

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

CP(IB) NO.676/KB/2020 & CP(IB) No.688/KB/2020

In the matter of;

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016

And

In the matter of;

M/s. Jai Balaji Industries
Having its registered office at,
5, Bentinck Street,
Kolkata-700001

... Operational Creditor

And

In the matter of;

Orissa Minerals Development Company Ltd.,
CIN No.: L51430WB1918GO1003026
Having registered office at
"SOURAV ABASAN", 2nd Floor,
AG-104m Sector-11, Salt Lake,
Kolkata, West Bengal-700091

... Corporate Debtor

Counsels on record:

- | | | |
|---|----------|----------------------------|
| 1. Mr. Ratnanko Banerji, Sr. Advocate |] | For the Operational |
| 2. Mr. Manju Bhuteria, Advocate |] | Creditor |
| 3. Ms. Pallabi Ghosh, Advocate |] | |
| 4. Mr. Mrigank Kejriwal, Advocate |] | |
| 1. Mr. Partha Sarathi Basu, Sr. Advocate |] | For the Corporate |
| 2. Mr. Kamal Chattopadhyay, Advocate |] | Debtor |

Coram: Shri M.B. Gosavi, Hon'ble Member (Judicial) & Shri Harish Chander Suri, Hon'ble Member (Technical)

Date of hearing: 21/09 2020

Order pronounced on: 30/09/2020

C O M M O N - O R D E R

Per Shri Madan B Gosavi, Member (Judicial)

1. Both above applications under Section 9 of Insolvency and Bankruptcy Code, 2016 (in short “IBC, 2016”) have been filed by M/s. Jai Balaji Industries Limited - Operational Creditor against M/s. Orissa Minerals Development Company Limited- Corporate Debtor, to initiate Corporate Insolvency Resolution Process of the Corporate Debtor on the ground that the Corporate Debtor committed default in paying operational debt of Rs.7,75,1684/- (in CP(IB)) No.676/KB/2020) and Rs.5,62,01,258/- (in CP(IB) No.688/KB/2020).
2. Since, Operational Creditor and Corporate Debtor are same, debts of default are same, Operational Creditor has sent demand notice under Section 8 of Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor and Corporate Debtor replied the same raising same defense thereto, we proposed to dispose-off both proceedings by common order.
3. To appreciate the claim of the Operational Creditor and defense of the Corporate Debtor, we noted the facts in CP(IB) No.688/KB/2020, they are as follows:
 - (i) Most of the facts are not in dispute, they are –

- (ii) In February 2004 the Operational Creditor had approached the Corporate Debtor for supply of iron ore. In pursuant thereto on 11.03.2004, Memorandum of Understanding (MOU in short) was entered into by and between the parties. There was clause of invocation of arbitration proceedings in case of dispute. As the Corporate Debtor failed to supply iron ore inspite of receipt of payment, the Operational Creditor invoke the arbitration clause in MOU. On 15.02.2010, two Members Arbitral Tribunal passed award for sum of Rs.2,79,92,122/- (Rupees Two Crore Seventy Nine Lakh Ninety Two Thousand One Hundred Twenty Two Only) together with interest @ 10% per annum.
- (iii) In December, 2010, Operational Creditor filed execution proceedings on the basis of award (EC No.61 of 2010). Meantime, the application was also filed in the District Court Barasat for approval of award (Misc. Case No.173 of 2010). On 29.02.2012, Learned District Judge, Barasat disposed-off that application thereby confirming the award. Thereafter the Corporate Debtor filed Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (In short A & C Act) in Hon'ble Calcutta High Court (F.M.A. No. 939 of 2012). On 22.11.2019, the Hon'ble Calcutta High Court dismissed the Appeal in default.
- (iv) The Operational Creditor states that on 22.11.2019, operational debt became due and payable by the Corporate Debtor, hence, on 14.02.2020, the Operational Creditor served on the Corporate Debtor notice of demand under Section 8 of Insolvency and Bankruptcy Code, 2016. The Corporate Debtor replied the notice. According to the Operational Creditor, the Corporate Debtor raised false pleas therein. Since the Corporate Debtor committed default in paying the operational

debt in spite of receipt of demand notice, Corporate Debtor may be admitted in Corporate Insolvency Resolution Process.

- (v) The Corporate Debtor was served with notice of this application. One of its Authorized Officer Mr. Samresh Kumar Hait appeared in the proceedings and filed affidavit in reply. We have gone through the reply. In para-18 of the affidavit in reply, the Corporate Debtor contended that after dismissal of its Appeal in default, it has filed application for restoration. The Appeal has been restored vide order dated 02.03.2020. The Appeal is pending for adjudication and as the award is under challenge in the Appeal, this proceedings under Section 9 of Insolvency and Bankruptcy Code, 2016 is not maintainable as the operational debt is disputed by way of Arbitration proceedings.
4. We heard Learned Senior Counsel Mr. Ratnako Banerjee for the Operational Creditor, Learned Counsel Mr. Kamal Kumar Chattopadhyay for the Corporate Debtor. Learned Senior Counsel Mr. Ratnako Banerjee submitted that upon dismissal of the Corporate Debtor's Appeal challenging the award, operational debt became due on 11.02.2020. On 14.02.2020, demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 was served to the Corporate Debtor, Corporate Debtor received the notice on 18.02.2020. The Corporate Debtor did not pay the amount within 10 days from the receipt of notice of demand nor pointed out any pre-existing disputes in form of suit of Arbitration proceedings. Hence, Corporate Debtor may be admitted in Corporate Insolvency Resolution Process. To substantiate his argument, Learned Senior Counsel laid on following orders / rulings;

- (i) *K. Kishan Vs. Vijay Nirman Company Private Limited - (2018) 17 SCC 662*
- (ii) *Décor India (P) Ltd. Vs. National Building Construction Corporation – 142 (2007) DLT 21*
- (iii) *Hindustan Construction Company Ltd. Vs. Union of India & Ors. – AIR 2020 SC 122*
- (iv) *Orissa Stevedores Limited Vs. Orissa Minerals Development Company Limited – CP(IB) No.729/KB/2017*

5. As against this, Learned Counsel for the Corporate Debtor submitted that in-fact, the Corporate Debtor has very good defence on facts. Apart from that, its Appeal challenging the award is still pending in Hon'ble High Court, hence, this proceedings is not maintainable. He submits that by notice dated 25.02.2020, the Corporate Debtor informed the Operational Creditor that Appeal against the award is still pending, hence, this application is not maintainable. To substantiate his arguments, Learned Counsel relied on the judgment of Hon'ble Apex Court in the case of *K. Kishan Vs. Vijay Nirman Company Private Limited - (2018) 17 SCC 662*. He also pointed out that the Operational Creditor has already filed application for execution of the award in Civil Court. It is also pending. Hence, this application is not maintainable.

6. From the material on record and submissions made at the bar, only point arises for our consideration is as follows:

- (i) Whether on the date on which the operational debt became due against the Corporate Debtor, the Appeal under Section 37 of Arbitration and Conciliation Act, 1996 was pending challenging the award?

Our answer to this point is in the **Negative**.

7. There is no dispute regarding the following facts – On 15.02.2020, Arbitration award came to be passed in favour of the Operational Creditor thereby directing the Corporate Debtor to pay the Operational Creditor sum of Rs.2,79,92,1822/-. On 29.02.2012, District Court, Barasat confirmed the award. Immediately thereafter, Corporate Debtor filed Appeal under Section 37 of A & C Act, 1996 challenging the awarded in Hon'ble Calcutta High Court. On 22.11.2019, that appeal was dismissed in default. On 14.02.2020, the Operational Creditor sent Corporate Debtor notice under Section 8 of Insolvency and Bankruptcy Code, 2016. It was received by the Corporate Debtor on 18/2/2020 and Corporate Debtor replied vide letter dated 25.02.2020. This application to initiate CIRP of the Corporate Debtor has been filed by the Operational Creditor on 29.02.2020. On that day, no Appeal under Section 37 of A & C Act, 1996 was pending because the Hon'ble High Court restored the Appeal on 02.03.2020.
8. Section 9(5)(ii)(d) of Insolvency and Bankruptcy Code, 2016 makes it clear that *“Adjudicating Authority shall, within fourteen days of receipt of application under Sub-Section (2) by an order”-*
- (i) *Admit the application and communicate such decision to the operational creditor and the corporate debtor if, -*
- (a)
- (b)
- (c)
- (d)
- (e)
- (ii) reject the application and communicate such decision to the Operational Creditor and to the Corporate Debtor, if
- (a)
- (b)
- (c)

(d) notice of dispute has been received by the Operational Creditor or there is record of dispute in Information Utility or –

(e)

The word dispute appearing in Section 5(ii)(d) has been defined under Section 5(6) of Insolvency and Bankruptcy Code, 2016 as follows:

Section 5(6) of Insolvency and Bankruptcy Code, 2016 defines *dispute* as "*dispute*" includes a suit or arbitration proceedings relating to –

(a) *the existence of the amount of debt;*

(b) *the quality of goods or service; or*

(c) *the breach of a representation or warranty;*

From the plain reading of un-disputed facts in this proceeding, it is clear that on the date on which the Corporate Debtor was served with demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 or on the date on which the application is filed against the Corporate Debtor, no arbitration proceedings was pending challenging the award.

9. Apart from above, the point whether Appeal pending challenging the award could be said to be the dispute had come for consideration before Hon'ble Apex Court in case of *K. Kishan Vs. Vijay Nirman Company Private Limited - (2018) 17 SCC 662*. In that case, Hon'ble Apex court noted the facts in para -6 which are as under:

"(6) ... It may be noted that after the notice and reply, on 20.04.2017, a Section 34 petition was filed by KCPL under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") challenging the aforesaid Award. Needless to add, this petition was

filed within the period of limitation set down in Section 34(3) of the A & C Act, 1996.”

While dealing with that situation, Hon'ble Apex Court held that in para 27 & 28 that:

“27. We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.

28. We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation”.

10. It has been held by the Apex Court that if it is shown that the application under Section 34 of A & C Act, 1996 is pending or Appeal under Section 37 of the Act is pending, then insolvency proceedings cannot be initiated. In this case, on the date of filing of this application under Section 9 of Insolvency and Bankruptcy Code, 2016 i.e on 29.02.2020, no proceeding under Section 34 or Appeal under Section 37 of the Act was then pending against the Operational Creditor (although restoration application of Appeal was pending). So on the facts, we hold that above ruling is in favour of the Operational Creditor rather than the Corporate Debtor. In short, Operational debt become due and payable on 29.02.2012 i.e on the date of which the Learned District Judge

confirmed the award under Section 34 of A & C Act. The Corporate Debtor filed Appeal under Section 37 of the Act. It was dismissed in default. 90 days thereafter, on 14.02.2020, Operational Creditor gave the Corporate Debtor notice under Section 9 of the Insolvency and Bankruptcy Code, 2016. On 28.02.2020.

11. What we gathered from the above facts is that the operational creditor sent a demand notice three months after the Corporate debtor's appeal was dismissed by Hon'ble high Court. As soon as the Corporate Debtor received the demand notice, its officers swung into action and get the appeal restored. Meantime, the operational creditor had filed this application. It appears from record that the officers of the Corporate Debtor using the proceedings under the law either to delay or to avoid the legitimate dues of the Corporate Debtor on one or the other ground.
12. For all above reasons, we hold that Operational Creditor has established that the Corporate Debtor committed default in paying the operational debt of Rs.5,62,01,258/- inspite of receipt of demand notice. There was no dispute pending (by way of arbitral proceeding or otherwise) on the date on which the default occurred or on the date on which the application is filed to initiate Corporate Insolvency Resolution Process of the Corporate Debtor.
13. We also note that no disciplinary proceeding is pending against the proposed Insolvency Resolution Professional. It is not in dispute that the corporate debtor did not pay the operational debts. Hence, we allow this application and proceed to pass following order.

ORDER

1. Corporate Debtor M/s. Orissa Minerals Development Company

Ltd. is admitted in Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016.

2. The moratorium under Section 14 of Insolvency and Bankruptcy Code, 2016 is declared for prohibiting all of the following in terms of Section 14(1) of the Code.

- (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;
- (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.

3. The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of the Section 31 or passes an order for liquidation of Corporate Debtor Company under Section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.

4. We hereby appoint Mr. Sandip Choraria having Registration No. IBBI/IPA-001/IP/P00549/2017-2018/10797 to act as an IRP

under Section 13(1) (c) of the Code. He shall conduct the Corporation Insolvency Resolution Process as per the provision of Insolvency and Bankruptcy Code, 2016 r.w Regulation made thereunder:

5. The IRP shall perform all his functions as contemplated, inter-alia, by Sections 17,18,20 & 21 of the Code. It is further made clear that all personnel connected with Corporate Debtor, its Promoter or any other person associated with management of the Corporate Debtor are under legal obligation under Section 19 of the Code extend every assistance and co-operation to the Interim Resolution Professional. Where any personnel of the Corporate Debtor, its Promoter or any other person required to assist or co-operate with IRP, do not assist or Co-operate, IRP is at liberty to make appropriate application to this Adjudicating Authority with a prayer for passing an appropriate order.
6. This Adjudicating Authority direct the IRP to make public announcement of initiation of Corporate Insolvency Resolution Process (CIRP) and call for submission of claims under Section 15 as required by Section 13(1) (b) of the Code.
7. It is further directed that the supply of goods/service to the Corporate Debtor Company, it continuing, shall not be terminated or suspended or interrupted during moratorium period.
8. The IRP shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor Company' and manage the operations of the Corporate Debtor Company as a going concern as a part of obligation imposed by Section 20 of the Insolvency & Bankruptcy Code, 2016. The Operational Creditor is directed to pay an advance of Rs. 1,00,000/- (Rupees One Lakh Only) to

the IRP within two weeks from the date of receipt of this order for the purpose of smooth conduct of Corporate Insolvency Resolution Process (CIRP) and IRP to file proof of receipt of such amount to this Adjudicating Authority alongwith First Progress Report. Subsequently, IRP may raise further demands for Interim funds, which shall be provided as per Rules.

9. The Registry is directed to communicate a copy of this order to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional and the concerned Registrar of Companies, after completion of necessary formalities, within seven working days and upload the same on website immediately after pronouncement of the order.
10. Accordingly, CP(IB) 688/KB/2020 is allowed.
11. In view of this, CP(IB) No. 676/KB/2020 stands disposed-off with liberty to the operational creditor to submit its claim in this proceedings to the IRP.
12. The matter to be listed on 02.12.2020 for further consideration.

(Harish Chander Suri)
Member (T)

(M.B. Gosavi)
Member (J)

Order dated on the 30th day of September, 2020