

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
HYDERABAD

CP (IB) No.198/9/HDB/2017

U/s 9 of the IBC, 2016 and Rule 6 of I & B
(Application to Adjudicating Authority) Rules, 2016

In the matter of

Bay-Forge Private Limited
Regd. Office at Palayanoor P.O.
Vedanthangal Road, Pukkathurai Village,
Madurantakam Taluk,
Tamil Nadu- 603 308.

... Petitioner/Operational Creditor

Versus

Nawa Engineers and Consultants Private Limited
Registered Office at Shed No.D-16, Unit-1 Phase-V,
IDA Jeedimetla, Hyderabad,
Rangareddi,
Telangana - 500 055.

... Respondent/Corporate Debtor

Order Pronounced on: 22.01.2018

CORAM:

Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)

Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

Counsels Present:

For the Petitioner: Mr. Rama Chandra Rao Gurram, Advocate
along with Ms. Isha Sinha, Advocate

For the Respondent: Mr. V.K. Sajith, Advocate

Per: Ravikumar Duraisamy, Member (Technical)

ORDER

1. The present Company Petition (IB) No.198/9/HDB/2017 is filed by Bay-Forge Private Limited duly incorporated and existing under Companies Act, 1956 and is a pioneer in large volume

critical forgings and rolled rings. The present Petition is filed for seeking the following reliefs:

- a. Admit the instant Company Petition and initiate corporate resolution process against the Respondent Company under the provisions of Insolvency and Bankruptcy Code, 2016 as it is unable to discharge its debts;
- b. Appoint Interim Resolution Professional of the Respondent Company and to take charge of all its assets, affairs, business, papers, income, properties, book of accounts, vouchers, documents, bank accounts, etc. with all its powers as prescribed under the Insolvency and Bankruptcy Code, 2016;
- c. Issue an injunction order against the Respondent Company, restraining the Respondent Company by itself, its directors officers, servants and agents from in any manner transferring, disposing, encumbering, alienating or parting away with the assets of the Respondent Company in any manner whatsoever, pending final hearing and disposal of this Petition;
- d. Pass ad- interim relief in terms of prayer (b) and (c) above;
- e. Direct the Respondent Company to compensate the Petitioner and all amounts due, interests, legal costs and cost of this Petition and any incidental costs incurred in relation to this Petition.
- f. Pass any other order and further reliefs as in the nature and circumstances of this case, the Hon'ble Tribunal may deem fit in the eyes of law.



Brief Facts of the case:

2. The present petition is filed for being aggrieved by the non-payment of the legitimate dues by the Respondent. It is stated that the Petitioner herein is a private limited company duly incorporated and existing under Companies Act 1956 and is a pioneer in large volume critical forgings and rolled rings.
3. As per Form 5 submitted by the operational creditor who is Bay Forge Private Limited, the Corporate Debtor/Respondent i.e. Nawa Engineers and Consultants Private Limited, an amount of Rs.46,02,625/- was the operational debt outstanding and the debt fell due on 24.01.2013. Further, in the Form it was also mentioned that an amount of Rs.35,01,367/- along with interest at the rate of 24% from the due date till the date of realisation and the date of 1st default was 30.03.2013.
4. The Respondent had placed with the Petitioner purchase order being P.O.No.NEC/CR4/2012-13/E432/BFL dated 25.11.2012 ("Purchase Order") for supplying of forged proof machine shafts. As per the expressed terms of payment in the Purchase Order, Respondent had agreed to make 100% payment to Petitioner by issuing irrevocable letter of credit of a nationalized bank payable at 60 days from the date of dispatch and that letter of credit shall be established immediately on receipt of inspection reports/readiness of the material along with proforma invoice.
5. It is submitted that in full compliance with the terms of the said Purchase Order, Petitioner supplied the Respondent at its site of work eight forged proof machine shafts in February 2013 and the remaining eight forged proof machine shafts in March 2013 as duly acknowledged by Respondent.



6. It is submitted that upon completion of the entire scope of work under the said Purchase Order the Petitioner raised invoices dated 28.02.2013 and 30.03.2013 to the Respondent. Its further submitted that Respondent *vide* its email dated 30.03.2013 requested the Petitioner to allow the Respondent to make the payments directly to Petitioner on the due date instead of issuing a letter of credit. The Petitioner in *good faith* acceded to the request made by Respondent and agreed to the said arrangement. It's further submitted that it is an undisputed fact that the terms of the said Purchase Order have at all times been duly honoured by the Petitioner.

7. That despite taking delivery of the said sixteen forged proof machine, Respondent failed and neglected to make the payments as raised by Petitioner in its invoices dated 28.02.2013 and 30.03.2013. Its further submitted that upon several follow-ups by the Petitioner, the Respondent on 25.11.2013 made a part payment of Rs. 5,01,000/- (Rupees five lakhs one thousand only) by way of wire transfer to Petitioner and assured of making good the outstanding dues by December, 2013. Further Respondent on 07.12.2013 made another part payment of Rs. 6,00,000/- (Rupees six lakhs only) by way of wire transfer to Petitioner and promised to repay the outstanding amounts by end of December 2013. Thus it is pertinent to state here that Respondent have at all times admitted to the liability of the outstanding dues *vide* its emails dated 25.10.2013, 22.04.2014 and 17.02.2016. It is also submitted that till date Respondent has raised no complaints in so far as the machines supplied are concerned.

8. It's submitted that when matter stood thus, Petitioner was constrained to issue a legal demand notice dated 11.08.2014 to clear the outstanding dues. The Respondent upon receipt of



winding up notice promised to clear the outstanding dues and relying on its assurances the Petitioner desisted from initiating any winding up proceedings against Respondent.

9. It is submitted that repeated reminders through e-mails and telephone calls were made to the Respondent Company asking for the clearance and payment of the said outstanding dues, however, the Respondent Company failed to fulfil its obligation toward the Petitioner Company.
10. It is submitted that Petitioner was constrained to issue a legal demand notice dated 06.07.2017 under the provisions of Insolvency and Bankruptcy Code, 2016 in the capacity of operational creditor. The Respondent received the said notice on 07.07.2017.
11. It is submitted that upon receipt of the notice dated 06.07.2017 the Respondent issued a reply dated 17.07.2017. In the said Reply, the Respondent has only taken a ground of the debt being time barred and has not disputed the debt at all in the reply.
12. The Petitioner Company has persistently via emails and telephone calls requested the Respondent company for the reasons for the delay in paying the outstanding dues, but has received a vague and evasive response and the Respondent has till date failed to make any payment of the outstanding legitimate due amounts.
13. It is submitted that the Respondent is unable to pay off its debts and the Respondent has become commercially insolvent. Thus, is liable to be wound up under the provisions of the Insolvency and Bankruptcy Code, 2016.



14. It is submitted that the Respondent Company is unable to discharge its debts. The debts due are reflected in the financial statements of the Respondent and it is reliably learnt that the Respondent is undergoing severe financial crunch and there are payments due to other creditors. The Respondent Company has no capacity to pay its debts and it is likely that the financial condition of the Respondent Company may deteriorate further beyond a point of revival. Therefore, it is submitted that in order to ensure that the assets of the Respondent Company are not wasted and/or unlawfully disposed of and rights of the creditors are sufficiently protected.



15. It is submitted that it is a fit case where pending admission, hearing and final disposal of this petition, the insolvency resolution professional be appointed of the Respondent company with all powers under the provisions of the Insolvency and Bankruptcy Code, 2016 including the power to take charge of all the assets, affairs, business, papers, income, properties, books of accounts, vouchers, documents, bank accounts etc., of the Respondent Company to conduct its affairs in the course of insolvency petition and to distribute its assets in accordance with law.

16. Thus it is submitted that Respondent Company is unable to discharge and pay its debts, and therefore this Hon'ble Tribunal be pleased to order and direct the Respondent Company to undergo corporate insolvency resolution process and undergo liquidation as per the prescribed provisions of Insolvency and Bankruptcy Code, 2016.
17. The Respondent/Corporate Debtor filed a detailed reply and submitted that all allegation/averments in the Petition are denied

and the Petition of the Operational Creditor is devoid of merits, truth and factual position of law. The Counsel has also raised various technical and procedural issues such as excel sheet print out does not constitute either a primary or secondary evidence, not in compliance with Section (2) (o) of the Information Technology Act,2000 read with Section 65B of Indian Evidence Act, 1872, notice under Section 8 of the IBC Code, 2016 i.e. Form No.4 was issued without specific authority by the board of the operational creditor etc. which are discussed in depth in the following paras and argued for dismissal of the Petition.

18. It is submitted that, there are lacunas in the captioned Petition which attracts legal disqualification under Insolvency and Bankruptcy Code, 2016. The said lacunas cannot be cured or rectified. The said defects start right from the Index of the Application to the Notice under Section 8 and the Application under Section 9 of Code, 2016, which does not meet the mandatory requirement under the Code.
19. It is submitted that, the Corporate Debtor has filed its Financial Statement as well as Books of Debt for the Period 2012- 2013 and 2016-2017 respectively. The True abstract of the Books of debt is duly certified and the conditions in Section 2(o) of the Information Technology Act R/W Section 65B of the Indian Evidence 1872 which is mandatory while producing extracts of "DATA" stored in a Computer system, Book of Debts or Ledger of Accounts. It is pertinent to note that, the above accounts filed by the Corporate Debtor do not evidence any payment due to the Operational Creditor.
20. It is submitted that the Applicant/Operational Creditor without complying with Section 2(o) of the Information Technology Act



R/W Section 65B of the Indian Evidence 1872 which is a mandatory requirements for producing any data output stored in a computer of the concerned entity is in due course of its business. It is further brought to the Notice of the Hon'ble Adjudicating Authority the Following Facts:

21. Statutory Notice under Section 8 of the Code, 2016, i.e. Form 4 was issued without specific authority by the Board of the Operational Creditor. The Board Resolution is dated 27.11.2014. The Code was notified in 2016 and as per the Orders of The Hon'ble National Company Law Appellate Tribunal in "**Palogix Infrastructure Limited Vs. ICICI Bank Limited**"-Company Appeal (AT) (Insol.) No. 30 of 2017. There should be specific authorization to initiate action under the Code. In the absence of the specific authorization to initiate proceedings under the Code, Notice dated 06.07.2017 is bad in law and to constitute a valid notice as mandated under the Code, it is in fact issuance of valid and subsisting notice together with other qualification as mandated under Section 8 & 9 Code. Notice under Section 8 Code is a condition precedent for preferring an Petition under Section 9 of the Code and a notice issued under Section 8 of the Code without authority is invalid and the consequence of which will cascade on the Petition filed under Section 9 of the Code also invalid is liable to be dismissed.
22. It is submitted that Petition filed under Section 9 of the Code i.e. Form 5 is filed without authorization of the Board of the Applicant/ Operational Creditor. The resolution passed by the Board do not specifically authorize Mr. Sundarerajan to issue Notice under Form 4 nor authorize him to submit the Petition under Form 5, for reason that the board resolution is as old as 2014 and the recitals of the resolution do not confer any



authorization for issuing notice under Section 8 of the IBC and this ground alone the captioned Petition is fully qualified to be dismissed without even attempting to look into other merits of the Petition.

23. It is submitted that, the captioned Petition is filed without any application of mind or in compliance of requirement under the Code.

24. It is submitted that, the Corporate Debtor is herewith filing its Financial Statement as well as Books of Debt for the Period 2012-2013 and 2016- 2017 respectively. The true abstract of the Books of debt is duly certified and the conditions in Section 2 (o) of the Information Technology Act, 2000 read with Section 65B of the Indian Evidence Act, 1872 which is mandatory while producing extracts of "DATA" stored in a Computer system, Books of Debts or Ledger of Accounts. It is pertinent to note that, the accounts filed by the Corporate Debtor do not evidence any payment due to the Operational Creditor.



25. It is observed from the material papers submitted by the parties that as per Form 5 submitted by the Operational Creditor who is Bay Forge Private Limited, the Corporate Debtor/ Respondent i.e. Nawa Engineers and Consultants Private Limited, an amount of Rs. 46,02,625/- was the Operational Debt outstanding and the debt fell due on 24.01.2013. Further, in the Form it was also mentioned that an amount of Rs. 35,01,367/- along with interest at the rate 24% from the due date till the date of realisation and the date of 1st default was 30.03.2013. The Operational Creditor has also a recommended Shri Taduvai Siva Naga Raja from Hyderabad as IRP and his registration particulars i.e. IBBI/IPA-003/IP-N00065/2017-18/10551.

26. The case was listed on various dates i.e. 20.09.2017, 26.09.2017, 03.10.2017, 10.10.2017, 20.10.2017, 03.11.2017, 06.11.2017, 13.11.2017, 23.11.2017 and finally on 30.11.2017 and objections raised by the registry was also complied by the petitioner. The Counsel for Petitioner sought one week time to appoint another IRP. When the case was listed on three occasions, none appeared for the respondents and only then the Counsel for the respondent started appearing before the Tribunal from 10.10.2017 onwards. The Director of the Respondent Company also appeared on few occasions before the Tribunal and an attempt to settle the issue in question/debt was initiated but the same was failed.

27. In view of the settlement of issue, the case was posted on various occasions, but the settlement amount proposed by the Respondent Company was not acceptable to the Operational Creditor, therefore, the settlement issue failed and orders were reserved.

28. The Director of the Respondent Company during the hearing held on 30.11.2017 confirmed before the Adjudicating Authority that he can make a payment of Rs. 5,00,000 (Rupees Five Lakhs only) as against a claim of Rs. 46,02,625. The Operational Creditor submitted that the settlement amount offered by the Corporate Debtor is paltry/ negligible sum as against huge outstanding amount and insisted for initiation of CIRP.

29. Notice under Form 4 of the IBC dated 04.07.2017 has also issued.

30. The Counsel for The Corporate Debtor filed a detailed reply dated 13.11.2017 denying the entire petition and the Application/Operational Creditor engaging itself in forum shopping, without any merits and not to admit. The Counsel has



also raised various technical and procedural issues such as excel sheet print out does not constitute either a primary or secondary evidence, not in compliance with Section (2) (o) of the Information Technology Act read with Section 65B of Indian Evidence Act, 1872, notice under Section 8 of the IBC Code i.e. Form No.4 was issued without specific authority by the board of the operational creditor etc.

31. The Corporate Debtor has also raised the issue of limitation, applicability of Limitations Act, 1963, from the records it is observed that Operational Creditor has been making demands/ seeking payment of outstanding debt amount vide its communication dated 25.10.2013, 22.04.2014, 17.02.2016, which shows that Operational Creditor has been making continuing demand for the cause of action which arose in the year 2013 for the supply of goods sold in February- March, 2013. Since it is a continuous cause of action, the Limitations Act, 1963, in this case will not be applicable and the outstanding debt is not timed barred debt as argued by the Respondent Company.
32. Since the settlement talks were initiated by both the parties, the adjudicating authority granted ample time for amicable settlement of issue and both the parties exchanged various email communication in this regard. However inspite of granting ample time, they could not arrive at solution.
33. Therefore the adjudicating authority has no other go but to initiate CIRP proceedings as prayed for by the Operational Creditor. In spite of various lacunas pointed out by the Respondent Company in its reply as discussed supra, it has submitted itself for settlement of debt in question amicably.



34. The Counsel for the Operational Creditor filed a Memo dated 04.12.2017 proposing another IRP viz. Mr. Ravichandra Mohan Kadiyala (Registration No. IBBI/IPA-002/IP-N00406/2017-2018/11179). Form No.2 is also submitted by the proposed IRP and we are satisfied with the same.

35. Upon perusal of the Petition and the documents submitted in support by the corporate debtor we are satisfied that the Petition is filed in accordance with Section 9 of IBC and debt and default is also proved. Therefore, the Adjudicating Authority is of the considered view to accept the Company Petition filed und Section 9 for initiation of CIRP. The Corporate Debtor is at liberty to take up on all the issues raised in its reply with the IRP/RP.



36. In view of the foregoing discussions, the Company Petition filed under Section 9 of the IBC by the Operational Creditor is admitted ,the Interim Resolution Professional is also appointed and moratorium also imposed as per the details given below:

By invoking the powers under Sections 10,12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 25 and other applicable provisions of Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority passes the following order:-

- i) Appointed CS. Ravichandra Mohan Kadiyala (Registration No. IBBI/IPA-002/IP-N00406/2017-2018/11179), 6-3-248/A, Flat No.202A, Maheswari Towers, Road No.1, Banjara Hills, Hyderabad – 500034 to act as Interim Resolution Professional with a direction to initiate appropriate action contemplated in CIRP in accordance with extant provisions of IBC, 2016 and other relevant rules.

ii) We hereby declare the following Moratorium U/s 14(1) of IBC in respect of the following:

a) 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;

b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).

d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of Corporate Debtor.

e) This order of moratorium shall have effect from the date of communication of this order till completion of CIRP or till passing an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.

f) Direct to cause a public announcement of the initiation of CIRP immediately as prescribed under Section 15(1) and (2) of Insolvency and Bankruptcy Code, 2016, on



www.ibbi.gov.in (designated website of Insolvency and Bankruptcy Board of India, circulated vide IIBI/IP/PUBLIC ANN/221 dated 01.02.2017) and email to public.ann@ibbi.gov.in in addition to other accepted modes of publication immediately and call for submission of claims as per Section 15 of the IBC read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Company is also directed to publish the same in its official website.



- g) The IRP is directed to follow all extant Code of IBC and all the Rules and Regulations framed by Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Afford full opportunity to all concerned parties to the issue by duly following Principles of Natural Justice;
- h) Both the Petitioner and Respondent are directed to extend full co-operation to the IRP to discharge his statutory functions;
- i) Direct the personnel of Nawa Engineers and Consultants Private Limited, its promoters or any other person associated with the management of Nawa Engineers and Consultants Private Limited, to assist and co-operate with Interim Resolution Professional to provide access to documents and records and management of the affairs of the Company.

- iii) Post the case 28.02.2018 with a direction to the IRP to appraise the Tribunal, about steps being taken by him from time to time, in instant CIRP, by way of filing an affidavit.
- iv) The IRP is also directed to schedule meeting(s) of concerned parties, verification etc., in such a way that CIRP shall be completed well before 180 days prescribed under the Code.



Sd/-
RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

Sd/-
RAJESWARA RAO VITTANALA
MEMBER (JUDICIAL)

Dr. Anantha Lakshmi
FOR Dy. Regr./Asst. Regr./Court Officer/
National Company Law Tribunal, Hyderabad Bench

प्रमाणित प्रति
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केस संख्या
CASE NUMBER *CP (IB) No. 198/9/HDB/2017*
निर्णय का तारीख
DATE OF JUDGEMENT *22.1.2018*
प्रति तैयार किया गया तारीख
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