

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.302
C.P. (IB)/143(AHM)2024

Order under Section 9 IBC

IN THE MATTER OF:

Devaram Mali
Vs
HEAT THERM PRIVATE LIMITED

.....Applicant

.....Respondent

Order delivered on: 09/05/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-I**

CP (IB) No.143/AHM/2024

(An application 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)

In the Matter of:

Mr. Deva Ram Mali
Proprietor of M/s. Bharat Steels
Registered office at
42, Room No.25, 1st Sutar Galli,
CP Tank Road, Mumbai,
Maharashtra- 400004.

...Applicant/Operational Creditor

VERSUS

Heat Therm Private Limited
(CIN: U29220GJ2014PTC080245)
Registered office at:
Plot No. 876 GIDC,
Sachin, Surat,
Gujarat – 394520.

...Respondent/Corporate Debtor

Order Pronounced On: 09.05.2024

CORAM:

SH. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)

SH. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant/OC : Mr. Shikhar Khandelwal, Advocate
For the Respondent/CD :

ORDER

1. The Present Application is filed on 20.03.2023 by the Applicant-Deva Ram Mali Prop. of M/s. Bharat Steels (hereinafter referred to as **“Operational Creditor”**) against the Respondent - Heat Therm Private Limited (hereinafter referred to as **“Corporate Debtor”**) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **“IBC, 2016”**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as **“IB (AAA) Rules, 2016”**) for initiation of Corporate Insolvency Resolution Process (**CIRP**) against the Respondent/Corporate Debtor, to appoint Interim Resolution Professional (hereinafter referred to as **“IRP”**) and declare the moratorium for having defaulted payment of the operational debt of **Rs.2,68,02,051/-** along with interest. The date of default is stated to be **30.05.2022 and 31.03.2023.**

2. A perusal of Part-I of the Form-5 reveals that this application is filed by Mr. Deva Ram Mali in the capacity of proprietor of M/s Bharat Steels.
3. On perusal of Part-II of the Form-5, it reveals that the Corporate Debtor is one Heat Therm Private Limited having CIN: U29220GJ2014PTC080245. The Corporate Debtor was incorporated on 25.07.2014 and having registered office at Plot No. 876 GIDC, Sachin, Surat, Gujarat – 394520.
4. On perusal of Part-III of the Form-V it reveals that Operational Creditor has not named any IRP under section 13 (1)(c) of the Code to act as Interim Resolution Professional (**IRP**).
5. On perusal of Part-IV of the Form-5 it reveals that total operational debt as claimed by the Operational Creditor is Rs.2,68,02,051/- along with interest @ 24% from the due date.
6. It is stated that Corporate Debtor had placed purchase orders verbally to Operational Creditor for purchase of coils, stainless steel pipes, rods, etc which have been delivered to

Corporate Debtor's assigned place. The Operational Creditor had supplied SS plates to Corporate Debtor on 30 days credit basis.

7. It is the contention of the Operational Creditor that as per the tax invoices, the *"payment terms: 30 days"* and *"interest @24% p.a. will be charged if the payments are not made within the due date."*
8. The transaction was carried between the parties in a usual course of business and the Operational Creditor in discharge of its obligations raised tax invoices and delivered the goods to the Corporate Debtor as well as Corporate Debtor has accepted the goods against the said invoices and never raised any dispute regarding the goods.
9. It is stated that on 30.05.2022 Corporate Debtor paid an amount of Rs.1,00,000/- thereby leaving an outstanding balance of Rs.2,68,02,051/- inclusive of interest due and payable by the Corporate Debtor. The balance confirmation was also received till 31.03.2023 from the Corporate Debtor acknowledging the debt due to the Operational Creditor.

10. It is stated that the Corporate Debtor has wilfully failed to fulfil the promise of repayment of money and several reminders were made by the Operational Creditor to the Corporate Debtor via emails.
11. Ultimately a Demand Notice was issued on 31.10.2023 to the Corporate Debtor which was delivered on 07.11.2023 email was also sent as prescribed under the Code, 2016. The copy of Demand Notice, postal receipt, tracking deliver report and e-mails sent is attached with the petition as Annexure-5.
12. The Operational Creditor relies upon the following documents:-
 - a. *Copy of pan card*
 - b. *Affidavit in support of the Application in accordance with Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016*
 - c. *A Copy of MCA Master Data of the Corporate Debtor*
 - d. *Copy of the Demand notice in Form-3 and Form-4 of Insolvency and Bankruptcy (Application Authority) Rules, 2016.*
 - e. *Copy of postal receipt and tracking delivery report and e-mail conversation.*

- f. Copy of Invoices, E-way Bills, Delivery Challans.*
- g. Copy of Ledger A/c*
- h. Copy of Interest Note*
- i. Copy of Balance Confirmation received from Corporate Debtor*
- j. Copy of Bank Statements of the Operational Creditor.*
- k. Proofs of serving a copy of the application (a) to the corporate debtor, and (b) to the Board.*
- l. Copy of Record of Default filed with NeSL*
- m. Proof that requisite fee has been paid. (Photocopy of Bharat Kosh Receipt).*

13. The Operational Creditor has filed Form-D being record of debt and default issued by National E-Governance Services Limited (“**NeSL**”) in which date of default is recorded as 30.05.2022 and default amount is mentioned as Rs.1,23,11,802/- with status “Deemed to be Authenticated”.
14. We have heard the learned Counsel for the Operational Creditor and perused the documents as placed before us. Following are the admitted facts in the matter:
- (i) The Operational Creditor has supplied certain goods for which Tax Invoices for the period between 01.06.2018 to 02.02.2019 aggregating to Rs.73,69,609/- were raised. Further, Tax Invoices for the period between

20.07.2020 to 02.01.2021 aggregating to Rs. 57,78,979/- were raised and due date for payment of these each invoices fell within exempted period u/s 10(A) of the IBC, 2016.

- (ii) The Corporate Debtor failed to make payment within 30 days from the date of tax invoices issued by the Operational Creditor.
- (iii) A Demand Notice was issued as per prescribed format and the same was delivered to the Corporate Debtor however, no reply was given to the said notice. Relevant receipt as well as tracking report is attached at page – 32-33 of the petition.
- (iv) Balance confirmation statement for the period of 01.04.2022 to 31.03.2023 was signed by the Corporate Debtor and the same annexed at Annexure-9 at page – 163-164.

15. The Corporate Debtor has withheld the payment and not even replied to the Demand Notice issued by the Operational Creditor.

16. Upon going through the various Tax Invoices, the Tax Invoices issued for the period between 01.06.2018 to 02.02.2019 along-with due amount are as under:

Invoice No.	Date	Amount (Rs.)	Due on
116/2018-19	01.06.2018	Balance 2,55,902	01.07.2018
128/2018-19	08.06.2018	2,19,151	08.07.2018
130/2018-19	09.06.2018	1,17,365	09.07.2018
131/2018-19	09.06.2018	1,72,403	09.07.2018
135/2018-19	11.06.2018	3,05,793	11.07.2018
143/2018-19	12.06.2018	2,49,730	12.07.2018
147/2018-19	13.06.2018	6,88,595	13.07.2018
148/2018-19	13.06.2018	4,30,464	13.07.2018
151/2018-19	14.06.2018	61,115	14.07.2018
163/2018-19	23.06.2018	24,772	23.07.2018
184/2018-19	03.07.2018	1,38,386	03.08.2018
214/2018-19	12.07.2018	39,490	12.08.2018
247/2018-19	30.07.2018	8,73,849	30.08.2018
302/2018-19	16.08.2018	2,10,542	16.09.2018
306/2018-19	16.08.2018	92,430	16.09.2018
309/2018-19	17.08.2018	51,6781	17.09.2018
330/2018-19	27.08.2018	94,884	27.09.2018
334/2018-19	27.08.2018	6,34,846	27.09.2018
350/2018-19	07.09.2018	1,67,354	07.10.2018
353/2018-19	07.09.2018	3,44,708	07.10.2018
378/2018-19	24.09.2018	38,631	24.10.2018
385/2018-19	26.09.2018	90,082	26.10.2018
394/2018-19	29.09.2018	79,889	29.10.2018
421/2018-19	06.10.2018	87,931	06.11.2018
431/2018-19	08.10.2018	1,10,626	08.11.2018
507/2018-19	03.11.2018	1,29,006	03.12.2018
511/2018-19	18.11.2018	49,906	18.12.2018
645/2018-19	03.01.2019	98,872	03.02.2019
649/2018-19	04.01.2019	68,457	04.02.2019

664/2018-19	08.01.2019	75,735	08.02.2019
726/2018-19	31.01.2019	18,479	02.03.2019
734/2018-19	02.02.2019	2,73,571	04.03.2019
Total		67,59,745	

17. From the above table, it is clear as per the bill-wise statement produced by the Operational Creditor, that the first Tax Invoice dated 01.06.2018 amounting to Rs.8,65,766/- was due on 01.07.2018 for which part payments were received on 26.06.2019, 24.05.2022, 26.05.2022 and 30.05.2022. The balance remaining amount against this Tax Invoice becomes Rs.2,55,902.68ps. for which limitation will end on 29.05.2025. Therefore, the Operational Debt qua this Tax Invoice amount is within limitation.

18. Furthermore, the Tax Invoices dated 31.01.2019 and 02.02.2019 are found to be within limitation after giving the benefit of exclusion period as per the judgment of Hon'ble Supreme Court rendered in **Suo Moto Writ Petition No. 3/2020** as these invoices expired after 28.02.2022. As entire intervening period from 15.03.2020 to 28.02.2022 being 716 days is liable to be excluded.

19. The details of above mentioned with in limitation Tax Invoices dated 01.06.2018, 31.01.2019 and 02.02.2019 are as under:-

Invoice No.	Date	Amount (Rs.)	Interest @ 24%
116/2018-19	01.06.2018	Bal 2,55,902.68	3,26,873.02
726/2018-19	31.01.2019	18,479.00	20,659.52
734/2018-19	02.02.2019	2,73,571.00	3,05,305.24
Total		5,47,952.68	6,52,837.78

20. The total operational debt due alongwith interest @24.00% of above three Tax Invoices is Rs.12,00,790.46ps.

21. However, the Tax Invoices starts from 08.06.2019 to 08.01.2019 fall beyond the period of limitation as due date of these invoices for the purpose of limitation expired during the period between 15.03.2020 to 28.02.2022 for which 90 days extended period was available till i.e. 30.05.2022 as per the judgment of Hon'ble Supreme Court rendered in **Suo Moto Writ Petition No. 3/2020**.

22. Further, upon going through the other Tax invoices which raised w.e.f. 20.07.2020 to 02.01.2021 are covered under the

exempted period of Section 10-A of the IBC, 2016. The details of such invoices is provided below:-

Invoice No.	Date	Amount (Rs.)
014/2020-21	20.07.2020	8,22,926
057/2020-21	19.09.2020	4,04,721
077/2020-21	26.09.2020	3,09,325
091/2020-21	02.10.2020	1,90,311
0139/2020-21	26.10.2020	7,65,171
0158/2020-21	31.10.2020	5,87,404
0226/2020-21	05.12.2020	11,11,236
0270/2020-21	24.12.2020	10,61,929
0298/2020-21	02.01.2021	5,25,956
Total		57,78,979

23. However, as per Section 10A of IBC, 2016, any default which occurred between the periods 25.03.2020 to 25.03.2021 is exempted and no IBC proceedings shall ever be initiated against the Corporate Debtor for the default which occurred during the period from “25th March, 2020 to 25th March, 2021. The focus of the law, which was brought by Section 10-A, was that when the Corporate Debtor suffers default on account of Covid-19, they should be protected from the filing of any Insolvency Application to the default committed during the said period.

24. As far as the copy of the Balance Confirmation received from the Corporate Debtor annexed at **Annexure-9** for the period of 01.04.2022 to 31.03.2023 is undated which will not give any help to the Operational Creditor for extension of limitation period of aforementioned time-barred invoices. If this Balance Confirmation is to be taken into consideration it will be considered as issued or signed either on 31.03.2023 or on subsequent date. This balance confirmation cannot be treated for retrospective date qua the payment liability, if any.

25. In view of the above, we are of the view that the present Application is not maintainable as it does not meet the threshold as prescribed under Section 4 of the IBC, 2016 as the operational debt fell due against the Tax Invoices raised on 01.06.2018, 31.01.2019 and 02.02.2019 is Rs.12,00,790.46ps. which is below the threshold limit of Rs.1.00 Crore in terms of Section 4 of the IBC, 2016. Further, the operational debt fell due against the Tax Invoices raised with effect from 08.06.2018 to 08.01.2019 is barred by limitation and the operational debt fell due

against the Tax Invoices raised with effect from 20.07.2020 to 02.01.2021 is hit by exempted period U/s 10A of the IBC, 2016.

26. It appears that the present application is filed only for the purpose of recovery. We rely upon the judgment of Hon'ble Principal Bench in the matter of **Ms. Rita Malhotra and Ors. Vs. M/s. Orris Infrastructure Pvt. Ltd. (CP (IB) -234 (PB)/2019)** wherein it is said that IBC cannot be used as a tool of recovery.
27. As such **CP (IB) 143 of 2024** is dismissed as not maintainable with no order as to costs.
28. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-Sd-
SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

MD