

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - I**

**R.C.P. (IB) NO.3 (MB) 2023 connected
to CP (IB) 3965 (MB) 2019**
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

Gupta Power Infrastructure
Ltd.

[CIN :

U31300WB1961PLC02510

4]

...Applicant/Operational
Creditor

Versus

API Engineers and
Equipment Pvt. Ltd.

[CIN :

U29299PN2003PTC017]

...Respondent/Corporate
Debtor

Order pronounced on 12.04.2024

Coram:

Hon'ble Member (Judicial) : Justice V. G. Bisht (Retd.)

Hon'ble Member (Technical) : Sh. Prabhat Kumar

Appearances:

For the Applicant/Operational Creditor: Mr. Avinash Khanolkar,
Advocate

For the Respondent : None

ORDER

Per: Justice V. G. Bisht (Retd.), Member (Judicial)

Brief facts:

1. This Company Petition is filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **Gupta Power Infrastructure Ltd.** ("hereinafter referred to as the Operational Creditor /Applicant"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **API Engineers and Equipment Pvt. Ltd.** ("hereafter referred to as the Corporate Debtor/Respondent").
2. The Applicant is an unlisted Public Non-Government Company, limited by shares, registered under the Companies Act bearing CIN U31300WB1961PLC025104 having its registered office at EN-62, Sector V, 7th Floor, Salt Lake City, Kolkata – 700091. The Applicant is being represented by Shri Sujit Pattanaik.
3. The Respondent was incorporated on 06.05.2003 under the Companies Act, 1956. Its Corporate Identity Number (CIN) is U29299PN2003PTC017 and registered office is at 18 A, Kapila Housing SOC Gokhale Nagar, Pune, Maharashtra - 411016. Therefore, this Bench has jurisdiction to entertain and decide the Petition. The Authorized share capital of the Respondent is Rs. 1,00,000/- whereas the paid up share capital is Rs. 1,00,000/-.

4. The Amount claimed to be in default is Rs. 59,72,619.42/- which includes Rs. 14,05,924.37/- as debt due plus Rs.45,66,695.05/- as interest calculated as per section 16 of Micro, Small & Medium Enterprises Development Act, 2006, that is at 3 times of bank rate of RBI with monthly rest on the aforesaid debt amount for the period starting from the date on which the debt fell due till 31.08.2019.

Submissions of the Applicant:

5. The Corporate Debtor issued a purchase order dated 14.02.2014 to the Operational Creditor for supply of ACSR Panther Conductor wherein it was categorically mentioned by the Corporate Debtor that 100% payment of the order value against PDC of 30 days from the date of offer for inspection.
6. The Operational Creditor dispatched the entire materials to the Corporate Debtor from its factory on 16.03.2014 vide its Delivery/Excise Invoices, Challan Cum Packing Lists, Consignment Notes and Invoices dated 16.03.2014 through Road Carrier.
7. That the materials/goods were received by the Corporate Debtor at the shipping destination as has been mentioned in the purchase order pursuant to which the Corporate Debtor has issued two postdated cheques bearing numbers 017880 and 025228 against two invoices. Since the Corporate Debtor paid, by way of RTGS, the full amount of the first cheque bearing 017880, the Operational Creditor returned the same. However, the second cheque bearing no 25228 dated 13.04.2014 for an amount of Rs.20,81,357/- was dishonored on its presentation and accordingly the Corporate Debtor issued another cheque in

favour of the Operational Creditor bearing no. 041168 dated 10.07.2014 for an amount of Rs. 20,81,357/- which was dishonored again. Accordingly, a complaint case under section 138 of the N.I. Act is pending before the S.D.J.M, Bhubaneswar.

8. That, though the due date for payment to the Operational Creditor starts from 15.04.2014 the Corporate Debtor has not made any payment even after issuance of notice under section 138 of N.I. Act. The default arose when the corporate debtor failed to make the due payments in respect of the goods supplied by the Operational Creditor. The total principal amount of Rs. 14,05,924.37/- was due as on 15.04.2017 on the Corporate Debtor to be paid to Operational Creditor. Further an interest of 3 times of the bank rate of RBI with monthly rest has been claimed by the Applicant from the Corporate Debtor in terms of the Central Legislation namely Micro, Small and Medium Enterprises Development Act, 2006. The Operational Creditor Company is an SSI unit bearing No.15/11/558 PMT dated 12.01.1997 and EM-II No.21.017-12-00121 dated 06.05.2008 issued by DIC, Bhubaneswar. Hence an interest to the tune of Rs.45,66,695.05/- has been claimed on the delayed payment.
9. On 16.12.2017 the Operational Creditor, sent a demand notice dated 13.12.2017 to the Corporate Debtor as per Form-3 as well as Form- 4 under section 8 (1) of the Insolvency and Bankruptcy Code, 2016 (“IBC”), read with rule 5 of the Insolvency and Bankruptcy Rules, 2016. No reply was given to the same.
10. Thereafter the Applicant filed form 5 under Section 9 of the IBC for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor before the NCLT, Mumbai Bench on 06.02.2018 vide CP 203/I&BP/2018.

11. The Corporate Debtor has raised a main issue of Limitation in their defense on the ground that the claim of the Operational Creditor arises from the Invoices raised on 16 March 2014 while the Petition is filed in the month of March 2018 and hence the Petition is time barred. The Operational Creditor states and submits that thereafter Memorandum of Settlement was reached and executed on 26.09.2018 wherein the Corporate Debtor acknowledged the liability of Rs 55,07,548.38/- (inclusive of Principal of Rs 19,81,361.37/- and interest of Rs 35,26,187.01/-) and the Corporate Debtor has also undertaken to clear the entire liability. However, with the execution of the above Memo of Settlement, the admission of liability gets confirmed as on 26.09.2018 and thus the issue or bar of limitation ceases to exist.
12. The Applicant has further submitted that the Corporate Debtor was not present before this tribunal despite receipt of notice in the proceedings of CP no. 203/I&BP/2018. The said petition was admitted by this bench (by instructing the Court Associate "ADMIT") and the Counsel left the Court Hall thereafter. The Final order which was uploaded on the NCLT website after 14.01.2019 that the Petition has been dismissed by this Bench. Further, there is no mention about the filing of the Settlement dated 26.09.2018 by the Counsel of the Operational Creditor across the Bench and the issue of limitation has been held against the Operational Creditor. The same has been challenged by the Applicant.
13. Therefore, Operational Creditor had filed a review petition Vide MA No. 492/MB/2019 against the Order dated 14.01.2019 received on 21.01.2019, passed by this Bench.

14. On 16.07.2019, with the consent of this Bench, the petition was withdrawn and the Operational Creditor was permitted to file a fresh petition. Order for the MA No. 492/MB/2019 stated that "*At the request of Counsel for the Applicant, this application is dismissed as not pressed. Hence this CP is closed.*"
15. After entering into the Settlement agreement, the Corporate Debtor made payment to the tune of Rs. 6,75,437.00/- only in 3 instalments on 11.07.2018, 25.09.2018 and 02.07.2019. The Operational Creditor, sent a fresh Demand Notice dated 16.07.2019 as per Form- 3 as well as Form-4 under section 8 (1) of the Insolvency and Bankruptcy Code, 2016, read with rule 5 of the Insolvency and Bankruptcy Rules, 2016 for claiming Rs.58,44,074.30 (which includes Principal of Rs.14,05,924.37/- and interest of Rs.44,38,149.93/- calculated upto 16.07.2019.) However, the same has not been paid by the Corporate Debtor.

Findings

16. Heard the submissions of the learned Counsel for the Applicant and perused the records.
17. Vide order dated 08.05.2023, company petition bearing no. 3965/2019 was dismissed for non-prosecution. However, the same was restored vide Restoration Application 21/2023. Further, vide order dated 27.02.2024, the Respondent was set exparte since the Respondent was not present despite the service of Notice. Also, no reply has been placed on record by the Respondent.
18. We note that the earlier petition no. CP (IB) 203/2018 for the underlying debt was filed and came to be dismissed by this tribunal vide order dated 14.01.2019 on the ground of limitation.

It is the case of the Applicant that it has preferred a review application no. MA 492/2019 seeking modification of the order dated 14.01.2019 and the Applicant had withdrawn the petition with the consent of this tribunal allowing liberty to file a fresh petition. However, on perusal of order dated 16.07.2019, we do not find any such order whereby the order dated 14.01.2019 was recalled and the petitioner was allowed to withdraw the petition on ground of consent terms allowing the liberty to the petitioner to file a fresh petition in case of default. The order dated 16.07.2019 only records that “*At the request of Counsel for the Applicant, this application is dismissed as not pressed. Hence this CP is closed.*” Accordingly, we find that the pleadings to the effect that this tribunal had allowed the liberty to file a fresh petition is not corroborated by the facts on record of this tribunal. Since the earlier CP no. 203/I&BP/2018 was already dismissed and the order attained finality, we are of considered view that the present application is not maintainable for the same cause of action. Hence dismissed.

Order:

1. The Petition bearing **R.C.P. (IB) NO.3 (MB) 2023 connected to CP (IB) 3965 (MB) 2019** filed by **Gupta Power Infrastructure Ltd.**[CIN:U31300WB1961PLC025104], the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **API Engineers and Equipment Pvt. Ltd.**[CIN : U29299PN2003PTC017], the Corporate Debtor, is **dismissed**.

2. The Registry is directed to communicate this Order to the Operational Creditor and the Corporate Debtor by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
3. Ordered accordingly.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
<MK>

Sd/-

JUSTICE V. G. BISHT
MEMBER (JUDICIAL)