

IN THE NATIONAL COMPANY LAW TRIBUNAL : NEW DELHI  
COURT - III

(IB)-297(ND)/2017

IN THE MATTER OF :

M/s. PCI Limited

... PETITIONER

Vs.

M/s. Ashimori India (P) Limited

... RESPONDENT

SECTION :

Under Section 9 of IBC Code, 2016

Order delivered on 10.10.2017

Coram :

R. VARADHARAJAN,  
Hon'ble Member (Judicial)

**For the Petitioner /applicant**

: Mr. Arun Khatri, Advocate  
Mr. Amit Kumar, Advocate  
Mr. Gagandeep Panwar, Advocate

**For the Respondent**

: Mr. Virender Ganda, Sr. Advocate  
with Shelly Khanna.  
Mr. Amit Dhingra, Advocate  
Mr. Amandeep Bawa, Advocate  
Mr. Ami Ranjan, Advocate

ORDER

- 1) This is an application filed by the applicant under the provisions of Insolvency & Bankruptcy Code, 2016 (for sake of brevity IBC, 2016) claiming to

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be an Operational Creditor against the Respondent/Corporate Debtor on the basis that a sum of Rs.20,50,385/- is due and outstanding payable and is in default and under the circumstances, the Corporate Insolvency Resolution Process (CIRP) is required to be initiated.

The facts in brief as averred in the petition are as follows :

- i) That the Respondent issued a Purchase order dated 28.3.2017 to the Operational Creditor for the supply & installation of 60 KWP Off-grid top Solar Photovoltaic Plants at the factory of Respondent situated at Neemrana, Rajasthan and the value of purchase order being in a sum of Rs.1.18 crores.
- ii) The petitioner avers that the erection & commissioning of the Solar PV Plant was completed on 28.12.2011 and that out of the sum of Rs.1.18 crores, being the total amount payable by the respondent, a balance sum of Rs.20,50,385/- remains due from 29<sup>th</sup> Nov, 2012 and since then, the amount has remained in default and no payment has been received from the respondent/Corporate Debtor.
- iii) In view of the non-payment, it is claimed by the petitioner that a demand notice U/s. 8 of IBC Code, 2016 read with attendant rules was sent to the Corporate Debtor on 20.6.2017 calling for the payment of amount in



default. However, instead of making payment, it is stated by the petitioner that Respondent sent a reply dated 7.7.2017 through its Counsel. In view of the non-payment of the amount in default, it is averred by the petitioner that an application as required to be made under the provisions of IBC, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) by an Operational Creditor has been made against the Corporate Debtor.

iv) In support of the above application, the petitioner has annexed a copy of the Invoice/Demand notice in Form-3 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 , hereinafter called the 'AAA Rules' as issued by its Legal Counsel on 26.7.2017. Further, the statement of account for the period 1.4.2012 to 31.3.2013 is annexed as Annexure-A striking a balance of Rs.20,50,385/- which is shown as due and payable from the Debtor/respondent. A copy of the purchase order placed by the Corporate Debtor as well as invoice as raised by the petitioner/Creditor has also been annexed. A reply as sent by the Respondent, being the notice of dispute dated 07.7.2017 has also been filed.

2) The above matter was listed on 23.8.2017 and during the course of hearing, directions were given to the petitioner to comply with the provisions of Section 9 (3) (c) of IBC, 2016. For this purpose, a week's time was also



granted. In the meanwhile, from order dated 05.9.2017, it is evident that the respondent Company had duly entered its appearance through its Counsel and a reply has also been filed, to which, the petitioner has also submitted its rejoinder. Perusal of the reply shows that the following contentions are being put forward by negating the claim as well as in relation to the maintainability of the Company Petition :

a) the respondent contends that in view of the pre-existence of a dispute, the petition, as such, is not maintainable.

b) In this regard, it is pointed out that on 05.5.2017 , a notice was sent to the respondent Company for its winding up in relation to the amount payable under the Purchase order dated 23.2.2011 and that the said winding up notice was also replied to wherein the payment of Rs.20,50,385/- being the amount claimed in default herein had been vehemently disputed on the ground that the claim is raised frivolously without fulfilling the obligation on the part of the Creditor/petitioner, pursuant to the understanding between the parties. It is also pointed out that as early as 03.5.2013, an E-mail had been sent by the respondent Company along with a letter dated 07.01.2013 received from Rajasthan Renewable Energy Corporation Limited which had





withheld 50% of the subsidy amount payable due to a faulty Inverter supplied by the petitioner

c) Despite the above communication sent to the applicant/petitioner, no efforts had been taken by the Creditor/petitioner to put the same in order which deprived the respondent Company from obtaining subsidy amount in full, due to which, the Respondent/Debtor is unable to clear the amount as claimed by the petitioner/applicant.

d) On the above basis, it is claimed that there is a pre-existence of dispute even prior to the sending of notice U/s. 8 of IBC Code, 2016 , being the notice of demand from the applicant/petitioner to the respondent Company.

e) In addition to the above, by way of preliminary objections, for non-compliance with the procedural aspects on the part of the petitioner, it is pointed out that the notice of demand, as issued by the petitioner has defects as the same has been issued by an Advocate who has not been duly authorized to issue such a notice on behalf of the petitioner and in support of the contention, the respondent has relied upon the decision of the Hon'ble NCLAT rendered in Uttam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr.



f) Further, it is also pointed out that the provisions of Section 9 (3) (b) of IBC, 2016 has not been complied with as in terms of said Section the applicant was required to furnish an affidavit to the effect that there is no notice of dispute in relation to the unpaid operational debts by the Corporate Debtor and the same has not been furnished.

g) It is also pointed out that the provisions of Section 9 (3) (c) of IBC, 2016 in relation to furnishing a copy of the Certificate from the Banker/Financial Institution maintaining the account of Operational Creditor in relation to the non-payment of unpaid operational debts by the Corporate Debtor has also not been filed which also becomes fatal in view of the decision rendered by the Hon'ble NCLAT in Smart Timing Steel Limited Vs. National Steel Agro Industries Limited.

h) In view of the non-compliance, despite sufficient opportunities having been granted to the petitioner vide order dated 23.8.2017 , the application it is represented on the part of the respondent/Debtor is required to be rejected in terms of provisions of Section 9 (5) of IBC, 2016. Another issue which has also been raised is in relation to the debt being barred by limitation as the amount which is claimed to be in default is said to be due even as per the statement of accounts of the petitioner since the year 2012-2013 and that the present



petition has been filed only on 21.8.2017 (i.e) after more than a period of 3 years.

i) Finally, it is also contended by the respondent that the respondent Company is a profit making company employing approx. 200 employees along with other group Companies and is having a turnover of approximately US \$ 500 Million and taking into consideration the same, the respondent Company is fully solvent and there is no question of insolvency as sought to be portrayed by the petitioner.

3) On the part of the petitioner, a rejoinder has been filed reiterating the contents of the petition and also stating that the applicant/petitioner has nothing to do with the Rajasthan Renewable Energy Corporation Limited nor for that matter in relation to the promised subsidy which is sought to be projected as ground for the denial of payment due to the petitioner.

4) Heard the oral submissions of the respective Counsels appearing for the parties in detail and perused the documents filed. It is seen from the typed set of documents filed by the respondent along with its reply that a winding up notice has in fact been sent by the petitioner on 05.5.2017 in which a claim of Rs.20,50,385/- being the amount in default as claimed in the present Petition





has been demanded. The above said notice for winding up has been replied to in detail by the respondent Company on 08.6.2017 putting forth the fact of denial of government subsidy to the extent of 50% as per Government team investigation through Rajasthan Renewable Energy Corporation Limited, providing Central Financial Assistance.

5) It is also seen from the E-mail dated 03.5.2013 filed along with the annexures annexed as Annexure-C (Colly) to the typed set of documents filed by the respondent that as early as in the year 2013, it has been brought to the notice of the petitioner that the respondent Company is failing to obtain the subsidy in view of the poor power generation due to the fault of inverter as the investigation has raised a query in relation to the power generation. However, subsequent to the receipt of e-mail, the petitioner/Creditor should have either rectified the defects as alleged or should have denied the claim of the respondent Company in relation to the defect and proceeded to take steps for the recovery of amounts due to it. However, there seems to have been no action on the part of petitioner, that too for a period of more than five years as the supply it is claimed by the petitioner to have been made in the year 2011 itself and the erection & commissioning of the plant even according to the admission of the petitioner was completed on 29.12.2011.





6. The above fact clearly discloses that the claim as made before this Tribunal is beyond the period of limitation of 3 years as the petitioner has failed to produce any evidence wherein subsequently, the respondent Company has acknowledged the liability or as to whether payments have been made in furtherance of acknowledgement of its liability owed to the petitioner. On the point of applicability of Limitation, the Hon'ble Principal Bench in the matter of M/s. Deem Roll-Tech. Limited Vs. R.L. Steel & Energy Limited in Company Application No.(IB)-24/PB/2017 has held vide its order dated 31.3.2017 that in the absence of any specific bar in the IBC to the application of the Limitation Act, 1963 coupled with the provisions of Section 433 of the Companies Act, 2013 which makes Limitation Act applicable to this Tribunal the debt as claimed is barred and cannot be the basis for invoking IBC before this Tribunal. It is also required to observe in this connection the provisions of Section 60 (6) of IBC, 2016 which saves any suit or application by or against the Corporate Debtor, for which, an order of moratorium is in place, from operability<sup>of</sup> limitation, being the only specific instance where the hand of limitation is withheld.

7) However, in a judgment recently passed by the Hon'ble NCLAT on 11<sup>th</sup> August, 2017 in the matter of Neelkanth Township and Construction Pvt.



Limited Vs. Unban Infrastructure Trustees Limited in Company Appeal (AT) (Insolvency) No.44 of 2017 has held at paragraph 24 of the said judgment in relation to the point of Limitation as follows :

“The next ground taken on behalf of the appellant is that the claim of the respondent is barred by limitation, as the Debentures were matured between the year 2011-2013 is not based on law. There is nothing on the record that Limitation Act, 2013 is applicable to I & B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I & B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I & B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted”.

8. In relation to the aspect of limitation, the Hon’ble Supreme Court in Civil Appeal No.1074 of 2017 filed against the above judgment of Hon’ble NCLAT in Neelkanth Township and Construction Pvt. Limited while dismissing the appeal, in relation to the question whether the Limitation Act would apply to IBC proceeding has chosen to keep the same open. Since the Hon’ble Supreme Court has chosen to keep the issue open and as the Hon’ble NCLAT has



categorically held that the law of Limitation Act, 1963 is not applicable to IBC, 2016, this Tribunal kowtowing to the judgment of the Hon'ble NCLAT refrains from discussing any further on the aspect of Limitation.

9) However, the non-applicability of Limitation Act, 1963 in view of the above cited judgment of Hon'ble NCLAT will not absolve the petitioner from accounting for delay and laches as the Hon'ble NCLAT in the case of Mr. Praveen Shankaralyam is M/s. Elan Professional Appliances Private Limited and others in Company Appeal (AT) No.34 of 2016 has held that though the submission that Section 433 of the Companies Act, 2013 will not be applicable to old cases filed under Section 397, 398 and 402 of the Companies Act, 1956, the appellant/petitioner (therein) before the Tribunal cannot escape the ground of delay and laches in preferring the Company Petition as raised by the respondents and since the appellant (therein) had not explained the delay of more than five years the appeal was dismissed.

10) Thus, hereto we find that the position quite apposite as even though the provisions of Limitation Act, 1963 may not be applicable to IBC, 2016 yet the petition suffers from doctrine of delay and laches as the silence on the part of the petitioner to enforce its claim for a period of more than 5 years without approaching any judicial Forum defeats the claim and the petitioner cannot



take recourse or umbrage to the provisions of IBC, 2016 with a view to initiate CIRP to recover the amounts alleged to be due to it from the respondent Company.

11) In addition, we also find credence in the objections raised by the respondent in relation to the defects in compliance with the mandatory procedure prescribed on the part of the petitioner Company.

12) The decision rendered by the Hon'ble Supreme Court in the case of Mobilox Innovations Vs. Kirusa Software Private Limited being Civil Appeal No.9405 of 2017 wherein the Hon'ble Supreme Court of India has held that even on a plausible dispute raised on the part of the Corporate Debtor, it should be given credence and it is not necessary that the dispute which is sought to be raised should ultimately succeed. The dispute raised here is of two fold nature, one in relation to the quality of goods supplied and its non-satisfactory performance and the other in relation to delay, both of which are seen to be prima-facie plausible dispute and does not seem to be vague and which can be raised as a defence/counter claim before civil courts. Further, it is also pointed out by the Hon'ble NCLAT in the case of Company Appeal (AT) (Insolvency) No.28 of 2017 in the matter of Smart Timing Steel Ltd. Vs. National Steel Agro Industries Limited that the provisions of Section 9 (3) (c) of IBC,





2016 in relation to production of Certificate from the bankers is mandatory in relation to unpaid debt. Perusal of the Certificate dated 11.9.2017 which was also produced beyond the mandatory period has not satisfied the requirement in relation to unpaid liability as the same has not been reflected therein as claimed by the petitioner in its application.

13) Further, it is pertinent to note that the Hon'ble NCLAT has held in Uttam Galva Steels Limited Vs. DF Deutsche Forfait AG & Anr. in Company Appeal (AT) (Insolvency) 39 of 2017 wherein at Paragraph 32 of the said judgment, it has been held that demand notice under Section 8 on behalf of the Operational Creditor cannot be issued by any person in the absence of any authority of the Board of Directors, and holding no position with or in relation to the Operational Creditor. However, in the present instance, no such authorization to issue such a notice by the legal Counsel on behalf of the Operational Creditor has been produced before this Tribunal by the petitioner.

14) Taking into account the facts and circumstances of the case and the position of law, this Tribunal finds no merit in the application as filed by the petitioner Company. On the other hand, the application seems to be frivolous one warranting imposition of Rs.50,000/- as costs payable by the petitioner for



unnecessarily dragging the Respondent Company to face an onerous insolvency proceedings before this Tribunal.

The application is hence dismissed with costs.

Sd— (R. VARADHARAJAN) 10.10.17  
(R. VARADHARAJAN)  
MEMBER (JUDICIAL)