

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,  
KOLKATA BENCH  
KOLKATA**

**C.P.(IB) No.650/KB/2017**

**Coram: Mr. Jinan K.R., Member (Judicial)  
Mr. Madan B. Gosavi, Member (Judicial)**

**In the matter of:**

**An application under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.**

**In the matter of:**

**MITCON CONSULTANCY & ENGINEERING SERVICES LTD.,** a Company incorporated under the provisions of the Companies Act, 1956 having its Registered Office at 1<sup>st</sup> Kubera Chambers, Shivaji Nagar, Pune 411 005, in the state of Maharashtra outside the aforesaid jurisdiction,  
... Applicant / Operational Creditor  
Versus

**In the matter of:**

**GOBIND SUGAR MILLS LIMITED,** a private limited Non-Government Company, limited by shares registered under the provisions of the Companies Act, 1956 having its registered office at 9/1 R.N. Mukherjee Road, Kolkata 700 001, in the state of West Bengal within the aforesaid jurisdiction.  
.... Corporate Debtor

**Counsel on Record:**

Ms. Debaleena Ganguly Advocate ] For the Operational Creditor  
Ms. Tutul Das, Advocate ]  
Mr. Amar Singh Advocate ]  
Mr. Varun Sharma Advocate - For the Corporate Debtor  
Mr. Sumit Pahwa, Advocate

**Date of Pronouncement of Order: 7th May, 2018**

Sd

Sd

## ORDER

Per Shri Madan B. Gosavi, Member (Judicial)

1. This petition has been filed under Section 9 of Insolvency and Bankruptcy Code 2016 (in short I&B Code) read with Section 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 is filed by M/s Mitcon Consultancy and Engineering Services Limited / Operational Creditor against the respondent M/s Gobind Sugar Mills Limited Limited / Corporate Debtor to initiate corporate insolvency resolution process for non-payment of dues amounting to Rs.1,66,026.25 together with interest @18% p.a. from 17.08.2017 till realization of payment and other expenses.

2. The facts giving rise to dispute between the parties are as follows:

3. The Operational Creditor provided the Corporate Debtor certain services as per the work order dated 02.08.2013. To claim the charges for the services rendered, they raised invoice from time to time. The stages of making the payment were agreed by both the parties as 10% of total amount in advance, 25% on submission of application to Ministry of New and Renewable Energy (MNRE) Government of India, 30% upon submission of required clarification from the Ministry, 25% upon completion

Sd

Sd

of scrutiny of tender by the Committee and 10% upon receipt of sanctioned letter of capital grant by the corporate debtor.

4. It is argued by the Operational Creditor that Corporate Debtor made payment against certain invoices. They received a total amount of Rs.2,70,000/- from the Corporate Debtor as per the payment schedule set out in the work order. They did their job and they submitted application to MNRE claiming capital grant for and on behalf of the corporate debtor. They submitted the required clarification of certain queries raised by MNRE. The proposal had gone through by the Scrutiny Committee of MNRE and sanction letter of the grant is yet to be received.

5. According to the Operational Creditor that since they completed their job up to the fourth stage, they claim payment of Rs.1,66,026.25 together with interest and other expenses. But the corporate debtor failed and neglected to pay the dues on one pretext or the other. Hence, on 16.08.2018, they served on the corporate debtor notice under section 8 of I&B Code claiming the amount. On 25.08.2017 the corporate debtor replied to their notice stating that the amount claimed by them is not due because MNRE is yet to release the capital grant. Thereupon, they (Operational Creditor) informed the corporate debtor that they have raised an invoice and claimed the payment as per the terms of the work order. They have not claimed payment, to be claimed by them at the last stage. Despite such clarifications by them and repeated demands of outstanding, corporate debtor showed inability to pay the amount and hence, the petition is filed.

Sd

Sd

6. Upon service of notice of this petition on Corporate Debtor, they appeared. They filed affidavit in reply and denied the claim. According to them, this is a frivolous petition filed by the petitioner claiming the amount which is not due and only to harass them and as such, the petition is not maintainable. They further contended that in the year 2013 they had approached the Operational Creditor to seek their service to get capital grant of Rs.1,35,00,000/- from Ministry of New and Renewable Energy, Government of India and Excise Duty exemption Certificate. Accordingly, work order was issued in favour of the Operational Creditor. As per Work Order, they agreed to pay 10% of the total amount as advance along with work order, 20% amount on submission of application of MNRE, 30% on submission of required clarification, 25% on completion of Scrutiny Committee Meeting and 10% upon receipt of the sanction letter from MNRE.

7. They further contended that they paid the operational creditor 10% amount along with the work order. They also paid further amount of 25% upon filing of application by operational creditor, 30% amount has also been paid upon submission of required clarification by MNRE.

8. According to them, they have withheld an amount of 25% and 10% amount because the Operational Creditors' job towards Scrutiny Committee of MNRE is yet to be completed and final sanction letter is yet to be received by them. They contended that this petition is prematurely

Sd

Sd

filed as there exists no operational debt as on today to be paid by them. Hence, the petition may be dismissed.

9. We have gone through the records and proceedings. We heard Ld. Counsel appearing for both the parties. In view of the material on record the submissions made at the bar, the following points arise for our consideration. We record our findings thereon for the reasons stated below:

| Point raised  | Our findings |
|---|--------------|
| Whether there exists a case within the meaning of Section 5(21) of the I&B Code 2016 against the Corporate Debtor in this case. | Yes.         |

10. Most of the facts are not in dispute. The Corporate Debtor availed the services of operational creditor in order to get corporate grant from Ministry of New and Renewable Energy, Government of India. In pursuance thereon Work Order at 'C' (Page 91 of Paper Book) was issued in their favour. The terms and conditions are set out in the Work Order were agreed to by both the parties. It is also not in dispute that Corporate Debtor paid the operational creditor the amount of Rs.10%, 25% and 30% as per the stages set out in the work order.

11. It is also not in dispute that the operational creditor did not claim final bill amount of 10% because the corporate debtor is yet to get letter of sanction of the said capital grant from MNRE. It is also not in dispute that

Sd

Sd

demand notice under Section 8 of I&B Code 2016 was received by corporate debtor and they have replied the same raising some dispute.

12. The dispute between the parties appear to be limited to the extent of amount of 25% to be paid to the operational creditor by the corporate debtor. As they have completed their task at stage four as set out in the work order. It would be proper to note the 4th stage as set out in the work order. It is as **"25% on completion of MNRE Scrutiny Committee meeting."**

13. In view of this, we have to see whether the operational creditor completed its task of service as set out in fourth stage as above.

14. Ld. Counsel for the corporate debtor submitted that the dispute about the debts is already raised. Hence, in view of Clause Sub-section 6 (a) of I&B Code, this application is liable to be dismissed. To substantiate his argument Ld. Counsel relied on the order passed by Hon'ble Bench of NCLAT in Company Appeal (**Insolvency No. 269 of 2017 in case of Vimal Organics Limited Vs. Anya Polytech and Fertilizers Pvt. Limited**).

15. We have considered his submission and also gone through the order in appeal passed by NCLAT. Hon'ble Appellate Court in that case has found that operational creditor has not performed his part of contract properly. The corporate debtor has raised that dispute much prior to receipt

Sd

Sd

of notice under Section 8 of I&B Code. In view of peculiar facts it was held that there is an existence of dispute. In this case the facts are altogether different. Admittedly, the Operational Creditor in this case have completed their job as per the work order and they also received the payment. The dispute between the parties appear to be whether the operational creditor can claim 30% amount because Scrutiny Committee Meeting is already held. The petition has to be admitted and if 4<sup>th</sup> stage is over and if it is prior to that meeting then it cannot be admitted.

16. To find out answer to the above questions, it is necessary to look into letter dated 31.01.2017 issued by MNRE (Exhibit.1) in favour of the corporate debtor. This letter is relied on by both the parties to the proceedings. It is clearly mentioned therein that ***“This is with reference with CPGRAM (Registration No.MONRE/E/2016/00156) dated 12.12.2016 received in the Ministry on 16.12.2016. In this regard it is informed that the CFA claim for your 30 Bagase Cogan plant at Aira Eastl, Vill. Khamai Pur Dist. Lakhimpur Khedi, Uttar Pradesh 262722 is under consideration. This has been issued with the approval of the competent authority.”***

17. Bare perusal of the above contents of the letter under reference, it is abundantly clear that the operational creditor has completed all formalities towards Scrutiny Committee of MNRE to get capital grant by corporate debtor. Now the proposal is under consideration of the competent authority. The corporate debtor denied payment on the ground that it has not been received sanction letter. However, in our considered

Sd

Sd

view the reason as stated by corporate debtor to deny the dues of operational creditor appears to be not sustainable for two reasons:

- (1) The operational creditor did not claim last payment of 10% amount which they would be claiming upon receipt of sanction letter and;
- (2) Having completed all formalities to claim capital grant, now it is beyond their control to expedite the work of sanction of the grant by the competent authority.

Hence considering the facts of the case we hold that there existing "Operational Debt" within meaning of Section 5(21) of I&B Code against the corporate debtor." We answer the points accordingly.

18. The Operational Creditor did not propose an I.R.P. Accordingly, compliance under Section 9(5) (1) (e) does not arise.

19. We have perused the records. Operational Creditor has complied with all other formalities to maintain this petition as stated under Section 9 (3)(b) and © of the I&B Code and the application is complete as per Section 9 (5)(1)(a) of the Code. We do not find any reason to reject this petition. For the aforesaid reasons,\* this application is admitted upon the following orders:

## ORDER

- (i) The application filed by the Operational Creditor under Section 8 and 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process. Moratorium order

Sd

Sd

is passed for a public announcement as stated in Sec.13 of the IBC, 2016.

- (ii) The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
- (iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
  - a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
  - b) Transferring, encumbering, alienating or disposing of by the corporate debtor 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 corporate debtor in respect of its property including any action under the Securitization and Reconstruction of

Sd

Sd

Financial Assets and Enforcement of Security Interest Act, 2002  
(54 of 2002);

- d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- e) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.
- f) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g) The order of moratorium shall affect the date of admission till the completion of the Corporate Insolvency Resolution Process.
- h) 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 Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
  - (iv) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made by the resolution professional upon receipt of the copy of this order.

Sd

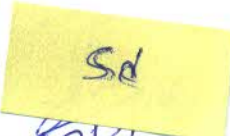
Sd

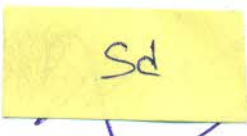
- (v) Mr. Samya Sengupta (Mobile No.9830129973) is appointed as Insolvency Professional registered with the ICSI Insolvency Professionals Agency having Registration No.IBBI/IPA-001/IP-P00098/2016-17/10198 as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.
- (vi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

Registry is hereby directed to communicate the order to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional.

Let the certified copy of the order be issued upon compliance with requisite formalities

List the matter on **11 th June 2018** for the filing of the progress report.

  
*(Jinan K.R.)*  
**(Jinan K.R.)**  
**Member (J)**

  
**(Madan B. Gosavi)**  
**Member (J)**

*Signed this day of 7th May,2018.*

*PS\_Aloke*