

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI

SPECIAL BENCH

(IB)-130(PB)/2017
(IB)-160(ND)/2017
(IB)-180(ND)/2017
(IB)-181(ND)/2017

SECTION :

Under Section 10 of IBC Code, 2016

IN THE MATTER OF :

(IB)-130(PB)/2017

M/s. Energo Engineering Projects Ltd.
Flat No.709, Eros Apartments,
56, Nehru Place,
New Delhi – 110019.

PETITIONER/APPLICANT

For the Petitioner/Applicant

: Mr.K.Datta, Advocate
: Mr. Hemant Sharma, Advocate

For Objectors

: Mr. Navinder Nath Mathur for SBI.
:Mr. Mukesh Kumar, AGM, PNB, Mr.

(IB)-160(ND)/2017

SECTION :

Under Section 9 of IBC Code, 2016

M/s. Levcon Valves (P) Limited
"Rajkamal" , 6th Floor,
13, Camac Street,
Kolkatta-700017.

PETITIONER

[1]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

Vs.

Energ Engineering. Projects Limited

Flat No.709, Eros Apartments,
56, Nehru Place,
New Delhi – 110019.

RESPONDENT

For the Petitioner/Applicant

: Mr.Pankaj Jain, Advocate

:Mr. Mohd. Salman Razi, Advocate

For the Respondent

:Mr.K.Datta, Advocate

:Mr.Hemant Sharma, Advocate

(IB)-180 (ND)/2017

M/s. HMTc Engineering Co. (Kolkata) Pvt. Ltd.

Chowdhury Para Street,
Uttarrara, Hooghly-712258.
HO : 35, Netaji Subhash Road,
Kolkata-700001

PETITIONER

-Vs-

M/s. Energ Engineering Projects Ltd.

Flat No.709, Eros Apartments,
56, Nehru Place,
New Delhi – 110019.

RESPONDENT

For the Petitioner/Applicant

: Mr.Soumitra Chatterjee, Advocate

:Ms. Sriparna Chatterjee, Advocate

For the Respondent

:Mr.K.Datta, Advocate

:Mr.Hemant Sharma, Advocate

[2]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energ Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTc Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

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M/s. Wellman Wacoma Ltd.
Tower House, 3rd Floor,
2A, Howringhee Square,
Kolkata-700069.

PETITIONER

-Vs-

M/s.Energo Engineering Projects Ltd.
Flat No.709, Eros Apartments,
56, Nehru Place,
New Delhi – 110019.

RESPONDENT

For the Petitioner/Applicant

: Mr. Ankit Kohli, Advocate

:Mr.Pankaj Jain, Advocate

For the Respondent

:Mr.K.Datta, Advocate

: Mr.Hemant Sharma, Advocate

: Mr.Milan Singh Negi, Advocate

:Mr.Kunal Godwani, Advocate

:Ms.Varsha Banerjee, Advocate

Heard on: 18.08.2017

Order delivered on: 05.09.2017

Coram:

**R. VARADHARAJAN,
MEMBER (JUDICIAL)**

[3]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



ORDER

1. Since the above four Petitions relate to the initiation of the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor under Insolvency & Bankruptcy Code, 2016 (IBC, 2016) however, filed by different applicants, one of the applicant being the Corporate Debtor itself, and in view of the commonality of the issue involved, namely initiation of CIRP, a common order is passed in relation to the above four petitions. While the Corporate Debtor has filed its application for initiating the CIRP vide Application No.IB-130(PB)/2017 under Section 10 of Insolvency & Bankruptcy Code, 2016, the other three applications have been filed under Section 9 of IBC, 2016, by persons who claim to be its Operational Creditors on the basis that each of them have supplied goods for value and the payment of consideration in relation to the same are in default.

2. All the four applications, even though as stated earlier, relate to the initiation of CIRP of the Corporate Debtor, the maintainability and merits of the applications as filed by the Operational Creditors are taken first in order to ascertain as to whether the applications are sustainable in light of

[4]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



the provisions of IBC, 2016, in preference to that filed by the Corporate Debtor itself.

3. It is to be noted that IBC, 2016 even though contains a waterfall in respect of liquidation process, however in relation to initiation of CIRP by more than one category of applicant (i.e) Financial Creditor, Operational Creditor or Corporate Debtor and as to which one of the application is required to be taken first or preference given, has not been specified, for its disposal. However, NCLT being named as an Adjudicating Authority under IBC, 2016 and being a Court of Equity and this Tribunal in the absence of a petition filed by any Financial Creditor seeking for initiation of CIRP against the Corporate Debtor, considers it appropriate to take up the Petitions as filed by the Operational Creditors, before taking up the petition filed by the Corporate Debtor itself, as it avoids any semblance of unfairness and lack of transparency that may be alleged on the part of Insolvency Resolution Professional named by the Corporate Debtor itself by other stakeholders, in case of admission.

4. Firstly, the facts of each of the three applications are considered separately and thereafter this Tribunal proceeds to decide whether one or more of the

[5]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



applications as filed by respective Operational Creditor is maintainable. In case none of the three Petitions/applications are held to be maintainable, this Tribunal will proceed to take up the application as filed by the Corporate Debtor under Section 10 of IBC, 2016 for initiation of CIRP against it. Turning first in this regard to CA No.(IB)-160(PB)/2017 being filed prior in point of time, the following facts are noticed:

CA No.(IB)-160 (PB)/2017

5 (a) Perusal of the above application as filed under Section 9 of IBC, 2016 read with the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rule, 2016 (for brevity AAA Rules, 2016) discloses that the amount in default is claimed to be in a sum of Rs.54,60,771/- arising out of goods sold by the Operational Creditor to the Corporate Debtor and delivered at its factory at Gurgaon (Haryana) in terms of the purchase orders placed by the Corporate Debtor the details of which are given hereunder :

- i) EETL/FP-0134606 dated 18.6.2015
- ii) EETL/FP-0134612 dated 4.9.2015

(b) Subsequent to the delivery of goods in terms of the Purchase orders, it is averred that invoices had been raised by the Operational Creditor, which remain unpaid even as of today even though the payment fell due on 31st March, 2016. In addition to the amount payable under 4 invoices in a sum of Rs.54,60,771/-, the

[6]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



Operational Creditor also contends that interest is payable @24% on the billed amount as per the invoices which aggregates to a sum of Rs.14,47,029/- till 21st April, 2017 and, thus, the total amount payable and in default including interest is in a sum of Rs.69,07,800/-. The Operational Creditor claims that in relation to the default, it had also issued a notice of demand dated 24.4.2007 on the Corporate Debtor by 'Speed Post'. However, despite service of notice, it is claimed that no payment was made by the Corporate Debtor nor any notice of dispute was served within the mandatory period of 10 days as contained in the provisions of IBC, 2016.

In view of the same, the operational creditor claims the above petition in CA No. (IB)-160 (PB)/ 2017 has been filed before this Tribunal seeking for the initiation of CIRP against the Corporate Debtor.

C.A No.(IB)-180(ND)/2017 :

6(a) This application is filed by another Operational Creditor against the Corporate Debtor and the Operational debt claimed as stated in the prescribed Form-5 as given in AAA Rules, 2016 is in a sum of Rs.26,56,747/-. It is stated that based on Purchase Order, EETL No./PO/1017/1041 dated 23.12.2013 for the supply of technological structure fabrication and more specifically mentioned thereof, for a consideration of Rs.1,94,00,000/- and subsequently, amended by revised Purchase Orders dated 03.2.2013, 24.5.2014 and 16.6.2014, wherein the value of goods to be supplied was ultimately reduced to Rs.80,83,000/- from Rs.1,94,00,000/-.

[7]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



- (b) In view of placing of the purchase order and subsequent amendments and in terms of the same, the Operational Creditor in the above Application C.A No.180(ND)/2017 claims that supply of all the equipment were made under 10 invoices totaling to Rs.87,42,725/- inclusive of taxes as raised against the Corporate Debtor.
- (c) The Operational Creditor further claims that in all, as against the invoices raised, a sum of Rs.60,85,978/- had been paid inclusive of the advance amount paid in a sum of Rs.19,40,000/- by the Corporate Debtor however, there yet remains a balance sum of Rs.26,56,747/- as due and unpaid debt from the Corporate Debtor.
- (d) Under the circumstances, it is claimed by the Operational Creditor that a statutory notice dated 12.8.2015 was issued under the erstwhile provisions of the Companies Act, 1956 for winding up the company on the grounds of inability to pay its debt and even though the said notice was received, no reply was forthcoming on the part of the Corporate Debtor. Despite subsequent reminders, the Corporate Debtor was not paying the balance sum due and hence, the Operational Creditor, it is stated caused a notice dated 9.2.2017 to be issued under the relevant provisions of IBC, 2016. Subsequent to the receipt of notice, the Corporate Debtor through its Advocate, it is stated to have caused a reply to be sent to the notice sent by

[8]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



the Operational Creditor dated 28.2.2017. However, it is contended by the Operational Creditor that in the reply, no dispute had been raised against the claim of the Operational Creditor nor any intimation regarding payment made in relation to the debt/default due has been specified and in the circumstances, the present application seeking for initiation of the Corporate Insolvency Resolution Process (CIRP) has been filed against the Corporate Debtor.

(IB)-181(ND)/2017 :

7(a) Finally coming to the above application which it is seen has also been filed by another Operational Creditor claiming that a sum of Rs.5,39,821/- is due from the Corporate Debtor towards goods supplied under Purchase Order dated 04.8.2014 and consequent three invoices raised, aggregating in all to Rs.5,39,821/-.

(b) In addition to the above sum, it is claimed that a sum of Rs.1,59,399/- is also payable towards interest @18% p.a. in view of the provisions of Interest Act, 1978.

(c) The total claim as specified in Form-5 of AAA Rules thereby aggregates in all to Rs.6,99,220/-. In view of the non-payment of the amount arising under the invoices raised, the Operational Creditor claims that prior to

[9]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



filing of the application, a demand notice under Section 8 in Form-3 as prescribed under the AAA Rule 2016 dated 15.5.2017 was sent and the said notice had also been delivered on 19.5.2017 to the Corporate Debtor and that a reply was received by the Operational Creditor on 15.6.2017 issued from and on the part of the Corporate Debtor.

(d) In view of the non-payment of the amount in default, nor any pending dispute cited by the Corporate Debtor constituting a 'dispute', the Operational Creditor it is stated has been constrained to file the above application seeking for the CIRP as against the Corporate Debtor.

C.P. (IB)-130(PB)/2017 :

8(a) In relation to the above petition, it is seen that even prior to the date of filing of the 3 petitions earlier dealt with, this petition has been filed on 26.5.2017 by the Corporate Debtor itself seeking for the initiation of CIRP. The application as detailed above, has been filed as already stated by virtue of Section 10 of IBC, 2016 read with AAA Rules, 2016. The application has been preferred under Form-6 of AAA Rules, 2016. Part-I of the prescribed format gives particulars of the Corporate Debtor and upon a perusal of the same, it is evident that the Company was incorporated on 08.6.1989 as Energo Engineering Projects Private Limited with Registration No.55-36554 with the Registrar of Companies, Delhi & Haryana and that subsequently, the name of the company had been changed to the present one and consequent upon the change of name, fresh Certificate of Incorporation had also been issued by the Registrar of Companies, NCT of Delhi & Haryana. It is also stated that the

[10]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



authorized share capital of the company is Rs.5,50,00,000/- divided into 55,00,000 equity shares of Rs.10/- each and that the paid-up equity share capital of the company stands at Rs.5,12,25,000/- divided into 51,22,500 equity shares of Rs.10/- each.

- (b) The name, address and authority of the person submitting the application on behalf of the Corporate Debtor /Corporate applicant is stated to be one. Mr. Jaya Singh, Director of the Corporate Debtor and in support of the same, a copy of the Resolution passed in the Board of Directors meeting held on 23.05.2017 is annexed.
- (c) In terms of the provisions of IBC, the Corporate Debtor has also named in the prescribed format, the interim Resolution Professional (IRP) as one Mr. Nilish Sharma, having registration No.IBBI-IPA-002/IP-00006/2016-17. The application further furnishes under Para-III of the prescribed format that in view of the default in payment to the Financial Creditors, both Secured & Unsecured, the application seeking initiation of CIRP is being preferred.
- (d) In support of the default, various documents including the minutes of the Joint Lenders Forum, held by Banks under consortium has also been annexed along with the application. In the circumstances, the above application for the initiation of CIRP as against itself is being sought for by the Corporate Debtor under the provisions of IBC, 2016.

[11]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



(e) Even though the above four applications were listed on different dates in view of the commonality of issue involved as discussed in the opening paragraph of this order supra, all the four applications were heard together on 18.8.2017. While in relation to the applications filed by the Operational Creditors were resisted by the Corporate Debtor, however, in relation to the application as filed by the Corporate Debtor, State Bank of India, a financial creditor, resisted the initiation of CIRP after notice was ordered to be sent to the Financial Creditors as listed by the Corporate Debtor in its application as a lead banker and on behalf of the consortium of lenders, predominantly on the ground of fraud alleged to have been perpetrated by the promoters of the Corporate Debtor to the detriment of the corporate debtor and the financial creditors as well, being the lenders who have advanced huge sums to the Corporate Debtor.

9) Delving further on the aspect of virtually simultaneous applications being preferred by the creditors as well as the Corporate Debtor which has been touched upon in the paragraph 3 & 4 supra, it becomes incumbent on the part of the Tribunal to justify its preference to the applications filed by the Operational Creditors first rather than the application preferred by the Corporate Debtor, even though, both, if admitted, will lead to the same result that of an appointment of IRP to take over the management and affairs of the Corporate Debtor in order to resolve the insolvency or in the case of its failure to its inevitable liquidation. But it is also required to be considered by this Tribunal as to which of the IRP will be perceived to sub-serve the interest of all the stake holders better, even though all the Insolvency Professionals are considered to be independent professionals, in view of the alleged perception or apprehension

[12]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



which the other stakeholders might have, if the person named by the Corporate Debtor itself is named as the IRP, to take control of the affairs of the Corporate Debtor, in case the applications filed by either the financial creditor or the operational creditor is found to be capable of being admitted, but the persons named therein as IRP is ignored. This Tribunal is of the considered view that in such a case appointing the IRP as named by the Corporate Debtor in preference to that of Creditors will go against the grain of IBC, 2016, as the purpose of IBC, 2016 in the case of insolvency, is to shift the control of assets and management from the hands of promoters or the prevalent management to that of the creditors who will be in a position to take a call as to whether the restructuring or resolution plan can be put in place or the Corporate Debtor needs to go through the liquidation process. The provisions of IBC permeate with the above objective as the Committee of Creditors, under Section 22 of IBC, 2016, is given a right to appoint a Resolution Professional of its choice by either retaining or removing an IRP appointed by this Tribunal with or without the recommendation of IBBI, as the case may be. Thus the scheme of IBC, 2016 as observed by the Hon'ble Supreme Court in its judgement dated 31.08.2017 rendered in M/s.Innoventive Industries Ltd Vs ICICI Bank &Anr in Civil Appeal No(s) 8337-8339/2017 in paragraph 34 is to the following effect:-

“The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay its debts and get back on its feet. All this is to be done within a period of 6

[13]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.”

10) It is further pertinent to note that under the provisions of IBC, 2016 there is a compulsion for the Financial Creditor under Section 7 of the IBC, 2016 or the Corporate Debtor approaching this Tribunal under Section 10 of IBC, 2016 in naming a Insolvency Professional (IRP) in the application itself as otherwise the application is considered to be not complete. Further by virtue of Section 16 of IBC, 2016, if an IRP has been named, then this Tribunal is required to name the said person proposed by the Financial Creditor or the Corporate Debtor as the case may be as IRP under the provisions of IBC, 2016. However, in relation to an Operational Creditor, while approaching this Tribunal under Section 8 & 9 of IBC, 2016, there is no such compulsion and thus it is left to the discretion of the Operational Creditor to either name or not to name an IRP in the application. In the absence of any IRP being named, Section 16 of IBC, 2016 enjoins this Tribunal to make a reference to Insolvency & Bankruptcy Board of India (IBBI) for the recommendation of an IRP and IBBI is required to recommend the name of an IRP to this Tribunal against whom, no disciplinary proceedings are pending. The above situation arises only if the petition is admitted by this Tribunal and the act of naming the IRP recommended by the Operational Creditor is left to the Adjudicating Authority. Further, as per the provisions of Section 16 of IBC, 2016, a period of 14 days is provided for naming an IRP from the date of commencement of Insolvency proceedings, which as per provisions of Section 7, 9 and 10 is stated to be the date of admission of the application. Even though the Corporate Debtor has named in its application the name of an IRP to be appointed, however, because of the vehement objections from financial creditors, namely State Bank of India as well as other operational creditors before us in the

[14]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



interest of justice, the corporate debtor, without prejudice has withdrawn the names and had left the choice to this Tribunal or to IBBI as the case may be, even in the circumstances where the other applications of the Operational Creditors are not considered to be fit for admission and the only one left is that of the application of the Corporate Debtor itself by this Tribunal. In this connection keeping in view Section 22 of IBC, 2016 when the lead banker of the consortium of banks, namely State Bank of Mysore (now merged with State Bank of India w.e.f. 01.04.2017) was asked to suggest a name in order to avoid delay and also taking into consideration the opposition by the other applicants under provisions of section 9 of IBC, 2016, it pleaded its inability to do so as it was stated that a minimum period of 14 days will be required to come to any conclusion in this regard by the consortium of bankers. Be that as it may, in view of the facts and circumstances of the case this Tribunal felt it necessary to elucidate its stand prior to proceeding further with a view to avoid any ambiguity.

11) Based on the above, we proceed to deal with the individual application of the Operational Creditors taking into consideration the objections raised by the Corporate Debtor vis-à-vis the said applications, including its maintainability in view of non-adherence to the provisions of Section 9 of IBC, 2016.

12) However, in all the 3 cases, the common ground by way of preliminary objections which is sought to be raised by the Corporate Debtor is in relation to either a lack of certificate being produced from the Banker of the concerned

[15]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



Operational Creditor's in relation unpaid liability or even if produced, the same being not in consonance with provisions of Section 9 of IBC, 2016 which certificate is required to be obtained and produced before this Tribunal under the provisions of Section 9 (3) (c) of IBC, 2016. For easy reference, the said Section 9 of IBC is reproduced in full :

"Sec. 9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

[16]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution Professional.

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause(a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

[17]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

13) It is evident from the above provision that an Operational Creditor as a pre-condition to maintain an application is required to obtain a Certificate from the financial institutions as defined under Section 3 (14), maintaining the accounts of the Operational Creditor confirming that no payment of an unpaid operational debt as defined under Section 5 (21) of IBC by the Corporate Debtor as defined under the provisions of Section 3 (8) of IBC, 2016 has been received. The compliance of the statutory mandate has also been reiterated by Hon'ble NCLAT in a number of its decisions including the one passed in Smart Timing Steel Ltd vs National Steel and Agro Industries Ltd in Company Appeal (AT) (Insolvency) No.28 of 2017 dated 19.05.2017. Coming to the instant cases on hand, in relation to the production of Certificate from the Bankers, the following position emerge:

14) CP (IB)-181 (ND)/2017 :

- a) Based on the submissions of the applicant/Operational Creditor in the above application that the banker, namely, HDFC Bank Limited, in which the Operational Creditor is maintaining the account has refused to give it a Certificate in compliance with the provisions of Section 9 (3) (c) of IBC, 2016, the Hon'ble Principal Bench has ordered vide Order dated 2nd August, 2017 as under :

"Learned Counsel for the petitioner states that in pursuance of the provisions of Section 9(3) (c) of the IBC, 2016, a request for issuance of Certificate has been made to the Financial Institution namely, HDFC Bank Ltd, Stephen House, 4, BBD Bag (East), Kolkatta-700 001 on 03.7.2017. Despite the application, certificate has not been issued. It is the duty of the HDFC Bank to issue certificate as per the provisions of Section 9(3) (c) of IBC, 2016. Therefore, HDFC Bank Ltd, Stephen House, 4, BBD Bag (East), Kalkatta-700 001 is directed to issue certificate on payment of

[18]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



reasonable charges, if any.

List the matter for arguments on 17th August, 2017. A copy of the order be given dasti."

- b) It is evident from the above order passed by the Hon'ble Principal Bench that the bankers had been specifically instructed to issue a Certificate as per the Legislative mandate given in Section 9 (3) (c) of IBC, 2016. However, despite the Legislative mandate, followed up with the judicial mandate of this Tribunal, the Bankers instead of complying with the relevant provisions of IBC, 2016, have chosen to issue a Certificate as follows :

"HDFC BANK	HDFC Bank Limited Stephen House 4 BBD Baag East Kolkata – 700001.
To Whomsoever It may Concern	
Dear Sir/Madam,	
This is to certify that WELLMAN WACOMA LIMITED A/C TAX is maintaining a HDFC Bank Current Account number 00082560017424.	
Cheque* 954275 has been credited to the above mentioned a/c on 03/10/2015. Details are given below:	
Txn Date	: 03/10/2015
Amount	: 5,25,627.00
Cheque No.	: 954275
The above certificate is being issued on receipt of specific request from the customer without any risk or responsibility on the part of the Bank or any	

[19]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

of its officials.

For HDFC Bank Ltd.

Authorized Signatory
HDFC Bank Ltd
Stephen House Branch

Date : August 16, 2017

Regd. office : HDFC Bank Ltd, HDFC Bank House, Senapati Bapat Marg,
Lower Parel, (West) Mumbai-400 013.”

- c) Perusal of the above certificate issued by the concerned Bank , namely, HDFC Bank Limited clearly discloses that the certificate issued by it is not in consonance with the provisions of Section 9 (3) (c) of IBC, 2016 and as directed to be issued in terms of the above order passed by the Hon'ble Principal Bench passed on 02.08.2017 which definitely is required to be explained by the said Bank for non-compliance of the order dated 02.08.2017. It is to be noted that the action of the above said Bank in relation to the certificate to be issued, in terms of the statutory as well as judicial mandate, regarding unpaid liability, has given rise to the Corporate Debtor in taking a plea that the Operational Creditor has not complied with the provisions of Section 9 (3) (c) of the IBC, 2016. The above attitude of HDFC Bank in issuing a certificate of its

[20]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

own choice rather than complying with the statutory as well as judicial mandate is strongly deprecated and calls for an explanation on its part to this Tribunal which will be dealt with in the concluding portion of this order.

15) CP(IB)-180 (ND)/2017

- a) Now coming to application in CP(IB)-180 (ND)/2017, it is specifically admitted in the affidavit dated 12th July, 2017 filed by the Deponent therein, being a Director of the Operational Creditor that the Operational Creditor has not been able to obtain a Certificate from the Financial institution/Banker, maintaining the Bank account of the Operational Creditor confirming that there is no payment of unpaid Operational debt by the Corporate Debtor and as such the Operational Creditor has obtained only a Certificate from the Chartered Accountant who maintains the books of accounts of the Operational Creditor and that in lieu of Bank statement, the same may be taken as Certificate in compliance with Section 9 (3) (c) of IBC, 2016.

- 16) However, both in the case of C.P(IB)-180(ND)/2017 as well as CP (IB)-181 (ND)/2017, in view of the absence of the requisite Certificate from the Bankers as

[21]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



contemplated under Section 9 (3) (c) of IBC, 2016 which in one case has not been provided despite specific direction and in the other due to specific admission on the part of the Operational Creditor itself and taking into consideration the judgment already cited above passed by Hon'ble NCLAT in SMART TIMING STEEL LTD VS NATIONAL STEEL AND AGRO INDUSTRIES LTD in company Appeal (AT) (Insolvency No. 28 of 2017), this Tribunal is constrained not to consider the said applications any further and in the circumstances, the said applications/petitions stand rejected under Section 9 (5) of IBC, 2016 despite sufficient time having been granted by this Tribunal for compliance. However, the order of dismissal of the said applications/ petitions will not preclude the respective applicant/petitioners therein from raising any claim before appropriate person or authority or Court or any other judicial Forum for enforcing their claim.

17) CP (IB)-160(PB)/2017 :

a) Now, coming to the Application in (IB)-160(ND)/2017, it is seen that the concerned Banker, namely, SBI has issued the following Certificate:

"As per your letter dated 02/08/2017, we confirm that we have not received proceeds in Cash Credit a/c No. 11000200622 of the following

[22]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



bills (A/c Energo Engineering Project Limited) during the period from 28/01/2016 till 05/06/2017”.

Date of invoices	Invoice No	Amount (Rs)
28/01/2016	399	2760949
28/01/2016	400	1531987
31/03/2016	513	97754
31/03/2016	515	1070081

- b) It is seen that the Banker’s Certificate issued by SBI dated 02.8.2017 is in relation to the unpaid amount as claimed by the Operational Creditor in the application as against the Corporate Debtor and which amount is alleged to be the amount in default and for which the applicant claims to have initiated CIRP before this Tribunal and hence prima facie crosses the initial hurdle as sought to be raised by the Corporate Debtor in relation to its maintainability.
- c) Turning to the Reply of the Corporate Debtor in relation to further objections to the above Application raised and concisely stated herein seems to be as follows:
- i) That no notice of demand as contemplated under Section 8 of IBC, 2016 read with Rule-5 of AAA Rule had been issued;

[23]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

(ii) That the applicant is not an Operational Creditor as it has not established supply of goods or rendering of services; and

(iii) It has failed to disclose the pendency of the dispute before the West Bengal State Micro Small Enterprises, Facilitation Council and in view of the suppression of the same, the application should be dismissed as the concealment of facts Qua between the parties.

- d) In relation to objection (ii) in paragraph (c) as above, the applicant submits that there is an inconsistency in the pleadings of the Corporate Debtor in as much as on the one hand, it is contended that no goods had been supplied, but on the other hand, it is stated that the quality of material was of inferior quality. Thus, it is claimed by the Operational Creditor that inconsistent pleadings of the Corporate Debtor in itself exposes the fallacy of the stand taken by the Corporate Debtor and also establishes that in fact, goods have been supplied to the Corporate Debtor and it cannot be denied by the Corporate Debtor.
- e) In relation to the existing dispute of which an issue is sought to be projected as in objection (iii) paragraph (c) as above, namely in relation to the proceedings as filed before the Facilitation Council, it is submitted by the Operational Creditor that the same has been withdrawn prior to approaching this Tribunal and in the circumstances, the Operational Creditor has not hidden anything from this Tribunal as alleged by the Corporate Debtor.
- f) In relation to the format of notice as contended in objection (i) paragraph (c) as above which is required to be adopted as prescribed under the AAA Rules, it is submitted by the Operational Creditor that the Form which was adopted by the

[24]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

operational creditor is as per the Rules, as a choice has been given to the Operational Creditor to either send, a demand notice in Form 3 or a copy of Invoice attached with notice in Form 4 and inform the Corporate Debtor about the default and the Operational Creditor avers that the latter course has been followed and hence there is no infirmity.

g) We have carefully considered the rival submissions and pleadings. While accepting the plea of the applicant – Operational Creditor, we do not find any merit in the contention of the Corporate Debtor as rightly contended by the Operational Creditor as there seems to be a paradox in the contention of the Corporate Debtor which clearly exposes that the dispute which is shown before this Tribunal is moonshine and not bonafide and it cannot be categorized as a dispute within the meaning of Section 5 (6) of IBC, 2016. In the circumstances, the application in CP (IB)-160 (PB)/ 2017 is deserved to be taken into consideration and is hence admitted.

h) However, even though an Insolvency Professional has been named in the Application CP (IB)-160(PB)/2017, declaration of the said IRP with necessary disclosures as mandated under the several rules framed by IBBI including under Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and as rightly pointed out by the Corporate Debtor has not been filed and hence this Tribunal is unable to consider the same.

18) In view of this Tribunal admitting C.P. No.(IB)-160(PB)/2017, the application filed by the Corporate Debtor for CIRP and for appointment of IRP named by the Corporate Debtor becomes superfluous and this Tribunal has also made its stand

[25]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.

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clear in paragraph 9 and 10 of this order as to the reasons for this Tribunal not appointing the IRP named by the Corporate Debtor, not once but twice and also fairly conceded by the Learned Counsel for the Corporate Debtor in the teeth of opposition from both the financial creditors who are before this Tribunal on notice, namely SBI having along with the other members of the consortium of bankers more than 75% of the voting percentage in the Committee of Creditors as contemplated under Section 22 of IBC, 2016 as well as the Operational Creditors who though does not have any significant voting due to the presence of the Financial Creditors in the Committee of Creditors and which is required to okay the appointment of an Insolvency Professional, of course subject to confirmation by IBBI and this Tribunal, to carry the CIRP to its logical conclusion as contemplated under IBC, 2016. However, in view of triggering the CIRP before this Tribunal by Operational Creditor their voices are also taken into consideration. However, the application of the Corporate Debtor only reinforces the decision of this Tribunal in initiating the CIRP as contemplated under IBC, 2016.

19) Based on the above discussions while dismissing C.P.No.(IB)-180(ND)/2017 and C.P.No.(IB)-181(ND)/2017 this Tribunal admits C.P No.(IB)-160(PB)/2107 and the necessary consequences of moratorium as provided under Section 14 of IBC, 2016 will follow in relation to the Corporate Debtor.

20) However, taking into consideration the provisions of Section 16 of IBC, 2016, this Tribunal makes a reference to the Insolvency and Bankruptcy Board of India for the recommendation of an Insolvency Professional who may act as an IRP within the time limit prescribed therein.

[26]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



21) Before parting this Tribunal wishes to highlight the casual and whimsical attitude of bankers in issuing the certificate as mandated under Section 9(3)(c) of IBC, 2016 and the differing stance adopted by each banker in issuing the same demonstrating their lack of understanding and coherence as to why the issue of such a certificate becomes absolutely essential in a proceeding relating to initiation of CIRP. While in CP No.(IB) 181(ND)/2017 it is seen that despite request of the Operational Creditor, its bankers as evident from the affidavit filed on behalf of it had refused to issue the requisite certificate, in relation to CP.No.(IB) 180(ND)/2017 the banker, namely HDFC Bank has failed to adhere to the statutory mandate as well as the express direction given by the Hon'ble Principal Bench of this Tribunal in terms of it. On the other hand in CP.No.(IB) 160(ND)/2017 the banker of the Operational Creditor had acceded to the request of its constituent and thereby complied with the provisions of Section 9(3)(c) of IBC, 2016. The refusal of the bankers in the first two instance to comply with the provisions of IBC, 2016 has resulted in the rejection of the said applications prima facie in the teeth of provisions of Section 9(3)(c) and judicial precedents of the Hon'ble Appellate Tribunal holding it as mandatory, has also led to an anomalous situation in the present instance as this Tribunal despite the Corporate Debtor expressly admitting the liability in the application filed under

[27]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



Section 10 by it in relation to one of the claims of the Operational Creditor in CP No.(IB) 180(ND)/2017 however, was forced to reject the application due to non-compliance with the provisions of Section 9(3)(c). All the above clearly points out to the lack of appreciation on the part of the bankers of the importance of the certificate as required to be issued by them. Furnishing of the Certificate as contemplated under the provisions of Section 9 (3) (c) of IBC, 2016 is all the more required in view of the fixed time frame provided under the provisions of IBC, 2016, firstly in relation to the compliance as provided for, failing which this Tribunal under Section 9 (5) of IBC, 2016, is required to reject the application. Further, in view of the fixed time frame fixed for disposal also which casts an onus on this Tribunal to decide expeditiously and under the circumstances, the Certificate from the banker as contemplated enables this Tribunal to be prima-facie satisfied that the amount of debt remains unpaid to the account of the Operational Creditor as the bills/invoices would have been primarily negotiated through the banker of the operational creditor in the first place and hence the banker of the operational creditor would be in the most privileged position to ascertain whether the proceeds have been successfully negotiated and credited to the account of the Operational Creditor, namely its constituent from the customer of the Operational Creditor (i.e.) the Corporate Debtor . Thus, viewing

[28]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



from any angle, the certificate from the Banker becomes imperative as contemplated under the provisions of IBC, 2016 and the bankers cannot, in any way wish away the responsibility of issuing the Certificate in terms of the provisions of Section 9 (3) (c) of IBC, 2016 as otherwise serious consequences follow in relation to the application itself (i.e) about its maintainability, thereby, seriously prejudicing not only the applicant but as well as other stakeholders thereby derailing the avowed objects for which the provisions of IBC, 2016 has been enacted. In fact, a request made by one of its constituent's, namely customer to its Banker, should immediately signal a red flag to the entire banking community, thereby ringing alarm bells to the lenders of any Corporate Debtor as well to sit up and take note of the status of solvency of the Corporate Debtor, which can be easily achieved in this age of electronic fund transfer between banks as well as prevalence of electronic cheque clearances.


22) In the circumstances this Tribunal is of the view that an explanation is called for, from the Bank Manager of HDFC Bank Limited, Stephen House, 4 BBD Baag East, Kolkata – 700001. for the non compliance with the express directions and order of the Hon'ble Principal, Bench, NCLT, New Delhi dated 02.08.2017 within a period of 4 weeks from the date of this order failing which this Tribunal will be constrained to take such appropriate actions as it deems fit and proper for

[29]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.



infraction of the orders of this Tribunal under the provisions of IBC, 2016 read with Companies Act, 2013. The Registry is directed to send a copy of the order to HDFC Bank Limited, Stephen House, 4 BBD Baag East, Kolkata – 700001 for necessary compliance at the earliest.


05.04.2017
(R. VARADHARAJAN)
MEMBER (JUDICIAL)

Surjit

[30]

(IB)-130/2017; (IB)- 160(ND)/2017; (IB)-180(ND)/2017 and (IB)-181 (ND)/2017 – M/s Energo Engineering Projects Ltd. v. Levcon Valves (P) Ltd., HMTC Engineering Co. (Kolkata) Pvt. and Wellman Wacoma Ltd.