

**NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI**

CP/335/(IB)/CB/2018

Under Section 9 Rule 6 of the IBC, 2016

In the matter of

M/s. Madras Fertilizers Limited

M/s.Tarapore Constructions Private Limited

...Operational creditor

Vs.

M/s. Madras Fertilizers Limited

....Corporate Debtor

Order delivered on: 12.09.2018

Coram

K. ANANTHA PADMANABHASWAMY, MEMBER (J)

S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Petitioner : Shri Ravirajagopalan, Advocate.
For the Respondent : Shri Jayesh.B.Dolia, Advocate.
Shri.Geethanjali.T, Advocate
(for M/s.Aiyar & Dolia)

ORDER

Per: S. Vijayaraghavan, Member (Technical)

1. Under consideration is an application filed under Section 9 of the I & B Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (The Rules) M/s.Tarapore Constructions Private Limited (The Operational Creditor) against M/s. Madras Fertilizers Limited (The Corporate Debtor), having its registered office at Manali, Chennai – 600068.

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2. The operational creditor has filed this petition for the amount of Rs.1,02,32,733/- towards Claim 1 and Claim 5 of the Arbitration Award dated 31.03.2004 and as amended on 25.05.2004 with interest at the rate of 12% per annum amounting to Rs.1,70,46,330/- (as on 15.02.2018).
3. The operational creditor executed civil & structural works for Ammonia, Urea and Utilities revamp in the corporate debtor's factory at Manali. For the same the Corporate Debtor owed a sum of Rs.1,89,39,181/- to the Operational Creditor at that point in time. The same was disputed by the Corporate Debtor who said that only a sum of Rs.16,34,671/- was due and payable.
4. Invoking clause 10.4 of the GCC of the Agreement, the Operational Creditor commenced arbitration proceedings before a 3 member panel and the arbitration commenced on 29.04.2002. They pronounced their final award on 31.03.2004 and amended it further on 25.05.2004 enhancing the award. Out of the award for claims there under bearing numbers 2, 4 & 8 a sum of Rs.23,17,499/- was due and payable to the Corporate Debtor. The same was paid to the Operational Creditor on 08.09.2006 pursuant to the orders of the Madras High Court in O.S.A 260/2006.
5. The award for Claim 1 being Rs.66,43,907/- and Claim 5 being Rs.35,88,826/- totally amounting to Rs.1,02,32,733/- the Corporate

Debtor, disputed the said award and filed O.P. 659 of 2004 before the Hon'ble Madras High Court, seeking to set-aside the same. The Hon'ble Madras High Court dismissed the same and upheld the award on 17.04.2007. Consequently execution proceeding was initiate to enforce the award and realise the amounts from the Corporate Debtor by the Operational Creditor.

6. Meanwhile, based on the 31.03.2006 balance sheet and accumulated losses, the CD was referred to the Board for Industrial & Financial Reconstruction which declared the Company sick under Section 15(1) of the Sick Industrial Companies Act, 1985 (SICA) in Case No. 501/2007. Moratorium under section 22 of SICA came into effect as a result of which the enforcement of the award/decreed could not be progressed and came to be suspended. Even as of 01.12.2016 when the SICA was repealed and all pending proceedings abated, no scheme was sanctioned by the Hon'ble BIFR.
7. The CD was still a Sick Company and was in default and therefore ought to have revived the abated BIFR proceedings in Case No. 501/2007 before this Tribunal before the expiry of 180 days in accordance with Section 4 of the SICA Repeal Act, 2003 which was notified to be effective from 01.12.2016 under the IBC, 2016. As on date no such proceeding has been initiated by the Corporate Debtor.

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8. The OC issued a demand notice in Form-3 dated 17.02.2018 to the CD in accordance with section 8 of the IBC, 2016 which was delivered to the CD on 01.03.2018. Even after the expiry of 10 days the CD has not made any payments nor has the notice of dispute under Section 8(2) been sent to the Operational Creditor.
9. The Respondent has stated that that Respondent Company is a Government of India enterprise under the aegis of Ministry of Fertilizers. The Corporate Debtor is engaged in manufacture of fertilizers. The Petitioner Company invited tenders for execution of civil and structural works for ammonia, urea and utilities plant at a cost of Rs. 7,41,09,776/-. The Respondent accepted the tender of the Petitioner and issued a letter of intent on 24.02.1995. The work order was issued on 12.06.1995. The contract was entered into on 18.08.1995. The duration of the contract was 18 months from the date of letter of intent viz. 24.02.1995. The work should have been completed on or before 24.08.1996. However, the Petitioner failed to complete the work within the time prescribed in the contract dated 18.08.1995. In the letter dated 20.08.1996, the Petitioner sought for extension of time till 30.06.1997 and again requested extension of time till 31.10.1997. The Petitioner completed the civil and structural work on 15.11.1997 after a delay of 15 months. The Petitioner had even accepted the delay caused in completion of the construction and the

same is reflected in the minutes of the meeting held between the Petitioner and the Respondent.

10.The Respondent has stated that on 01.10.1999, the Petitioner addressed a letter making a claim of sum of Rs.1,48,15,011.58/-. On 02.05.2000, the Petitioner addressed a lawyer's notice demanding payment for the work done by it. The claim was refuted by the Respondent by reply notice dated 09.11.2000. On 25.11.2000, the Petitioner addressed the notice disagreeing with the reply notice dated 09.11.2000 and invoked the Arbitration clause. On 17.01.2001 and 11.03.2002, the Petitioner and the Respondent nominated their respective arbitrators. The Petitioner herein filed a claim statement claiming a sum of Rs. 4,42,25,800/- together with interest at 18% per annum pendente lite and future interest on the awarded amount from the date of claim statement till date of payment in full. The Petitioner claimed the above said amount under 10 claims. The Respondent herein filed its counter statement inter alia disputing its claims.

11.The Respondent has stated that on 31.03.2004, the Arbitral Tribunal passed an Award allowing the claim Nos. 1, 2, 4, 5 & 8 and rejected the other claims. Aggrieved by the same, the Respondent filed O.P. No .659 of 2004 challenging the Award passed in respect of claim Nos. 1 and 5. The Respondent paid a sum of Rs. 23, 17,499/- to the Petitioner on 08.09.2006 in respect of claim Nos. 2, 4 & 8 after initiation of

Execution proceedings and by the direction of the Hon'ble High Court in OSA No. 260 of 2006. Subsequently, O.P. No. 659 of 2004 was dismissed by the Hon'ble High Court, Madras on 17.04.2007. The Respondent had already preferred an Appeal against the order dated 17.04.2007 passed in O.P. No. 659 of 2004 vide SR. No. 58428 of 2018 and the same is pending. However, no stay order has been granted by the Hon'ble High Court.

12. Further the Respondent has stated that the Respondent Company was referred to BIFR and was registered as sick company on 30.03.2007 under the provisions of Sick Industrial Companies Act, 1985. The Respondent Company being a sick company was protected under the provisions of SICA until repeal of the same. Further, out of the 5 claims awarded in favour of the Petitioner, an Execution Petition was filed against the Respondent Company for Claim Nos. 2, 4 & 8 and the same was paid by this Respondent. The Petitioner had failed to file Execution Petition for the remaining claims and has approached this Tribunal to circumvent the ordinary execution proceedings.

13. The claim as awarded by the Arbitration proceedings is only Rs.1.023 crores whereas the Petitioner claims Rs.2.72 crores by adding an interest at the rate of 12% per annum. The Claim Petition is liable to be dismissed for the reasons that the Petitioner being an Operational

Creditor had included interest as part of claim which is not provided under the Insolvency and Bankruptcy Code.

14. It is respectfully submitted that the Respondent is a Central Government Public Sector Company and a going concern. The Petitioner instead of initiating execution proceedings has approached this Tribunal with the mala fide intentions to initiate Corporate Insolvency Resolution Process and henceforth the same is liable to be dismissed for the same.

ORDER

- 1) In this the Tribunal observes that the respondent had preferred an appeal against the order dated 17.04.2007 passed in O.P.No.659 of 2004 vide S.R.No.58428 of 2018 and that the same is pending. In this regard, the Tribunal observes that there is no order of stay of proceedings by the Hon'ble High Court and thus this Tribunal is not barred from issuing orders in this case.
- 2) The Tribunal further observes that the CD is a sick company and was in default and they ought to have revived the abated BIFR proceedings in Case No. 501/2007 before this Tribunal before the expiry of 180 days in accordance with Section 4 of the SICA Repeal Act, 2003 which was notified to be effective from 01.12.2016 under the IBC, 2016 which was not done by the Corporate Debtor.

- 3) The claim amount 1 and 5 in the Arbitral Award along with the interest at the rate of 12% p.a. from 31.03.2004 till 15.02.2018 amounts to Rs.2,72,79,063/-. In this regard the said amount which includes the interest is considered as the claim amount in the case.
- 4) It is seen from the Balance Sheet of the Respondent as on March 31st 2017 that the accumulated losses amount to Rs.717.6 Crores and the non-current liabilities amount to Rs.153.22 Crores and the current liabilities are to the extent of Rs.1504.32 crores. It is seen that as compared to the figures of March 31st 2016 the accumulated losses have increased during the Financial Year 2016-17. It is seen that the Company has been incurring losses contributing to the inability of the respondent to satisfactorily service the amounts due to the creditors. It is seen from the Respondent's Report Audit that the Company has defaulted loans from Government of India (GOI) which amounts to a total of Rs.418.23 Crores from 2004-05 onwards. The capital base of the Company which is at Rs.162.14 Crores has been totally eroded with the accumulated losses of Rs.717.60 Crores.
- 5) The petitioner/Financial Creditor has complied with all the requirements stipulated under the provisions of the I & B Code, 2016 and the Rules framed there under.
- 6) In these circumstances, we are inclined to admit the instant petition.

- 7) The instant petition is admitted and we order the commencement of the Corporate Insolvency Resolution Process against the Respondent/Corporate Debtor which shall ordinarily get completed within 180 days reckoning from the day this order is passed.
- 8) Since the Operational Creditor has not suggested any name for IRP. The Tribunal appoints **Mr. Swarnamani Ramaswamy** as an IRP. The IRP is directed to submit his consent in Form-2 within three days of issue of this order. The IRP is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under section 15 of the I & B Code, 2016 within three days from the date the copy of this order is received and call for submissions of claims in the manner prescribed.
- 9) We declare the moratorium which shall have effect from the date of this order till the completion of corporate insolvency resolution process for the purpose of referred to in section 14 of the I & B Code, 2016. We order to prohibit all of the following namely:
- (i) 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.

- (ii) Transferring, encumbering, alienating or disposing of by the corporate debtors any of its assets or any legal right or beneficial interest therein;
 - (iii) 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 (54 of 2002)
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- 10) The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.
- 11) The IRP so appointed shall comply with the provisions of sections 13(2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and cooperation to the

IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I & B Code.

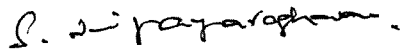
12) The petitioner/Operational Creditor as well as the Registry is directed to send the copy of this order to IRP on his appointment so that he could take charge of the Corporate Debtor's assets etc and make compliance with this order as per the provisions of the I & B Code, 2016.

13) The Registry is also directed to communicate this order to the Operational Creditor and the Corporate Debtor.

With the above directions the **petition is allowed.**

The details of the IRP are as follows;

Mr. Swarnamani Ramaswamy
IBBI/IPA-002/IP-N00560/2017-18/11701
D6, Dev Apartments,
36 Kalakshetra Road,
Lakshmipuram, Thiruvanmiyur,
Chennai- 600041
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Mobile – 9486906984



(S.VIJAYARAGHAVAN)
MEMBER (TECHNICAL)



(K.ANANTHA PADMANABHA SWAMY)
MEMBER (JUDICIAL)

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