

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH - V

C.P. (I.B) No. 4216/MB/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules 2016)

In the matter of

ABC India Ltd.

Having its address at P-10, New C.I.T. Road, Kolkata 700073

.....Petitioner/Operational Creditor

Vs

Prabhakar Engineers Pvt. Ltd.

Having its registered office at Plot No. 116, MIDC Bhosari, Pune 411016

.....Corporate Debtor

Order Dated: 01.05.2024

Quoram:

Reeta Kohli, Hon'ble Member (Judicial)

Madhu Sinha, Hon'ble Member(Technical)

Appearances in physical/video-conference/ hybrid mode:

For the Petitioner/Operational Creditor: Mrs. Kenny Thakkar and

Mr. Deepak Aggarwal

For the Corporate Debtor: Adv. Aditya Mehta

ORDER

This Company Petition is filed by **ABC India Ltd.** (hereinafter referred as “**the Petitioner/Operational Creditor**”) seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as “**CIRP**”) against **Prabhakar Engineers Pvt. Ltd.** (hereinafter called “**Corporate Debtor**”) on **26.11.2019** by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy Code, 2016 (hereinafter called “**the Code**”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for committing default in payment of an Operational Debt of **Rs. 19,03,500/- (Rs. 12,69,000 /- due as on the date 30.11.2016 as per the Demand Notice and contractual interest of Rs. 6,34,500/- @ 24% p.a.) along with further interest till the date of realisation.**

Brief Facts and Submissions by the Operational Creditor:-

1. The Operational Creditor and the Corporate Debtor are both companies registered under the Companies Act where the former is engaged in the business of logistics and transportation and the latter is engaged in the design and manufacture of Boiler Pressure parts among other lines of business.
2. The Corporate Debtor approached the Operational Creditor for transportation of Cargo from Bhosari, Pune to Indian Oil Corporation, Vadodra. Accordingly, a meeting was convened on 04.07.2016 between the two parties.
3. Vide email dated 06.07.2016, the Operational Creditor mailed the full terms and conditions of the offer to the Corporate Debtor. The offer clearly mentioned that Rs. 9,38,000/- would be the freight charges and the aggregate would amount to Rs. 9,50,000/-

provided Detention Charges are levied. The Corporate Debtor would get 1 day for loading and 2 days for unloading as Detention Free Days. The Corporate Debtor, based on this offer, issued an Order to the Operational Creditor dated 06.07.2016.

4. It is the case of the Operational Creditor that one category of cargo, namely, Hydraulic Axle, was reported for loading on 21.09.2016 but its movement started only on 01.10.2016. it reached the unloading point on 26.10.2016, permitted entry at the Indian Oil Corporation on 05.11.2016 and finally released only on 26.11.2016.
5. Similarly, another category of cargo, namely, Mechanical Trailer was reported for loading on 21.09.2016 but its movement started only on 04.10.2016. it reached the unloading point on 11.10.2016, was stranded till 09.11.2016 for unloading and finally released only on 26.11.2016.
6. On 16.11.2016, a joint meeting was held between the Operational Creditor, Corporate Debtor and Indian Oil Corporation wherein it was agreed that the Corporate Debtor would pay detention charges to the Operational Creditor and the Corporate Debtor would be reimbursed by Indian Oil Corporation. On this assurance alone, the Operational Creditor unloaded the goods. An email of the same date, recording the minutes of the afore stated meeting has been placed on record of this Hon'ble Tribunal.
7. Accordingly, 2 Invoices with detention charges were raised by the Operational Creditor and were duly received, accepted and acknowledged by the Corporate Debtor without raising any objections. The details of the two invoices are as follows:-

SR. NO.	INVOICE NO.	DATED	AMOUNT (IN RS.)
1.	BBYP/BP 2263-A/16-17	30.11.2016	2,71,000/-
2.	BBYP/BP 2272-A/16-17	30.11.2016	9,98,000/-
	TOTAL		12,69,000/-

8. Vide email dated 25.11.2016, the Corporate Debtor requested the Operational Creditor to receive payment for detention at loading point on 28.11.2016, however failed to pay the same. This email in itself amounts to admission on the part of the Corporate Debtor.
9. Thereafter, through its diverse emails/letters ranging from the starting date of 19.11.2016 to 16.03.2018, the Operational Creditor requested the Corporate Debtor to pay detention charges but in vain.
10. The Corporate Debtor by its letter dated 11.11.2017 had replied to the Operational Creditor's letter dated 07.11.2017 thereby enclosing the email of 16.11.2016 along with various reminders sent by the Corporate Debtor to Indian Oil Corporation in relation to payment of detention charges. It is here the case of the Operational Creditor that failure of reimbursement to the Corporate Debtor by Indian Oil Corporation does not free the Corporate Debtor of its liability to pay the Operational Creditor. There is absolutely no privity of the contract between Indian Oil Corporation and Operational Creditor. The claim of the Corporate Debtor that detention charges are in nature of damages and compensation cannot be entertained as the Operational Creditor

had not made any claims for loss of business on account of its vehicles being blocked for delay in loading and unloading points.

11. As no payments were forthcoming in relation to the undisputed invoices, the Operational Creditor sent a Demand Notice dated 16.01.2019 in Form 3 under Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditor further submits that the date of default as per Demand Notice was 30.11.2016 and the Amount of Default was Rs. 19,03,500/-. However, the Corporate Debtor had neither replied to the afore stated Demand Notice nor made any satisfactory payment within the statutory period of 10 days from the date of the Demand Notice and hence this Petition.

Submissions by the Corporate Debtor:

12. It is the case of the Corporate Debtor that it is an admitted position and is also clearly evident in the order of this Hon'ble Tribunal dated 06.02.2020 that charges payable in respect of the transportation services have been paid in full. The bank statement of the Operational Creditor clearly reflects a receipt of the sum of Rs. 6,50,000/- on 21.10.2016 and a further sum of Rs. 2,88,000/- on 02.11.2016 by the Operational Creditor from the Corporate Debtor. These receipts cumulatively add up to Rs. 9,38,000/- which coincides with the overall amount stipulated in the order for transportation. Thus, the Corporate Debtor had duly paid towards the services availed and no operational debt remains outstanding.
13. It is the further case of the Corporate Debtor that detention charges do not come within the purview of Operational Debt as defined under Section 5(21) of the Code as they are in the nature of penalty/damages, payable because of breach of a contractual

stipulation and/or a sum payable because of a loss suffered by a party. Therefore, the petition in itself is not maintainable.

14. Additionally, there is no contract whereby the Corporate Debtor had agreed to pay detention charges. Even the Order of Transportation dated 06.07.2016 relied on by the Operational Creditor does not contain any clause pertaining to detention charges. In fact, even this Hon'ble Tribunal in its Order dated 06.02.2020 had arrived at a prima facie conclusion that there is no *"provision as per the terms and conditions for charging the detention amount"*. The Petitioner had relied on an email dated 16.11.2016, to show agreement for payment of detention charges. It is pertinent to note that the above stated email is addressed by the Operational Creditor and not the Corporate Debtor. The Corporate Debtor had neither signed the minutes constituted in the above stated mail nor acknowledged the mail and verified its contents.
15. It is the case of the Corporate Debtor that the liability to pay Detention charges was of Indian Oil Corporation which can be evidenced from the following:-
 - Email dated 25.11.2016 whereby the Respondent informs to the Operational Creditor that it will remit the Detention Charges immediately to the Operational Creditor on receiving it from Indian Oil Corporation.
 - Email dated 05.12.2016 addressed by the Operational Creditor to the Corporate Debtor stating that they are drafting a complete letter which can be forwarded by the Corporate Debtor to Indian Oil Corporation to facilitate release of our unloading point detention charges.
 - Several emails sent by the Corporate Debtor to Indian Oil Corporation asking for release of Detention Charges and explicitly stating that only on repayment of the Detention Charges by Indian Oil Corporation to the Corporate Debtor

would the Corporate Debtor be liable to transfer the same to the Operational Creditor. All of which have been copied to the Operational Creditor but the Operational Creditor had nowhere contended that if Indian Oil Corporation did not pay the charges, the Corporate Debtor would be liable to pay the same.

- The email dated 16.11.2016 particularly captures that the fault because of which “Detention Charges” had been incurred rested with the Indian Oil Corporation and not the Corporate Debtor. Therefore, Indian Oil Corporation had agreed to pay the charges. Just because there is failure on the part of Indian Oil Corporation to pay the charges, it is inequitable for the Operational Creditor to now cast the liability on the Corporate Debtor and furthermore, misuse this Code for recovering the same in place of instituting a civil suit against Indian Oil Corporation before the competent civil court for calculating damages.

Findings

- A. The case of the Operational Creditor is that the Corporate Debtor had hired freight services of the Operational Creditor for delivering goods from Pune (loading point) to Vadodra (unloading point) and at the inception admitted to pay to the Operational Creditor detention charges in case of delay after one day from loading point and delay beyond two days at unloading point. The above stated term was explicitly mentioned in the email dated 04.07.2016 based on which the Corporate Debtor issued the Work Order dated 06.07.2016. Furthermore, the email dated 16.11.2016 clearly records the minutes of the Joint Meeting held between the 3 parties on the same day, namely, the Operational Creditor,

Corporate Debtor and Indian Oil Corporation, in which the primary liability to pay the detention charges is cast upon the Corporate Debtor. It is pertinent to note that the Corporate Debtor had raised no kind of objection to this mail in any manner. Additionally, the Corporate Debtor had also accepted its liability and asked the Operational Creditor to collect payment of the charges vide email dated 25.11.2016. It is the further case of the Operational Creditor that Detention Charges claimed by it are not in the nature of damages/penalty. The reason being that they are not claimed on account of loss of business but for its vehicles being blocked for delay at loading and unloading points. This can be established from email dated 04.07.2016 based on which the Corporate Debtor issued the Work Order dated 06.07.2016.

B. The main contentions of the Corporate Debtor are as follows:

- i. Detention Charges are not a part of Operational Debt and
- ii. These Charges were not agreed to be paid to the Operational Creditor before its receipt from Indian Oil Corporation meaning thereby that Indian Oil Corporation would first pay the detention charges to the Corporate Debtor and subsequently the Corporate debtor would pay it to the Operational Creditor.

C. After close perusal of all documents placed on record and appreciating the arguments of both the parties, it is established that the Corporate Debtor had impliedly agreed to pay the detention charges at the very inception since the Order for Transportation dated 06.07.2016 was issued by the Corporate Debtor in pursuance to the email dated 04.07.2016, which expressly contains the detention charges term. This email dated 04.07.2016 also contains per day detention charges of each type of trailer beyond the detention free day.

D. Furthermore, in the instant case, there has been an express agreement between the three parties whereby the Corporate

Debtor has agreed to pay detention charges and then avail its reimbursement qua the charges from Indian Oil Corporation. This agreement is established without any kind of ambiguity through the email dated 16.11.2016 to which the Corporate Debtor had never raised any objections whatsoever which clearly amounts to deemed acceptance. The main clause of the minutes is quoted ad verbatim as follows:

“Mr Bhargava has clearly communicated that M/s. Prabhakar Engineers has to settle and pay detention charges to his vendor [ABC India]. The M/s. Prabhakar Engineers will have to submit the detention claim charges with detail to IOCL.

This express statement by the representative of Indian Oil Corporation, Mr. Bhargava leaves no scope of ambiguity on the point that Indian Oil Corporation will only repay the detention charges to the Corporate Debtor and the primary liability to pay the detention charges to the Operational Creditor is on the Corporate Debtor.

- E. In fact, the Corporate Debtor itself communicated to the Operational Creditor to depute its representative to negotiate and collect payment against detention charges on 28.11.2016. This communication can be established in the Corporate Debtor's email dated 25.11.2016. The contents of the email dated 25.11.2016 are reproduced, ad verbatim, as follows:

Dear Sir,

With reference to the above subject matter, we hereby confirm that detention charges (approved between you and IOCL) paid by IOCL to us will be immediately remitted to your bank account.

Kindly depute your representative to negotiate and collect payment against detention charges at PEPL, Pune on Monday dtd. 28.11.2016

However, the Corporate Debtor had failed to honour the payment on the concerned date. Thus, this email establishes that privity of the contract is between Operational Creditor and the Corporate Debtor and not between the Operational Creditor and Indian Oil Corporation along with express acknowledgement of the debt by the Corporate Debtor.

- F. One more ground substantiating deemed acceptance of debt is no reply by the Corporate Debtor to the Demand Notice dated 16.01.2019 by the Operational Creditor. Therefore, in view of the above stated observations, it is clear that debt due to the Operational Creditor by Corporate Debtor is established beyond reasonable doubt on more than one occasion. The fault lay in the understanding of the Corporate Debtor, that it was liable to pay to Operational Creditor only on receiving payment from the Corporate Debtor. This kind of understanding of the Corporate Debtor is even contrary to the basic meaning of the term “reimbursement”, which according to both Oxford and Webster Dictionary means “to pay back to someone”. Thus qua the meaning of the word reimbursement also, the liability of Indian Oil Corporation is secondary.
- G. This Hon’ble Tribunal is also of the opinion that Detention Charges are very much a part of the Transportation Charges as the moment transportation services are availed of any delay on the part of the Corporate Debtor to load or unload the goods is bound to become part of the Order of Transportation.
- H. On the basis of the above observations, this Hon’ble Tribunal comes to the conclusion that there is a clear establishment of **“Debt”** and corresponding **“Default”** along with satisfaction of pecuniary, subject matter and territorial jurisdiction which makes it a fit case for admission of the Corporate Debtor to CIRP under Section 9 of the Code.

ORDER

- a. In view of the aforesaid findings, the above Company Petition No. 4216/IBC/MB/2019 is hereby **admitted** and thereby initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Prabhakar Engineers Pvt. Ltd.
- b. Since there is no proposal for the name of Interim Resolution Professional by the Operational Creditor, Mr. Shekhar Kumar Agarwal having Registration Number IBBI/IPA- 002/IP-N00883/2019- 2020/12874 is appointed as the Interim Resolution Professional from this Tribunal's Panel.
- c. The Operational Creditor shall deposit an amount of **Rs. One Lakh** towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.
- d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; the recovery of any

property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

- e. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- g. That the order of moratorium shall have effect from the date of pronouncement of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai for updating the Master Data of the Corporate Debtor.
- k. Accordingly, CP 4216 of 2019 is **admitted**.

Sd/-

MADHU SINHA

MEMBER (TECHNICAL)

//VLM//

Sd/-

REETA KOHLI

MEMBER (JUDICIAL)