to accept their proposal of paying the due amount in eight instalments which would amount to accepting the request of the Corporate Debtor to pay the amount in eight instalments. A reply was issued by the Corporate Debtor on 24.06.2017 intimating that the Board of Company has taken a decision not to issue Post-Dated Cheques (PDCs) for any payment and once again undertaking to clear the dues in eight instalments stating from July, 2017. A letter was issued by the Operational Creditor on 04.07.2017 rejecting the proposal of the instalments without Post-Dated Cheques (PDCs) and also rejecting the plea of waiver of interest at 12% p.a. on the delayed payment. A letter dated 27.07.2017 was issued by the Corporate Debtor, categorically admitting that as per the books of the accounts the balance as on 31.03.2017 stands at Rs.3,79,47,945/- and they are liable to pay the company the said amount as claimed by the letter of the Operational Creditor dated 18.07.2017. This letter seems to be in response to the letter dated 18.07.2017 by the Operational Creditor calling upon the Corporate Debtor to confirm the balance due to them as on 31.03.2017. Hence, when there is a clear admission on the part of Corporate Debtor with regard to the debt due as on 31.03.2017 which is the same amount which is claimed in the CP, rejecting the application for not filing invoices would be a travesty of justice.

There seems to be no pre-existing dispute as contended and hence, the judgment of the NCLT, Chennai in IBA/937/2019 dated 05.05.2020 ***between Cellpap BV Vs. Oren Hydrocarbons Private Limited***, does not have any application. The judgment of the High Court of Judicature at Bombay in ***Chamber Summons No.1705 of 2008 in Suit No.3382 of 2007 between M/s.Hari Shree Enterprises Vs. M/s.Vikas Housing Limited and others*** also is not considered as relevant, since, the facts of this case and the said judgment differ. The observations with regard to the institution of suit are that it was not a technical matter and it has far reaching effects and it would affect the policy and events of the company and unless the power to sue is conferred upon a particular director he would have no authority to sue and such a power can be conferred upon only by the Board of Directors by passing a resolution in that regard. In this case the powers conferred are on a particular person and the deeds done by him are ratified by a subsequent resolution. The judgment of the NCLT, Mumbai Bench in ***CP (IB) 2161/MB/C-IV/2019 dated 06.05.2020 between Rushabh Civil Contractors Private Limited Vs. Centrio Lifespaces Limited*** does not find any relevance, since the facts differ. Hence, in the light of the above discussion it can be safely concluded that the Corporate Debtor is due an amount of Rs.4,63,19,366/- to the Operational Creditor and has defaulted in discharging the said due and hence, CIRP can be initiated against the Corporate Debtor.

9. Hence I am of the considered view that it is a fit case to admit and order initiation of Corporate Insolvency Resolution Process

(CIRP) against the Corporate Debtor. The Operational Creditor did not suggest any name as Insolvency Resolution Professional (IRP) and sought the Tribunal to appoint an IRP. Hence Mr.Immaneni Eswara Rao, (Registration No. IBBI/IPA-001/IP-P01224/2018-2019/11943) as Insolvency Resolution Professional (IRP).

ORDER

The Company Petition is admitted. The Corporate Insolvency Resolution Process of the Corporate Debtor shall commence from this date and shall be completed within 180 days hence.

i. Mr.Immaneni Eswara Rao, **(Registration No. IBBI/IPA-001/IP-P01224/2018-2019/11943)**, having office at 40-26-22 , Mohiddin Street, Opp. BSNL Exchange, Labbipeta, MG Road, Vijayawada, Krishna, Andhra Pradesh-520010; e-mail: **ier_ca@outlook.com**; Mobile: 9248123333 is appointed as the Interim Resolution Professional. No disciplinary proceeding is pending against him as per the IBBI website. He is directed to file his written consent in Form No. 2 forthwith.

ii. He is directed to take charge of the Corporate Debtor's management forthwith and take necessary steps in furtherance of the CIRP in terms of Sections 13(2), 15, 17, 18 and 20 of Code and Rules made thereunder.

iii. Moratorium in respect of the Corporate Debtor is hereby declared in terms of Section 14 of the Code.

iv. The Directors, Promoters or any other person(s) associated with the management of Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 of the Code for effectively discharging his functions under the Code.

v. The Registry shall communicate the order to the Operational Creditor and the Corporate Debtor forthwith.

vi. The Operational Creditor and the Registry shall send the copy of this order to IRP for necessary compliance.

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu