

**NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No.234/Chd/Hry/2018

**Under Section 9 of the Insolvency
and Bankruptcy Code, 2016.**

In the matter of:

M/s Bhuleshwar Steel and Alloys Private Limited,
Having its registered office at Gut No.233,
Village-Yawat, Daund, Pune, Maharashtra 412214.

....Petitioner/Operational Creditor.

Versus

Empathy Infra and Engineering Private Limited,
Having its registered office at 305 C Third Floor,
Sohna Road, Sector 48, Gurgaon, Haryana 122002.

...Respondent/Corporate Debtor

Judgement delivered on: 19.12.2019

**Coram: HON'BLE MR. AJAY KUMAR VATSAVAYI, MEMBER (JUDICIAL)
HON'BLE MR. PRADEEP R. SETHI, MEMBER (TECHNICAL)**

For the Petitioner : Mr. J.S.Bhatia, Advocate

For the Respondent : Mr. Padamkant Dwivedi, Advocate

Per: Pradeep R. Sethi, Member (Technical)

JUDGEMENT

The instant application in Form 5 is filed by M/s Bhuleshwar Steel and Alloys Private Limited (**Bhuleshwar**) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**Code**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiation of corporate insolvency resolution process (**CIRP**) in respect of

Empathy Infra and Engineering Private Limited (**Empathy**). The application is signed by Shri Vikas P.Goyal, Director of Bhuleshwar. He is authorised vide Board resolution dated 03.10.2017 of Bhuleshwar (Annexure A of the petition). His affidavit in support of the application is filed at pages 15-17 of the petition.

2. The registered office of Empathy is stated to be in Gurugram (Haryana). Therefore, the jurisdiction lies with this Bench of the Tribunal.

3. It is stated that Bhuleshwar is in the business of manufacturing, sales and supply of TMT Bars, iron and steel material required for building and construction purpose and that Empathy placed purchase order No.EIEPL / POSCO / BSAPL / Niv-Hills / 14-15 / 007, dated 27.04.2015 for supply of steel material and accordingly, Bhuleshwar supplied material total amounting to Rs.27,10,967/- as per tax invoices No.0453, dated 30.04.2015 (Rs.8,94,318/-); No.0457, dated 30.04.2015 (Rs.9,23,886/-); No.0485 dated 02.05.2015 (Rs.8,92,763/-) and that Empathy made payment of Rs.15,00,000/- on 29.07.2015. It is stated that in accordance with minutes of meeting dated 20.10.2015 (Annexure C of the petition), Empathy made a payment of Rs.4,00,000/- on 26.10.2015 and did not make any payments thereafter resulting in a balance due of Rs.8,10,967/- with interest at 24% per annum from 16.06.2015 till the realisation of the amount.

4. Demand notice dated 01.11.2017 in Form 3 is filed at Annexure G of the petition and sent by speed post at the registered address of Empathy at Gurugram. Tracking report showing "item delivered" on 06.11.2017 is at page 41 of the petition. Affidavit of no dispute under Section

9 (3) (b) of the Code is filed at Annexure H of the petition stating that no reply is received to the demand notice dated 01.11.2017 and there is no dispute of unpaid operational debts pending between the parties in any Court of law and no notice has been given by Empathy relating to dispute of the unpaid operational debts. The affidavit of no dispute is affirmed by Shri Vikas P. Goyal, Director of Bhuleshwar.

5. In Part-III of Form 5, no proposal for appointment of Interim Resolution Professional (**IRP**) has been made.

6. Vide order dated 09.08.2018, notice of the petition was directed to be issued to Empathy. Written statement by Shri Ravi Kushwaha, Director of Empathy has been filed by diary No.5697, dated 17.10.2019.

7. We have heard and considered the arguments of the learned counsel for Bhuleshwar and Empathy and have also perused the record carefully.

8. It has been pleaded by the learned counsel for Empathy that Empathy entered into an agreement with POSCO E & C India Private Limited (**POSCO**) having corporate office at Park Centra, 5th floor, Tower A, Sector 30, Gurugram 122001 for the construction of project named 45 Nirvana Hills at Pune, Maharashtra on 20.01.2015 with specific terms and regulations of execution of the said project on back to back basis and that the project came under legal dispute on 29.01.2016 for reason of delayed payment, local hindrance, pending design and drawings, government clearance etc. and the legal proceedings are pending before the Hon'ble Court of Pune, Hon'ble Courts of Gurugram and Hon'ble High Court of Bombay under Arbitration and

Conciliation Act, 1996. It is pleaded that Bhuleshwar is well aware of the litigation pending before different Courts and Empathy machineries, documents, books of account, computers and all official records related to project "45 Nirvana Hills" are in possession of POSCO. It is pleaded that Bhuleshwar was introduced to Empathy by Shri Kalpesh R. Patil, Sr. Engineer (Procurement) of POSCO. It is stated that Bhuleshwar has initially raised the quotation to POSCO and all negotiations were made between Bhuleshwar and POSCO for supply of material and term of payment. It has been submitted that various communications with regard to quotations, negotiations, sale, purchase and payment assurance etc. have been initiated and finalised by POSCO. It is pleaded that the petition deserves to be dismissed on the sole ground of non-joinder of the necessary party i.e. POSCO and that the affidavit of no dispute filed is false.

9. In ***Mobilox Innovations Private Limited Vs. Kirusa Software Pvt.Ltd.*** (2017) 140 CLA 123 (SC), the Hon'ble Supreme Court has held as follows:

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not

need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

10. The contentions raised by the learned counsel for Empathy are being examined with reference to the judgment of the Hon'ble Supreme Court (supra).

11. In Annexure R-1 (Colly) of the reply, Empathy has furnished copy of e-mail dated 18.04.2015 from Shri Kalpesh R. Patil, Sr. Engineer (Procurement) of POSCO addressed to Bhuleshwar giving Bhuleshwar an opportunity to supply to the Pune based project of POSCO too and there are copies of some e-mails asking for quotations. However, the purchase order dated 27.04.2015 (Annexure F (Colly) of the petition) for supply of TMT Bars (Straight) of Rs.27,08,100/- is not issued by POSCO but is issued by Empathy. The purchase order for supply by Bhuleshwar is signed by Shri Ravi Kushwaha on behalf of Empathy. In the reply filed during the present proceedings, Empathy has submitted that it never received the signed copy of purchase order. However, the factual position of issue of purchase order by Empathy and the subsequent supply of material is not disputed. Moreover, in para No.5 of the reply (supra), Empathy has accepted that it made payment of sum of Rs.19 Lacs on ad hoc basis to Bhuleshwar.

12. Empathy has specifically referred to e-mail communication dated 16.06.2016 from POSCO to Empathy stating *“Please note that POSCO E & C India Pvt.Ltd. had already taken Guarantee to your sub-vendor for*

releasing the timely payment. We will keep R. A. Bill payment on hold till receiving your sub-contractor payment schedule.”

13. The e-mail only states that guarantee has been taken by POSCO for the payment to the sub vendor Bhuleshwar and therefore, the sub-contractor payment schedule is required and till that time, the R. A. Bill payment to Empathy will be kept on hold. The e-mail therefore, clearly shows the relationship between Empathy and Bhuleshwar and also evidences supply of material by Bhuleshwar to Empathy for which payment is due, albeit guaranteed by POSCO. We may add here that Empathy has not furnished any copy of the agreement claimed by it to have been entered into with POSCO on 20.01.2015 as well as any copy of the legal proceedings stated to be pending before the different Courts.

14. On the basis of the above discussion, we held that the dispute sought to be raised is not shown to exist in fact and is a patently feeble legal argument and assertion of fact unsupported by evidence. The contention that there is non-joinder of necessary party and that the affidavit is false, is not acceptable.

15. The provisions of Section 9 (5) (i) of the Code are as follows:-

“(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 payment 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."*

16. We find that the application in Form 5 is complete and there is non-payment of operational debt of Rs.8,10,967/-. We have already discussed above that the notice under Section 8 of the Code was delivered to Empathy and that affidavit of no dispute has been filed. The contentions raised by the learned counsel for Empathy during the course of present proceedings have been discussed above. It has been concluded that Empathy has not shown that a dispute truly exists in fact and is a patently feeble legal argument and assertion of fact unsupported by evidence. There is no proposal for appointment of IRP and therefore, the issue of pendency of disciplinary proceedings against the proposed IRP does not arise.

17. The conditions provided for in Section 9 (5) (i) of the Code are satisfied in the present case. We, therefore, admit the application for initiation of the CIRP in the case of Empathy Infra and Engineering Private Limited and give directions for moratorium and appointment of Interim Resolution Professional below:

18. We declare the Moratorium in terms of sub-section (1) of Section 14 of the code as under:-

- (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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

19. It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during moratorium period. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

20. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or

passes an order for liquidation of corporate debtor under Section 33 as the case may be.

21. Under sub-section (4) of Section 9 of the Code, the operational creditor may propose the name of Resolution Professional to be appointed as Interim Resolution Professional but it is not obliged to do so. In the instant case also the operational creditor has not proposed the name of any Resolution Professional to be appointed as Interim Resolution Professional. Section 16(3)(a) of the code says that where the application for corporate insolvency resolution process is made by an operational creditor and –

*“a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;
b) xxxxx”*

Sub-section (4) of Section 16 says that the Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

22. In this regard a letter bearing File No.25/02/2019-NCLT dated 28.06.2019 has been received from the National Company Law Tribunal, New Delhi forwarding therewith a copy of letter No.IBBI/IP/EMP/2018/02 dated 24.06.2019 along with the guidelines and the panel of resolution professionals approved for NCLT, Chandigarh Bench for appointment as IRP or Liquidator. The panel is valid for six months from 01.07.2019 to 31.12.2019. We Select Mr.Amit Jain appearing at Serial No.45 of the panel to be appointed as Interim Resolution Professional.

23. The Law Research Associate of this Tribunal has checked the credentials of Mr.Amit Jain and there is nothing adverse against him. In view of the above, we appoint Mr.Amit Jain, bearing Registration No.IBBI/IPA-001/IP-P01447/2018-2019/12196, Mobile No.9810812036, e-mail id amitj1@kpmg.com as the Interim Resolution Professional with the following directions:-

- i) The term of appointment of Mr.Amit Jain shall be in accordance with the provisions of Section 16 (5) of the Code;
- ii) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed

to prepare a complete list of inventory of assets of the Corporate Debtor;

- iii) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the 'Code of Conduct' governing his profession and as an Insolvency Professional with high standards of ethics and moral;
- iv) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;
- v) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;

- vi) The Interim Resolution Professional shall after collation of all the claims received against the corporate debtor and the determination of the financial position of the corporate debtor constitute a committee of creditors and shall file a report, certifying constitution of the committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the committee within seven days of filing the report of constitution of the committee; and
- vii) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.

A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send copy of this order to the Interim Resolution Professional at his email address forthwith.

Sd/-
(Ajay Kumar Vatsavayi)
Member (Judicial)

Pronounced in open Court.

Sd/-
(Pradeep R. Sethi)
Member (Technical)

December 19, 2019
Ashwani