

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI**

**CP (IB) No.761/MB/2022**

*[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:

**SHARADA ERECTORS PRIVATE LIMITED**

[CIN: U45209PN1989PTC052171]

**Registered Office:** Lex Chambers

601 C, Neelkanth Building

98, Marine Drive, Marine Lines

Mumbai-400002

Maharashtra.

**...Operational Creditor**

Vs.

**ORBIT ELECTRO EQUIPMENTS PRIVATE LIMITED**

[CIN: U74999MH2008PTC178529]

**Registered Office:** Unit No. 1,2 & 3, J Wing,

4<sup>th</sup> Floor, Tex Centre, Chandivali Farm Road

Chandivali, Andheri (E)

Mumbai-400072

Maharashtra.

**...Corporate Debtor**

**Pronounced:05.07.2024**

**CORAM:**

**HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)**

**HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)**

**Appearances : Hybrid**

Operational Creditor: Adv. Vaidehi Kulkarni

Corporate Debtor : Adv. Ravi Prakash Jadhav Adv. Anchal Singh

**ORDER**

***[Per: SANJIV DUTT, MEMBER (TECHNICAL)]***

**1. Background**

- 1.1 This Application bearing C.P.(IB) No.761/MB/2022 was filed by Sharada Erectors Private Limited, the Operational Creditor on 11.06.2022 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 through Mr. Rajeev Purushottam Bodas, Director of the Operational Creditor duly authorised in this behalf *vide* Board Resolution dated 02.06.2022 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of Orbit Electro Equipments Private Limited, the Corporate Debtor.
- 1.2 The Corporate Debtor *vide* letter dated 16.03.2017 agreed to supply materials to the Operational Creditor for a Solar Project with a total project cost of Rs.17,00,00,000/-. The payment terms stipulated 50% advance payment including Service Tax and the balance payment was to be made within 15 days from the date of delivery of materials. Accordingly, the Operational Creditor made an advance payment of Rs.8,50,00,000/- (Eight Crores Fifty Lakhs Rupees) through RTGS from its account with the ICICI Bank on 29.03.2017 for the supply of materials. The materials were to be delivered within six months from the date of receipt of advance. However, the Corporate Debtor failed to supply the goods within the agreed time. Thereafter, the Operational Creditor *vide* letter dated 23.02.2018 cancelled the order for purchase of materials and called upon the

Corporate Debtor to refund the principal amount of Rs.8,50,00,000/- along with interest @13.50% per annum.

- 1.3 Several correspondences were exchanged and meetings were held between the parties. At the request of the Corporate Debtor, a moratorium of one year on principal and interest amount was granted till 30.09.2019. However, despite several follow-ups and meetings, the Corporate Debtor failed to honour its commitment.
- 1.4 The Operational Creditor issued Demand Notice dated 28.03.2022 to the Corporate Debtor as required under Section 8 of the Code seeking payment of the outstanding operational debt of Rs.10,98,36,301/- including interest of Rs.2,87,66,096/- within 10 days of receipt of the notice. However, the Corporate Debtor neither replied to the notice nor made any payment. As a result, the Operational Creditor has preferred the present Application seeking commencement of CIRP in respect of the Corporate Debtor.

## **2. AVERMENTS OF OPERATIONAL CREDITOR**

- 2.1 The Operational Creditor made an advance payment of Rs.8,50,00,000/- (Eight Crore Fifty Lakhs Rupees) on 29.03.2017 to the Corporate Debtor towards the supply of materials for a solar project. The same was confirmed by the Operational Creditor *vide* its letter dated 30.03.2017 and by the Corporate Debtor *vide* its letter dated 30.03. 2017.
- 2.2 The stipulated time for the supply of goods was 6 months. However, due to lack of communication from the Corporate Debtor, the Operational Creditor enquired about the status of the supply of material *vide* its letter on 14.08.2017. The Corporate Debtor responded on 22.08.2017, requesting for an extension of time

to supply the materials up to October, 2017. Subsequently, on 20.09.2017, the Operational Creditor urged the Corporate Debtor to fulfill their commitment within the agreed time-frame.

2.3 Despite assurance for delivery of goods by October 2017, the Corporate Debtor failed to supply the goods. The Corporate Debtor requested again on 05.11.2017 for another extension of time which was granted till 31.01.2018, with an inspection planned for the 2nd week of January, 2018. However, on account of continued and prolonged delay in supply of goods, the Operational Creditor cancelled the purchase order on 23.02.2018, and demanded refund of the amount paid.

2.4 Subsequent correspondences and meetings were held between the parties which, however, yielded no resolution. In a letter dated 04.09.2018, the Corporate Debtor acknowledged the cancellation of purchase order and requested the Operational Creditor to grant some relaxation in repayment of advance amount of Rs.8,50,00,000/- along with interest of 13.50% p.a. within a period of 3 years including a moratorium of one year for the principal amount and interest. The Operational Creditor accepted the request of the Corporate Debtor *vide* letter dated 28.09.2018 granting a moratorium from 01.10.2018 to 30.09.2019.

2.5 As per the arrangement, the Corporate Debtor was to make payment to the Operational Creditor on 31.12.2019. A reminder letter was sent to the Corporate Debtor in this regard on 10.12.2019. However, the Corporate Debtor *vide* letter 03.01.2020 informed that there was some GST raid at their premises and sought further extension of 15 days to make the payment. However, once again, the Corporate Debtor failed to make payment and following this, a letter dated 30.01.2020 was sent by the Operational Creditor to the Corporate Debtor reiterating the demand for outstanding payments.

- 2.6 Thereafter, efforts to contact the Corporate Debtor proved futile. After several follow-ups, the Corporate Debtor informed the Operational Creditor *vide* letter dated 26.03.2021 that it had made payment of Rs.28,92,329/- on 25.03.2021 for the period 01.10.2019 to 31.12.2019. Thereafter, no payments were received by the Operational Creditor. The entire outstanding of Rs.8,50,00,000/- plus the interest was required to be paid by the Corporate Debtor on or before 30.06.2021 but till date, the Corporate Debtor has failed to honour its commitments.
- 2.7 Consequently, the Operational Creditor issued a Demand Notice dated 28.03.2022 to the Corporate Debtor under the provisions of Section 8 of the Code. The Operational Creditor has furnished the Affidavit dated 09.06.2022 under Section 9(3)(b) of the Code stating that it had not received any notice or letter from the Corporate Debtor regarding any dispute of unpaid operational debt or dispute towards the quality of goods supplied.
- 2.8 The Operational Creditor maintains a Running Accounting Ledger of the Corporate Debtor confirming the outstanding debt. Further, debt is also evident from the Balance Sheet of the Corporate Debtor for the financial year 2018-19.
- 2.9 In view of above, the Operational Creditor has filed this Application to initiate CIRP in respect of the Corporate Debtor.

### **3. CONTENTIONS OF CORPORATE DEBTOR**

- 3.1 In its reply dated 21.06.2023, the Corporate Debtor submits that it is not in a position to pay Rs.11,08,73,767/- (Eleven Crore Eight Lakhs Seventy-Three Thousand Seven Hundred and Sixty-Seven Rupees) on account of slump in business due to impact of COVID-19 pandemic. The entire business activity of the Corporate Debtor has come to a grinding halt due to lockdowns declared by

both the Central and State Governments. This macro-economic situation has significantly impacted the business of the Corporate Debtor and resulted in default.

- 3.2 The default is thus a direct consequence of genuine business slowdown. The Corporate Debtor is making sincere efforts to mitigate this situation and revive its business.

#### **4. ANALYSIS AND FINDINGS**

- 4.1 Upon due consideration of the pleadings along with the materials available on record and hearing the Ld. Counsel for the Operational Creditor and Corporate Debtor, our findings in the matter are as under:-

- 4.2 A perusal of Part-IV of the Application reveals that the Operational Creditor has claimed a sum of Rs.11,08,73,767/- to be in default as on 31.12.2019. This includes advance payment of Rs.8,50,00,000/- made by the Operational Creditor to the Corporate Debtor on 29.03.2017 for supply of materials and balance amount of interest @13.50% p.a. As stated above, the Corporate Debtor *vide* letter dated 16.03.2017 had agreed to supply materials for a solar project to the Operational Creditor for a total cost of Rs.17 Crores. 50% payment was to be made in advance and the balance payment was to be made within 15 days of deliver of materials. The materials were to be supplied to the Operational Creditor within 6 months from the date of advance payment. However, there was no supply of material within the stipulated time. The Operational Creditor made multiple inquiries about the status of the supply of materials through various correspondences and on each occasion, the Corporate Debtor sought extension of time for supplying the material. Owing to

inordinate delay in the supply of materials, the Operational Creditor *vide* letter dated 23.02.2018 cancelled the purchase order and sought refund of the amounts paid.

- 4.3 Subsequently, the Corporate Debtor requested for some relaxation in repayment of the advance amount along with interest which was granted by the Operational Creditor till 30.09.2019. Despite repeated follow-ups and several reminders made by the Operational Creditor *vide* letters dated 10.12.2019, 30.01.2019 and 09.03.2020, no payments were made by the Corporate Debtor. This clearly shows that the Corporate Debtor had not only failed to supply the materials but also committed a default in refunding the advance amount along with interest to the Operational Creditor. It is now well-established that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an 'operational debt' within the meaning of Section 5(21) of the Code, as held by the Hon'ble Apex Court in ***Consolidated Construction Consortium Limited Vs. Hitro Energy Solutions Private Limited [2022 SCC OnLine SC 142]***. The expression "a claim in respect of provision of goods or services" in Section 5(21) covers not only claims from a supplier who has not received the agreed-upon payment from the buyer of its goods or services but also claims from a buyer/ receiver who has not received the agreed-upon goods or services despite paying advance sums towards it. In view of the above legal position, it is clear that the amount of advance money paid by the Financial Creditor to the Corporate Debtors for supply of goods has to be treated as an 'operational debt' under Section 5(21) of the Code. The Operational Creditor has placed on record necessary evidences and materials such as Ledger Account, Balance Sheet of the Corporate Debtor for F.Y.2018-19, correspondences between the Operational

Creditor and the Corporate Debtor exchanged from time to time and Demand Notice dated 28.03.2022 in order to prove the existence of operational debt.

- 4.4 The next point to be determined is with regard to the occurrence of default. The date of default mentioned by the Operational Creditor in Part-IV of the Application is 31.12.2019. However, this does not appear to be factually correct. It is observed from the record that the Corporate Debtor *vide* letter dated 04.09.2018 addressed to the Operational Creditor accepted the cancellation of purchase order and requested for time for repayment of the advance payment of Rs.8,50,00,000/- along with interest rate of 13.50% p.a. for a period of 3 years including a moratorium of one year for principal as well as interest. In response, the Operational Creditor *vide* letters dated 04.09.2018 and 28.09.2018 accepted the proposal and allowed a moratorium of one year for principal and interest from 01.10.2018 to 30.09.2019. As per the repayment schedule, the principal amount of Rs.8,50,00,000/- was payable on 30.06.2021 and quarterly interest was to be paid in seven instalments commencing from 31.12.2019 to 30.06.2021. Thus, it is noticed that only first instalment of quarterly interest of Rs.28,92,329/- was payable by the Corporate Debtor on 31.12.2019 which was actually paid on 25.03.2021. In other words, the amount in default as on 31.12.2019 was only Rs.28,92,329/- in terms of the repayment schedule conveyed to the Corporate Debtor *vide* letter dated 28.09.2018 while the principal debt of Rs.8,50,00,000/- was payable on 30.06.2021. It is also noticed that no payments were made by the Corporate Debtor after 25.03.2021. Therefore, we are of the considered view that it is not 31.12.2019, as claimed in the Application but 30.06.2021, which ought to be considered as the actual date of default when the entire principal debt along with outstanding interest was due and payable by the Corporate Debtor as per the aforesaid repayment schedule but



remained unpaid. The present Application filed by the Operational Creditor on 11.06.2022 is thus well within the period of limitation under Section 238A of the Code read with Article 137 of the Limitation Act, 1963.

4.5 Coming now to the Corporate Debtor's defence based on its inability to pay the outstanding dues of the Operational Creditor, this is nothing but an admission of unpaid operational debt. Moreover, it is well-settled that inability to pay debt has no relevance for admitting or rejecting an application for initiation of CIRP under the Code. What has to be seen is not the inability to pay debt but the occurrence of a default. The judgment of the Hon'ble Apex Court in **Swiss Ribbons Pvt. Ltd. Vs. Union of India (2019) 4 SCC 17** makes it clear that rather than the "inability to pay debts", it is the "determination of default" that is relevant for allowing or disallowing an application filed under Sections 7, 9 or 10 of the Code. Thus, we hold that inability to pay debt cannot be treated as a valid defence in proceedings under Section 9 of the Code. With the enactment of the Code, legislative policy has moved away from the concept of 'inability to pay' to 'determination of default' and one of the policy reasons for this shift was that the cause of default is not relevant. The said shift enables an applicant to prove by documentary evidence that there was an obligation to pay the debt and that the debtor has failed to fulfil its repayment obligations.

4.6 In view of aforesaid discussions, it is evident that there was a default on the part of the Corporate Debtor in the payment of undisputed operational debt to the Operational Creditor exceeding Rs.1,00,00,000/- (One Crore Rupees) being the threshold monetary limit under Section 4 of the Code prevailing on the date of filing of the present Application. Thus, this Application under Section 9 of the Code preferred by the Operational Creditor is found to be maintainable. The Application is complete and has been filed in the prescribed form. There is no payment of the

unpaid operational debt till date. The Demand Notice has been delivered by the Operational Creditor to the Corporate Debtor and no notice of dispute has been received by the Operational Creditor. In view of the above, we find that all requisite conditions necessary to trigger CIRP in respect of the Corporate Debtor are satisfied and the matter is fit for admission under Section 9(5)(i) of the Code.

- 4.7 The Operational Creditor has proposed the name of Mr. Anshul Gupta, a registered Insolvency Professional with Registration Number IBBI/IPA-002/IP-N00310/2017-18/10899, having valid Authorisation for Assignment up to 06.11.2024 as the Interim Resolution Professional (IRP) and annexed his consent in Form 2 wherein no disciplinary proceeding is shown to be pending against him.

### **ORDER**

In view of the aforesaid findings, this Application bearing C.P.(IB) No.761/MB/2022 filed under Section 9 of the Code by Sharada Erectors Private Limited, the Operational Creditor, for initiating CIRP in respect of Orbit Electro Equipments Private Limited, the Corporate Debtor is **admitted**.

We further declare moratorium under Section 14 of Code with consequential directions as follows:

I. We prohibit-

- 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 of 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 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 the moratorium period.
- III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Bench approves the resolution plan under sub-section (1) of section 31 of the Code or passes an order for the liquidation of the Corporate Debtor under section 33 of the Code, as the case may be.
- IV. That the public announcement of the CIRP shall be made immediately in accordance with Section 13 of the Code and the relevant Rules and Regulations made thereunder.
- V. That this Bench hereby appoints **Mr. Anshul Gupta**, a registered Insolvency Professional having Registration Number- **IBBI/IPA-002/IP-N00310/2017-18/10899**, and Email ID- [contactanshulgupta@gmail.com](mailto:contactanshulgupta@gmail.com) as the Interim Resolution Professional (IRP) to carry out the functions

under the Code. The fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.

- VI. That during the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of Section 17 or Section 25, as the case may be, of the Code. The officers and managers of the Corporate Debtor are directed to provide effective assistance to the IRP as and when he takes charge of the assets and management of the Corporate Debtor. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP within a period of one week from the date of receipt of this Order and shall not commit any offence punishable under Chapter VII of Part II of the Code. Coercive steps will follow against them under the provisions of the Code read with Rule 11 of the NCLT Rules, 2016 for any violation of law.
- VII. That the IRP/IP shall submit to this Tribunal periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- VIII. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, we order the Operational Creditor to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the Operational Creditor on priority upon funds from the Committee of Creditors (CoC) becoming available with IRP/RP. The

expenses, incurred by IRP out of this fund, are subject to approval by the CoC.

- IX. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.
- X. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the IRP including by way of email and WhatsApp.
- XI. Besides, a copy of this order shall also be forwarded by the Registry of this Tribunal to the IBBI for their record.
- XII. **Compliance report of the order by Designated Registrar is to be submitted today.**

Sd/-

**SANJIV DUTT  
MEMBER (TECHNICAL)**

Deepa & JNK

Sd/-

**K. R. SAJI KUMAR  
MEMBER(JUDICIAL)**