

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. No. 1319/I&BP/2017

Under section 9 of the IBC, 2016

In the matter of
Elecon Engineering Co. Ltd.
.... Applicant

v/s.

Enviro Bulkk Handling System Pvt. Ltd.
.... Respondent

Order delivered on: 04.12.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Ms. Shilpa Kapil, Adv. & Mr. Mahesh Kulkarni, Rep.
For the Respondent : Mr. P.D. Saupde, Adv.

Per V. Nallasenapathy, Member (Technical)

ORDER

This Company Petition is filed by Elecon Engineering Co. Ltd. (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Enviro Bulkk Handling Systems Pvt. Ltd. (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default in making payment to the extent of ₹ 4,10,99,075/- inclusive of interest @ 22% p.a. up to 31.03.2017, the actual date of default being 23.03.2010, by invoking the provisions of Sections 8 and 9 of I & B Code (hereinafter called "Code") read with Rule 5 and 6 of Insolvency & Bankruptcy (AAA) Rules, 2016.

2. The Petitioner is engaged in design, manufacture and supply of equipments for coal handling. On 21.02.2009 Corporate Debtor placed Purchase Order on the Petitioner for the supply of engineering equipments such as crusher, stacker, reclaimer, etc. for ₹8,35,25,000/-. One of the terms in the Purchase Order provides that Corporate Debtor have to release 10% of

Order value as advance against Advance Bank Guarantee to be provided by the Petitioner. As per the instructions of Corporate Debtor, the Petitioner supplied the manufactured material between 03.03.2010 and 10.06.2011 and the unpaid invoices are annexed to Petition at page Nos. 24 to 232. The amount in default is given in the computation as below:

	₹
a) Unpaid invoices	1,07,52,502.00
b) Retention money	83,52,500.00
c) Interest @ 22% p.a.	<u>2,58,94,023.00</u>
	4,49,99,075.00
<u>Less:</u>	
Debit Note as per Minutes of Meeting (MoM) dtd. 9.7.2016	<u>39,00,000.00</u>
Total	<u><u>4,10,99,075.00</u></u>

3. The demand notice under the IB Code was issued by the Petitioner on 03.04.2017 which was not responded by the Corporate Debtor. Admittedly, the claim pertains to invoices raised between 03.03.2010 and 10.06.2011, the Petitioner to say that the claim is not hit by limitation, heavily relies on a minutes of a meeting dated 09.07.2016 between the officers of the Petitioner and Corporate Debtor, which is reproduced as below:

"Minutes of Meeting between M/s. Enviro Bulkk & M/s. Elecon EPC dated 09.07.2016 held at Enviro Head Office, Pune

Members Presents:

Enviro Bulkk

Mr. Milind Dixit

Mr. Pravin Dumale

Mr. Nitin Patil

Elecon EPC

Mr. Kushal Patel

Mr. Alpesh Thakar

Points were discussed during meeting are as under:

- a) *Debit of ₹39 Lacs is accepted by M/s. Elecon, details of debit note is as per attached Annexure.*

b) Enviro Bulkk levied Liquidated Damages of ₹41.76 Lacs however, Elecon has not accepted the same. This issue of Liquidated Damages is to be discussed at higher level of Elecon & same to be resolved before this month end.

c) Enviro agreed progressive outstanding payable to Elecon is ₹107.525 Lacs."

4. The Corporate Debtor contends that the Petitioner issued first Winding up Notice on 16.07.2013 demanding ₹2,18,42,633 (₹1,91,05,004 as principal and ₹27,37,629/- as interest up to 31.03.2013), second Winding up Notice on 17.11.2016 demanding ₹3,96,13,004/- with future interest @22% p.a. under Sections 433, 434 and 430 of the Companies Act, 1956 and under Sections 271 and 272 of the Companies Act, 2013 by annexing statement of account as on 14.11.2016 and minutes of meeting dated 09.07.2016, the second winding up notice issued after three years of the first notice, hence the claim is barred by limitation.

5. The Corporate Debtor had given a reply to the second Winding up Notice vide its letter dated 02.01.2017, saying that (i) the claim is barred by limitation, (ii) invalid due to variations in the contents of the first notice and second notice, (iii) there are unresolved disputes which is evident from the minutes of meeting dated 09.02.2016, (iv) there is no resolution of disputes relating to liquidated damages of ₹41.76 lakhs, (v) no claim for interest is mentioned in the minutes of meeting dated 09.07.2016, (vi) no statement on refund of retention money of ₹83.52 lakhs is included in the said minutes of meeting, (vii) MoM dated 09.02.2016 is not an admission of ascertained debt.

6. In respect of the first point of the reply, admittedly, the supply of material by the Petitioner to the Corporate Debtor pertains to the period 03.03.2010 to 10.06.2011. The claim is barred by limitation as on 10.06.2014. The MOM is dated 09.02.2016, wherein the Corporate Debtor agreed progressive outstanding of ₹107.525 lacs. To save limitation, the debt should have been acknowledged on or before 09.06.2014, but here the acknowledgement had taken place only on 09.02.2016 which could not save limitation and the logical conclusion is that the debt is barred by Limitation.

7. In respect of the second and third point of reply, even though the Corporate Debtor states that there are unresolved disputes, the facts depicts otherwise, the debit note issued for ₹39 lacs is already resolved by both the parties, the liquidated damages of ₹41.76 lacs discussed in the meeting is not included in this claim, hence variation in the amount of claim in first, second and the demand notice under the IBC cannot be faulted. In respect to interest claim, when the payment is not made by the Corporate Debtor, in business dealing when the party who is liable to make the payment delays it unusually for a long time, the consequence of interest payment will arise but the only question is at what rate. Charging 22% simple interest is not abnormal in commercial dealings and hence the claim of interest by the Petitioner cannot be held to be unfair. As far as the retention money is concerned, the same has to be repaid after the contract is executed, it is not the case of the Corporate Debtor that there is no retention money or the retention amount is wrong or the retention amount claimed by the petitioner is wrong and further, there is no material to show that the retention money is forfeited by the Corporate Debtor and hence the inclusion of retention money in the claim is in order.

8. The next point relates to the existence of dispute. The Corporate Debtor enclosed umpteen number of e-mail correspondences with the Petitioner wherein many issues relating to short supply, delay in supply, defective execution of project, etc. were raised. There is an e-mail to the Petitioner on 23.09.2011, on the subject of extension of Advance Bank Guarantee dated 26.08.2008 for ₹81,72,500/- expiring on 30.09.2011, informing that "please note nowhere we have agreed saying that the machines supplied by you are commissioned and running as per its duty requirements. It has been notified that even today stackers and re-claimers have problems at site i.e. machines are not working. As you have not submitted Performance Bank Guarantee (PBG), we do not have choice to encash the said Advanced Bank Guarantee if it is not extended by you till 30.09.2012". However, subsequently, there is nothing on record to suggest that the Corporate Debtor has initiated any action till now, in furtherance of the disputes. Further, MOM dated 9.7.2016, wherein issues were discussed and resolved, there is no whisper of existence of any dispute by the representative of the Corporate Debtor. Hence, the defense of existence

of dispute is a moonshine defense, therefore it leads to a logical conclusion that there is no existence of dispute or whatsoever.

In view of the judgement of the Hon'ble NCLAT in the case of *Speculum Plast Pvt Ltd vs. PTC Techno Pvt. Ltd.* decided on 8.11.2017 holding that law of limitation is not applicable to IB Code, 2016, the contention of the Corporate Debtor that the claim is barred by limitation become untenable therefore we are of the view that it is a fit case for admission.

9. This Bench having satisfied with the Application filed by the Operational Creditor which is in compliance of provisions of section 8 & 9 of the Insolvency and Bankruptcy Code admits this Application declaring Moratorium with the directions as mentioned below:

- i) That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the 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 moratorium period.
- iii) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

- iv) That the order of moratorium shall have effect from 04.12.2017 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, 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 the Code.
10. Accordingly, this Petition is admitted.
11. This Bench makes a reference to the Insolvency and Bankruptcy Board of India (IBBI) for the recommendation of Insolvency Professional for appointment as Interim Resolution Professional.
12. The Registry is directed to forward a copy of this order to IBBI and post this matter after receipt of reply from IBBI for the appointment of IRP.
13. The Registry is hereby directed to communicate this order to both the parties.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)