

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU, BENCH
(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
(Through physical hearing/VC Mode (Hybrid))

CP (IB) No.18/BB/2023
U/s. 9 of the IBC, 2016
R/w Rule 6 of the IBC (AAA) Rules, 2016

IN THE MATTER OF:

M/s. G.K ISPAT PRIVATE LIMITED

No.44 Brigade Business Suites
5TH Floor, T Mariayappa Road,
2nd Block, Jayanagar, Bangalore- 560011

... Operational Creditor

Versus

M/s. BEST GOLDEN DEVELOPERS PRIVATE LIMITED

#8, Tumkur Road,
NH4, Yashwanthpur,
Bangalore, Karnataka – 560022

... Corporate Debtor

Order delivered on: 16/02/2024

Coram: Hon'ble Shri. K. Biswal, Member (Judicial)
Hon'ble Shri. Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner : Shri Anupam Agarwal
For the Respondent : Ms Niyathi. M

O R D E R

Per: Manoj Kumar Dubey, Member (Technical)

1. The present petition is filed on 17/11/2022 under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC'/Code), r/w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules 2016, by M/s **G K Ispat Pvt Ltd** (for brevity 'Operational Creditor/Petitioner') inter alia seeking to initiate Corporate Insolvency Resolution Professional Process against M/s. **Best Golden Developers Pvt. Ltd** (hereinafter referred as 'Corporate Debtor'/Respondent) on the ground that the Corporate Debtor has committed a default for a total outstanding amount of Rs. 2,45,99,070/-. The date of default mentioned in the Part IV of Form 5 is 18/06/2019.

2. Brief facts of the case, which are relevant to the issue in question, and as narrated by the Petitioner are as follows:
 - i. The Operational Creditor supplied iron and steel good to the Corporate Debtor against purchase order bearing no. TPT / 18-19/1045 issued on 04/06/2019 and thereafter vide an email dated 18/06/2019 amended the Purchase order bearing no. PT/18-19/1045-Amend. Against the amended Purchase order dated 18/06/2019, iron and steel goods were timely supplied by the Operational Creditor.
 - ii. Invoices were raised against the delivery of goods, out of which, the Corporate Debtor made some part payments towards the total invoice amount and finance charges. Upon several follow ups made by the Operational Creditor the Corporate Debtor issued 3 cheques for further payment, all dated 30/09/2019, for Rs, 50,00,000/- , Rs 66,57,980/- and Rs 50,00,000/-. However, all the 3 cheques were dishonoured and returned to the Operational Creditor with an endorsement "Funds insufficient."
 - iii. The Operational Creditor filed 3 Complaints under Section 200 of Code of Criminal Procedure read with Section 138 and 142 of Negotiable Instruments Act before the Chief Metropolitan Magistrate at Bengaluru for the dishonour of each of the above mentioned cheques, which are still pending.
 - iv. Total amount payable as on 30 /08/2022 by the Corporate Debtor against the goods delivered to the Corporate Debtor was

Rs.2,45,99,070/- (Rupees Two Crores Forty-Five Lakhs Ninety-Nine Thousand Seventy Only). However, the Corporate Debtor failed to pay the abovementioned amount to the Operational Creditor.

- v. The Operational Creditor served a Demand Notice dated 24/09/2022 under Section 8(1) of IBC upon the Corporate Debtor. As the Corporate Debtor failed to make payment of the debt within 10 days thereof, the Operational Creditor sought to initiate Corporate Insolvency Resolution Process.
3. The notice in the present case was issued on 06/03/2023. On 13/06/2023, the Respondent filed its statement of objection, vide Diary No: 3091 and contended as under:
 - i. It is stated that the Petition was liable to be dismissed since it has been filed in respect of invoices which are all more than three years old, i.e. between the dates of 18.6.2019 and 29.6.2019, and the present Petition has been filed on 17.11.2022. Further, the Operational Creditor has itself mentioned the Date of Default as 18.06.2019 in Part-IV of Form No.5.
Moreover, in the synopsis filed by the Respondent vide Diary No.5994 dated 29.11.2023 reliance has been placed on the Judgment of the Hon'ble Apex Court in the case of *Ramesh Kymal Vs. Siemens Gamesa Renewable Power Pvt. Ltd., in Civil Appeal No.4050 of 2020* dated 09.02.2021 for the contention that once a Date of Default has been mentioned, the same cannot be changed subsequently. Therefore, it has been reiterated that considering the Date of Default of 18.06.2019, the present Petition is barred by limitation.
 - ii. The Corporate Debtor has made part payments at various instances before the date of filing of Petition, to the tune of Rs 58,23,709/-. Thereafter, though the said petition was filed by the Operational Creditor, the Corporate Debtor has made further payments of 85,00,000/- on various dates after the date of filing

of the Petition. Therefore, the Corporate Debtor in all has paid a sum of Rs 1,43,23,709/-, Hence, deducting the said paid amount, the threshold limit of Rs 1 Cr is not satisfied in the present petition.

- iii. The Petitioners have wrongly alleged default in payment of a sum of 2,45,99,070/-. The total amount payable as per the Invoices in the Petition filed by Operational Creditor is however only 1,76,57,980/- This difference of Rs 69,41,727/- is not accounted for by the Operational Creditor and no details have been furnished. Therefore, there is a mismatch in the claim made and the invoices submitted.
 - iv. There are proceeding pending before the Addl. Chief Metropolitan Magistrate, U/s 200 of Code of Criminal Procedure and 138 of NI Act, for the bouncing of the cheques mentioned above, therefore the same constitutes a pre-existing dispute and hence the Petition is liable to be dismissed under Section 9(5)(ii)(d) of the IBC.
 - v. Further, in Annexure IIC at page no.33 of the Petition, it is seen that the Petitioner has also added an amount of Rs.121,83,465/- towards Finance Charges, whereas, there was no agreement for the same and the Operational Creditor has not produced any document on record for justification of these charges. Thus, objections have been raised for levying of finance charges which is added to the principal amount of the invoices and it has been emphasized that considering the total amount of Rs.1,43,23,709/- paid before or after filing of the Petition, the threshold requirement is not fulfilled.
 - vi. Moreover, the Corporate Debtor was financially solvent and is an ongoing concern with 71 employees employed and the present Petition is merely filed to extort the Corporate Debtor.
4. The Learned Counsel for the Petitioner filed its rejoinder vide Diary No:4518 dated 30/08/2023 and written submission vide Diary No: 400 dated 19/01/2024 and contents as:

- i. The Respondent had a pending liability of Rs 1,18,34,271/- which was still due for payment as on the date of filing of the Petition; and the same is exclusive of the interest. Further, as per the terms of tax invoice, 2% interest per month was to be levied in case of delay of payments. The same was added to the default amount by the Petitioner amounting to a total claim of Rs 2,45,99,070/-.
- ii. The last payment made by the Respondents was on 30/11/2019 and thereafter on 30/11/2022 i.e after filing the said petition, with the sole intention to bring the default amount below the threshold limit of Rs. 1,00,00,00,000/-.
- iii. The Operational Creditor and the Respondent were in a continuous business transaction. That the last date of payment was on 30/11/2019 which was a part payment. That though the first default occurred on 18/06/2019, the default was in continuation as the Respondent used to make partial payments towards the Principal and Interest Amount till 30/11/2019, therefore the date of default to be taken into consideration was 30/11/2019. The Ld Counsel for the Petitioner have quoted the judgements in Hon'ble Supreme Court in *B.K Educational Services (P) Ltd. V. Parag Gupta & Associated* MANU/SC/1160/2018, and Hon'ble NCLAT judgement in *Unigold System v. Fortune Spirit* MANU/NL/0493/2021.

5. We have pursued the record available and also heard Learned Counsels based on which we observe the following:

As per Part IV of Form No.5 the Amount in default was Rs. 2,45,99,707/-, i.e principal invoice value along with interest calculated at 24% as on 30/08/2022. The argument of the Ld Counsel for the Respondent regarding the principal operational debt being only Rs 1,76,57,980/- as per the 12 invoices raised by the Operational Creditor and that the interest amount cannot be claimed as the same was not agreed upon.

However, it is observed that the Invoices raised from 18/06/2019 to 29/06/2019, clearly stipulate that an interest of 2% per month would be levied from the due date. The Corporate Debtor has made part payments in the past and issued cheques towards the payment of debt and no dispute on this clause was ever raised or noted from record available before us.

In this regard reliance is placed on the judgment of Hon'ble NCLAT in *Prashant Agarwal v. Vikas Parasrampuriah & Anr, Company Appeal (AT) Ins No. 690/2022*, wherein it was observed that,

“In this context, as discussed above, all 9 invoices clearly stipulated provision of Interest on delayed payment. It is also observed that payments of three invoices has been made in full and for one invoice in part against said invoices by CD and no dispute on this clause was ever raised as noted from record available before us.

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Since, interest on delayed payment was clearly stipulated in invoice and therefore, this will entitle for “right to payment” (Section 3(6) IBC) and therefore will form part of “debt” (Section 3(11) IBC).”

Hence this Tribunal is satisfied from these facts that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself.

6. The contention of the Respondent in the objections that the Petitioner has concealed the payment made before the date of filing of the Petition to the tune of Rs.58,23,709/- is found to be incorrect. Considering the details of the ledger Account of the Corporate Debtor maintained by the Petitioner Company which has been furnished with the Petition at page no.33 Annexure II-C and page 66 Annexure 2H, it clearly shows that

this entire amount of Rs.58,23,709/- has been duly taken into consideration and deducted from the gross amount of Rs.1,76,57,980/- for arriving at the net outstanding amounts, and the finance charges have been included subsequently. Therefore, there is no mismatch in the claim made in the Form No.5 of the total outstanding amount of Rs.2,45,99,707/- with reference to the details of the invoices attached.

7. In so far as the claim of the Petitioner in the written submission regarding the change of date of default from 29.6.2019 to 30.11.2019 is concerned, it has been rightly argued by the Respondent that no such change of date of default is allowable considering the judgement of the Hon'ble Apex Court in the case of Ramesh Kymal (supra); as well as in accordance with the prevalent legal principles in this regard. However, it is mentioned that there is a part payment made by the Respondent amounting to Rs.5 lakhs on 30.11.2019; which is reflected in the ledger Account, Annexed at page no.61 of the C.P. Such part payment amounts to an acknowledgment of debt in view of the judgement dated 04.08.2021 of the Hon'ble Apex Court in the case of *Dena Bank Vs. C. Shivakumar Reddy and Anr. in Civil Appeal No.1650 of 2020*. Since the part payment was made on 30.11.2019, the period of limitation allowable will be three years from the date of this part payment in accordance with the Section 18 of the Limitation Act, 1963. Since this Petition has been filed on 17.11.2022, therefore, it is within the period of Limitation.
8. Moreover, the case filed by the Operational Creditor U/s.138 of the Negotiable Instrument Act, 1881 for bouncing of cheque before the Hon'ble Chief Metropolitan Magistrate does not amount to any pre-existing dispute as held by the Hon'ble NCLAT in the *Company Appeal (AT) (Insolvency) 623 of 2018 in the matter of Sudhi Sachdev Vs. APPL Industries Ltd.*, vide Order dated 13.11.2018.

9. Accordingly, this adjudicating authority is of the considered opinion that there is no reason to deny the petition filed under section 9 of the IBC, 2016 by the Operational Creditor to initiate CIRP against the Belvedere Project of the Corporate Debtor. Therefore, the instant Company Petition bearing **CP (IB) No. 18/BB/2022 is admitted** against the Corporate Debtor Best Golden Developers Pvt Ltd and moratorium is declared in terms of Section 14 of the Code. As a necessary consequences of the moratorium in terms of Section 14 of the Code, the following prohibitions are imposed, which must be followed by all and sundry:
- a. The institution of suits or continuation of pending suits or proceedings against the Project of Corporate Debtor including execution of any judgment, decree or order in
 - b. any court of law, tribunal, arbitration panel or other authority;
 - c. Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
 - d. 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - e. The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Corporate Debtor;
 - f. It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period;
 - g. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector

regulator and to a surety in a contract of guarantee to a Corporate Debtor;

- h. The order of moratorium shall have effect from the date of this order till completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under sub-section (1) of Section 31 or passed an order for liquidation of Corporate Debtor under Section 33 as the case may be;

- 10.** This bench appoints Ms Pavithra S Vyas Registration No. IBBI/IPA-002/IP-N01144/2021-2022/13844, having registered address: CCB 52, 3rd Floor, Opp. Shivaji Garden, Dr. SPM Road, Khade Bazar, Shahapur, Belagavi-590003,Shahapur ,Opp. Shivaji Garden , Union Bank Of India, Belgaum, Karnataka ,590003, Contact No: 9449191848, e-mail:*cspavithravayas@gmail.com* as Interim Resolution Professional to carry the functions as mentioned under the IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Section 15,17,18,19,20,21 of the IBC. The IRP shall file his written consent within one week from today.
- 11.** The Operational Creditor shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakhs Only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors.
- 12.** The Interim Resolution Professional shall after collation of all the claims received against Belvedere Project of the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first

meeting of the Committee within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every fortnight.

- 13.** A copy of the order shall be communicated to both the parties. The learned Counsel for the Petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send the copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

-Sd-

(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

-Sd-

(K.BISWAL)
MEMBER (JUDICIAL)