

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 02.05.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/304/2021
NAME OF THE COMPANY	Benita Industries Limited
NAME OF THE PETITIONER(S)	Eriez Magnetics India Pvt Ltd
NAME OF THE RESPONDENT(S)	Benita Industries Limited
UNDER SECTION	9 of IBC

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this petition is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II

CP(IB) No.304/9/HDB/2021
U/s. 9 of IB Code, 2016

Between:

M/s. Eriez Magnetics (India) Pvt. Ltd.,
R/o. 1/1, Ambattur Vanagaram,
Main Road, Athipet, Chennai,
Tamil Nadu – 600058.

.... Operational Creditor

Vs.

M/s. Benita Industries Ltd.,
R/o. 8-2-685/P1, 8-2-685/P,
8-2-685/P6/1 & 8-2-685/P6,
3rd Floor, Road No. 12, Banjara Hills,
Hyderabad – 500 034.

.... Corporate Debtor

Date of Order: 02.05.2024

CORAM:-

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)
Sri Sanjay Puri, Hon'ble Member (Technical)

Counsels present:

For the Applicant : Mr. Dinesh Babu Eedi, Advocate
For the Respondent : Mr. Maharshi Viswaraj, Advocate.
Heard on : 04.04.2024

Per: Sanjay Puri, Member (Technical)

ORDER

1. This petition has been filed by M/s. Eriez Magnetics (India) Pvt. Ltd, the Operational Creditor (**OC**) on 12.11.2021, seeking to initiate the Corporate

Insolvency Resolution Process (**CIRP**) under Section 9 of IBC against M/s. Benita Industries Ltd, the Corporate Debtor (**CD**), alleging a default of debt payment of **Rs 2,88,52,886.63**. This total comprises the principal amount of Rs 3,22,83,410 inclusive of Rs 21,01,000 for storage of equipment beyond the due delivery date and other miscellaneous charges. Additionally, interest amount of Rs 66,38,476 has been computed from the date of default till 31.10.2021. A deduction of Rs 1,00,69,000 has been made from already paid amounts by the CD. Therefore, the net default amount claimed stands at Rs 2,88,52,886.

Brief facts of the petition:

2. It is averred that the OC is engaged in manufacturing and supplying various industrial equipment, including magnetic separators, metal detectors, vibratory feeders, and conveyors. In 2018, the CD approached the OC for supply of machinery, for their mining operations in Chabali, Kadapa District, Andhra Pradesh.
3. It is submitted that after thorough verification and satisfaction with the quality of the equipment, the CD placed a Purchase Order¹ (**PO**) on 11.10.2019 for the manufacture and supply of 17 Single Drum RE Magnets and 6 Single Roller RE Magnets, for a total contract price of **Rs 5,98,14,200** inclusive of Goods and Service Tax.
4. It is claimed that 10 Drum Magnets and 4 Roller Magnets (Lot-1 Shipments) were to be supplied by the OC within 3 months and balance machines (Lot-2 Shipments) were to be supplied by the end of 4 months from the date of receipt of 10% advance by the CD.
5. Following payment terms were outlined in the PO:
 - a) 10% on acceptance of the order by the OC (1st Instalment)
 - b) 15% upon approval of drawings of the Equipment by the CD. (2nd Instalment)

¹ Pg no. 39-40 of the Application

- c) 50% on inspection and before despatch on pro-rata basis (3rd Instalment)
- d) 15% on receipt of the Equipment (4th Instalment); and
- e) Balance 10% on successful commissioning or in 30 days of supply whichever is earlier.

The CD provided an advance amount of 10% on 11.10.2019 upon issuing of the PO.

6. It is submitted that the CD approved the drawings on 18.10.2019 and requested extra features for which the OC had absorbed additional costs, but did not make any modifications to the contract price/PO. Upon approval of drawings, the CD was to pay 2nd instalment. However, despite repeated requests for payments, the CD paid only Rs 50,00,000 instead of Rs 76,03,500.
7. It is asserted that the CD through various emails acknowledged that payments were due and would be settled shortly. Furthermore, on 17.12.2019 in a meeting convened between OC and CD, the officials of CD provided assurance regarding the payment. Following which, OC had manufactured the Lot-1 shipment on 02.01.2020. An email then was sent to CD about the status of the completed equipment, and urging the CD to conduct an inspection by 08.01.2020. However, no inspection was carried out by the CD.
8. It is stated that after many follow ups by the OC through emails requesting CD for taking delivery of the equipment and making due payments, the officials of CD had informed the OC that due to sudden cash flow issue, the delivery could not be taken at that time. The OC however continued to procure raw materials for Lot-2 shipment and manufactured the same within the stipulated timelines.
9. It is averred that the OC had made various calls and sent emails requesting the CD to take the delivery of equipment and to settle the pending dues of Rs. 2,83,27,800 for Lot-1 shipment. It is claimed that in

the emails dated 13.10.2021, 09.11.2021 and 24.01.2021 the CD had reassured the OC about taking delivery of the equipment before 10.03.2021. The OC in response then informed the CD vide email dated 03.02.2021 about the inventory costs, storage charges, interest on delayed payments etc., incurred for holding onto the equipment since January 2020.

10. It is stated that in March 2021 the OC had visited the registered office of the CD, to resolve all issues and secure payments. On 06.03.2021 a letter was formally issued on the letterhead of the CD to the OC, assuring about taking delivery of the equipment in the 1st quarter of FY 2021-2022.
11. The OC on 06.05.2021 through an email informed the CD about all the additional costs incurred and difficulties faced. It is submitted that as on 10.08.2021 the total amount debt due was Rs 3,79,59,580 towards the equipment manufactured, expenses incurred by the OC for storage of equipment, maintenance, interest on delayed payments etc. The CD had by then paid only Rs 1,00,69,000, and the amount of Rs 2,78,90,580 remained to be paid. Since the payment of Rs 2,78,90,580 was still not received, on 24.08.2021 the OC issued a Demand Notice under section 8 of IBC. Receiving no payment thereafter, the present application was filed.

Counter on behalf of Corporate Debtor:

12. It is contended by the CD that no part of the Goods under the PO were supplied by the OC, and the OC is not entitled to any claims towards interest on delayed payments, manufacture, and storage of equipment, etc., as the claim does not arise from the terms of the PO.
13. It is contended that the Adjudicating Authority is not a Court that can decide whether a claimant is entitled to certain payments on grounds of breach of contract. Wherein the OC is founding its claims on a disputed claim of breach of the terms of the PO. The Clause-16 of PO has in any event provided for arbitration for determination of such dispute.

14. The CD relies on the judgment passed by the Hon'ble Supreme Court in **"Swiss Ribbons Pvt. Ltd. Vs. UoI²"** which observed that

"Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law"

15. It is argued that the substantial part of the OC's claims pertain to damages. Specifically, it is contended that no basis or proof has been provided for Rs 3,01,82,410 claimed by the OC for the cost of materials and labour. Similarly, the claim of Rs 21,01,000 for storage, security and other miscellaneous charges is also contested, as no basis has been given.
16. It is argued that these claims were not founded in any part of the PO from which the OC is claiming the right to sue. Since these basic claims are not maintainable, the claim for interest too will not be maintainable as held by the **Hon'ble NCLT, Mumbai Bench, in the case of Tata Chemicals Ltd³**.
17. It is contended that, according to the terms of the PO, the OC has not supplied any machines to the CD to date. Thus, it is the OC who is in breach of the PO that it is relying on to assert its claims.
18. It is further submitted that in the 'Demand Notice' dated 24.08.2021, OC has admitted incorporating extra features in the machines after the drawings were approved. According to the CD, the OC was required to obtain approvals for drawings for such modifications and additional features and since it was not done, there was a non-compliance of the

² AIR (2019) 4 SCC 17

³ Tata Chemicals Ltd Vs. Raj Process Equipments and Systems Pvt. Ltd. in CP 21/I&BP/NCLT/MAH/2018.

payment terms of the PO. Therefore, the CD was not obliged to pay the 15% advance on drawings approval, as claimed by the OC.

19. It is also argued that, even according to the OC, the amount payable after approval of drawings was Rs 76,03,500 out of which Rs 50,00,000 was paid by the CD and thus the default was only Rs 26,03,500, which is below the threshold to invoke the provisions of IBC.
20. It is averred that on 03.09.2021 the CD in response to the Demand Notice dated 24.08.2021 called upon the OC to fix a date for necessary inspection of the goods and to provide the necessary reports. The OC without any giving reply to the CD, approached this Adjudicating Authority, which shows that it had no intent to supply the goods.
21. It is contended that the OC has not provided any documentation such as purchase orders, invoices, bills, or vouchers to support their claim for expenses and charges. Additionally, there is no evidence submitted to demonstrate that the OC procured the material and had the goods ready for inspection as claimed.
22. It is argued that the CD is not liable for 50% of the goods, as it was to arise after inspection and clearance. The OC's claim is stated to be premature as per the PO terms, which require inspection before any further payment. The OC demand lacks clarity on the readiness of the equipment for inspection. Therefore, the CD has denied its liability for the claimed amount, losses, damages, or additional costs until inspection was completed. It is further averred that the claim of the OC towards interest, losses/ damages, additional charges are not agreed to be paid under the PO and they do not come within the ambit of "Debt" as defined under IBC.
23. It is asserted from that the CD was not liable to pay any amount towards the procurement of material and labour costs incurred by the OC much less the amount of Rs. 2,79,59,580 as in Demand Notice or Rs. 2,88,52,886 which is alleged as per Part-IV of Form-5 of the Application.

The amount demanded vide Demand Notice under IBC cannot be claimed and does not give rise to any debt and default under the provisions of IBC.

24. It is averred that Part-V of Form-5 requires the submission of relevant documents demonstrating that the debt has become due. The OC has relied solely on emails to claim that it has incurred substantial losses from procuring materials, labor costs for manufacturing, and additional expenses for storage and security of equipment. It is contended that none of the amounts specified in Part-IV of Form-5 are due and payable. Therefore, the claim made by the OC based on the Purchase Order dated 11.10.2019 does not constitute a debt, and it is a claim without any basis.

Additional Counter on behalf of CD

25. It is contended that OC has included an amount of Rs 3,01,82,410.21 in the computation of debt, purporting to be the cost of material and labour costs with a deliberate intent to confer the jurisdiction of this Adjudicating Authority. Furthermore, the OC failed to account for the salvage value of the goods in question. It is implausible that the goods hold no value, especially considering the substantial amount purportedly spent by the OC to secure them. If the salvage value of the goods had been considered, the situation would likely demonstrate that instead of the CD owing any amounts to the OC, it would be the other way around, with the OC owing money to the CD.
26. It is contended that the claim arises out of the PO for Rear Earth Magnets are made from neodymium, which is typically produced in China and the prices of which vary from day-to-day. It is averred that the PO was placed on 11.10.2019. Furthermore, the claim of Rs. 3,01,82,410.21 is based on the price of Neodymium on that day, the resalable value of the goods would be more than twice that of the claim.

27. It is contended that the OC is trying to hoodwink this Adjudicating Authority into believing that really there is a claim and that it crosses the threshold to be entertained.
28. In the rejoinder the OC reiterated the contentions made in the Application.

The Decision

29. We have heard the Counsel for the parties and gone through the records. Admittedly, in this case, the goods were not supplied to the CD in pursuance of the PO dated 11.10.2019. It has been claimed by the OC that the CD has not taken delivery of the goods which were manufactured in pursuance of the aforesaid PO and, therefore, the CD was liable to pay the price of the goods and the non-payment of the said amount tantamount to a default in respect of an operational debt. Now, the question arises as to whether in the given scenario, non-acceptance of goods on the part of the CD amounts to an operational debt or not.
30. To answer this question, we must first refer to the PO dated 11.10.2019, where the terms for the supply of goods by the OC were outlined by the CD. The relevant terms were:

“Payment terms shall be 10% on order acceptance, 15% on drawing approval, 50% on inspection and dispatch on pro-rata basis, another 15% on receipt at our works. Final 10% on successful commissioning or in 30 days of supply whichever is earlier.”

“All goods supplied against this PO shall be subject to Inspection and approval by Buyer at any time within 30 days from the date of receipt. Any rejection, shortage, damage, breakage etc. shall be on Vendor’s account. Unless otherwise stipulated weight/volume recorded at the Buyer’s premises shall be final.”

“Property in the goods shall pass on to the Buyer on payment or on supply whichever occurs first. The goods shall remain at vendor’s risk, till they are safely delivered to the Buyer.”

31. From the terms of the PO, it is evident that the CD's right to receive goods in acceptable condition was contingent upon payments made after reaching certain milestones. Similarly, the OC's right to payments depended on achieving these milestones. Specifically, the CD was entitled to receive goods in acceptable condition once 90% of the total price had been paid. Conversely, the OC was obligated to reach milestones that would lead to the supply of finished goods, with payments being made upon receipt, inspection, and approval by the CD.
32. The OC's right to receive payments, following 'drawing approval', was dependent on 'inspection before dispatch', 'receipt' of goods at the CD's premises, and 'successful commissioning'. Since none of conditions after 'drawing approval' were met, the OC could not legitimately claim any right to payment, regardless of the fact that these conditions were dependent on the actions to be taken by the CD.
33. According to the contractual terms outlined in the PO, the Vendor (the OC) does not have the right to demand payment from the Buyer (the CD) if it fails to exercise its right to receive the ordered goods. Initially, the CD made a payment of 10% of the goods' price upon placing the PO. Subsequently, after 'drawing approval', a payment of Rs 50,00,000, which represented part of the second agreed tranche, was also made. Since only a partial payment was made after the 'drawing approval' milestone and no further payments were made, the CD forfeited its right to enforce the execution of subsequent milestones, including receipt of the finished goods. However, under the terms of the PO, this does not grant the OC any right to demand specific performance from the CD or make any claim for not taking delivery of the impugned goods.
34. We note that the OC by this stage had received from the CD Rs 1,00,69,000. Since no further payments were made, no goods were supplied. Therefore it is the OC which has received money for supplying nothing. Even if the goods were manufactured by the OC as per the

agreed specifications, according to the terms of the PO, the property in the goods remained with OC as neither the payment was made nor the finished goods supplied.

35. The CD indeed failed to comply with the terms of the PO by not making the scheduled payment of 15% following 'drawings approval'. The OC has quantified this failure at Rs 26,03,500. Consequently, the maximum claim the OC holds against the CD is this amount, which falls below the threshold required for initiating action under section 9 of IBC.
36. Any additional claims the OC may have against the CD are not derived from the PO and therefore do not establish a 'right to payment' under the terms of the agreement. Without any valid claims, there exists no 'debt' due from the CD as defined under section 3(11) of the IBC, apart from the aforementioned Rs 26,03,500.
37. Even if the breach is considered in respect of the terms of the PO, the claim does not arise automatically. In this context it is relevant to refer to the judgment of the Hon'ble Supreme Court in the case of **Union of India vs. Raman Iron Foundry**⁴ wherein it was held as follows:

*“When there is a breach of contract, the party who commits the breach does not **eo instanti** incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not in actionable claim and this position is made amply clear by the amendment in s. 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred.”*

⁴ 1974 AIR 1265

38. This Authority does not have the jurisdiction to adjudicate matters pertaining solely to contractual damages. Furthermore, the PO stipulates that any disputes arising should be referred to arbitration. Consequently, we find no cause of action to entertain this application, which involves only the payment of damages. This order does not preclude the OC from filing a claim for the recovery of damages, if any, before the appropriate forum.

The present Application is therefore dismissed.

Sd/-
(SANJAY PURI)
MEMBER (TECHNICAL)

Sd/-
(RAJEEV BHARDWAJ)
MEMBER (JUDICIAL)

Rohit