

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

CP/736/IB/2018

Under Section 9 r/w rule 6 of the IBC, 2016

In the matter of M/s. Balu Spinning Mills Private Limited

M/s. OPG Power Generation Private Limited

---Operational Creditor

V/s

M/s. Balu Spinning Mills Private Limited

---Corporate Debtor

Order delivered on: 28.03.2019

Coram:

B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Operational Creditor: *Shri. R. Sankaranarayanan, Sr. Advocate*

Ms. Harshini, Advocate

For K Gaurav Kumar, PCS

For the Corporate Debtor : *Shri Guru Dhananjay, Advocate*

ORDER

Per: B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

Heard and Pronounced on: 28.03.2019

It is a Company Petition filed, the Operational Creditor filed u/s 9 of the Insolvency & Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process against the Corporate

Debtor for having the Corporate Debtor defaulted in paying ₹ 1,54,05,282.30 to the Operational Creditor herein.

2. On perusal of the factual matrix, it is an agreement between the parties for supply of power to the Corporate Debtor, in pursuance thereof, the Operational Creditor kept on supplying power to the Corporate Debtor, having supplied so, the creditor simultaneously raised invoices against the Corporate Debtor. As and when any tariff rate is raised, fresh agreements have been executed, this practice being in vogue, the Operational Creditor subsequently entered into a new agreement on 20.05.2016 superseding the earlier agreement dated 15.11.2014.

3. Now the case of the Corporate Debtor is that since new agreement has been entered into between the parties on 20.05.2016 superseding earlier agreement dated 15.11.2014, whatever invoices raised basing on tariff determined under the old agreement dated 15.11.2014 will get extinguished, thereby it shall not be construed that right is still subsisting in favour of the creditor to make claim

against the invoices raised basing on the earlier agreement dated 15.11.2014 after new agreement has come into existence.

4. On hearing the submissions of either side, the point for consideration is, *as to whether or not the claim made over the power already supplied basing on the tariff determined under the old agreement dated 15.11.2014 could get extinguished and the debtor is relieved from paying off the earlier dues on the footing new agreement entered into on 20.05.2016 superseded the earlier agreement dated 15.11.2014.*

5. It is an agreement between the parties that the creditor would supply power to the debtor and the debtor would pay for the same as per the terms entered between them, to fulfil the same, they entered into the agreement on 15.11.2014, basing on which the power was supplied and the debtor consumed the same. Over which the creditor raised invoices, since the same was not paid, the creditor initiated this proceeding after issuing section 8 notice. As it was said in the preceding paras, another agreement has been entered into on 20.05.2016 determining tariff for future supply superseding the earlier agreement dated 15.11.2014.

6. As per the earlier agreement dated 15.11.2014, the power was already supplied and it was consumed without any objection, now the objection of the debtor when it has come to pay is, since the earlier agreement is not in force, no obligation is subsisting upon the debtor to pay to the power supplied by the creditor and consumed by the debtor under the old agreement.

7. This argument could be true if the creditor wanted to enforce it seeking performance of the agreement, but here the creditor is only asking for payment for the power already supplied under the old agreement, not asking for enforcing any of the clauses of the earlier agreement. It is not a suit for specific performance of an agreement so as to see as to whether agreement is in force or not. If that is the case, then it is necessary to find out as to whether agreement is alive and enforceable by the time of filing of suit. Here it is not the case. In fact payment obligation would arise only after the invoices raised, not before, thereafter it goes basing on the invoices raised.

8. It is simple common sense that the debtor cannot wriggle out from the obligation of payment to the power already consumed

without any demur by showing out the subsequent agreement superseding the earlier agreement, because one has to pay to the services or goods availed notwithstanding the fact as to whether agreement is in force or not as because the obligation of power supply was fulfilled, but the obligation of payment against the invoices raised for the supply already made is not fulfilled. When supply is admitted, invoices raised admitted, how this debtor could wriggle out from evading making payment to the power already availed, therefore it is evident that debt is in existence.

9. It is not the case of the Corporate Debtor that power was not supplied, supply had defects, the creditor violated any of the clauses of earlier agreement and it is not even its case that tariff rates claimed by the Corporate Debtor are different from that of earlier agreement, therefore we have not found any element of dispute between the parties as to the claim raised before this Bench.

10. In view of the same, we have not found any merit in the argument of the Corporate Debtor counsel saying that the debtor is

under no obligation to pay the dues for the supply of power already availed under the old agreement dated 15.11.2014.

11. For it is not even the case of the debtor that this claim is hit by limitation, obligation to pay to the supply availed is already cleared and dispute existing between the parties, we cannot arrive to a conclusion that the debtor is relieved from paying the dues against the power supplied by the creditor.

12. Since the Creditor has filed copies of invoices, earlier agreement dated 15.11.2014 entered into between the parties, subsequent agreement, Demand Notice dated 07.03.2018 sent to the Corporate Debtor and also Reply Notice dated 19.03.2018 by the Corporate Debtor, we are of the view that this Applicant/Operational Creditor has established the existence of debt as well as default, whereby, this Company Petition is hereby **admitted** with the directions as follows:

(I) That Moratorium is hereby declared prohibiting all of the following actions, namely,

- (a) 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;
 - (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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);
 - (d) 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 28.03.2019 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.

(VI) That this Bench hereby appoints **Mr. Ramasamy Shanmugam**, having **Registration Number [IBBI/IPA-001/IP-P00811/2017-2018/11738]**, **No.207, 1st Floor, Thirukumaran Building, 11-F, Mettur Road, Near Kalayan Silks, Erode, Tamilnadu - 638 011** **Email: shanmuggam@yahoo.co.in** with his consent to carry the functions as mentioned under The Insolvency & Bankruptcy Code.

13. Accordingly this petition is hereby **admitted**.

14. The Registry is hereby directed to immediately communicate this order to the operational, the Corporate Debtor and the Interim Resolution Professional by way of e-mail.

-SD-
(S. VIJAYARAGHAVAN)
MEMBER (Technical)
SR/TJS

-SD-
(B. S.V. PRAKASH KUMAR)
MEMBER (Judicial)