

S.No.103

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
30-12-2021 AT 10:30 A.M. THROUGH VIDEO CONFERENCE.

CP(IB) No.679/9/HDB/2019
U/s 9 of IBC, 2016

IN THE MATTER OF:

Nexo Industries Pvt Ltd

...Operational Creditor

Vs

Tata Projects Ltd

...Corporate Debtor

C O R A M :-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)**

ORDER

Learned Counsel Mr. Damodar Mundra for Operational Creditor and Learned Counsel Ms. Shireen Sethna Baria appeared via video conference.

Orders pronounced in CP(IB) No.679/9/HDB/2019 vide separate sheets.

In the result, this CP(IB) No.679/9/HDB/2019 is allowed and Corporate Insolvency Resolution Process(CIRP) is ordered against the Corporate Debtor.

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MEMBER (T)

Srinivas

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MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.679 /9/HDB/2019

Under section 9 of IBC, 2016 read with
Rule 6 of I&B (AAA) Rules, 2016.

In the matter of

M/s Nexo Industries Pvt Limited

Represented by its Director
Having office at Village Mangarh
Kohara – Machiwara Road
Ludhiana, Punjab – 141112.

.. **Applicant/
Operational Creditor**

VERSUS

M/s Tata Projects Limited

A company incorporated under Companies Act, 1956
Having registered office at:
Mithoona towers 1, 1-7-80 to 87
Prenderghast Road
Secunderabad, Telangana.

.. **Respondent
Corporate Debtor**

Date of order: 30th December 2021

Coram:

**HON'BLE DR. VENKATA RAMAKRISHNA BADARINATH NANDULA
MEMBER (JUDICIAL)**

and

**HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)**

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Counsels present:

For Applicant : Shri Mayur Mundra, Advocate.
For Respondent : Shri S. Ravi, Senior Advocate for Ms. Shireen Sethina Baria and Ms. B.Saroj Advocates.

PER BENCH

This is an application filed under section 9 of Insolvency and Bankruptcy Code, 2016, read with Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon, contending that the Corporate Debtor herein failed to discharge its debt of an amount aggregating Rs.44,20,909/- (forty four lacs twenty thousand nine hundred and nine only), which is said to be due and payable by the corporate debtor to the operational creditor.

2. The gist of the averments in the Application are that: the applicant here in after referred as the Operational Creditor is a private limited company. As accessed through the Ministry of Corporate Affairs website the Operational Creditor is registered with RoC, Chandigarh with CIN U28939PB1998PTC021859.

3. The Respondent herein after referred to as the Corporate Debtor too is a private limited company having CIN U45203TG1979PLC057431 registered with RoC, Hyderabad.

4. The operational creditor would contend that it has supplied various kinds of materials to Corporate Debtor such as, bolts, washers and other

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related items under various invoices on different dates. Invoice amounts were required to be paid within 15 days of the date of invoice, failing which the Corporate Debtor is liable to pay interest at the rate of 18% per annum. Since the Corporate Debtor failed to pay the invoice amounts, the Operational Creditor had issued Demand Notice in Form-3 dated 01.07.2019 (page 174 of the petition). However as there was no response from the Corporate Debtor, the Operational Creditor has preferred this application on the basis of invoices, purchase orders, delivery challans and statement of accounts for initiation of CIRP against the corporate debtor herein.

5. The Corporate Debtor has raised the following contentions in its Counter:

- Copies of invoices are not legible. Corporate Debtor is not able to co-relate the invoice with purchase order.
- Material facts have been suppressed. It is pointed out that Corporate Debtor has issued purchase orders to Nexo Industries Pvt Limited, whereas invoices filed by Operational Creditor with the petition at pages 40-69 pertain to Nexo Industries Limited. and invoices filed at pages 71-77 relate to Nexo Industries Pvt Limited. It is further pointed out that Ledger account filed by Operational Creditor pertains to NEXO INDUSTRIES LTD. Thus, there suppression of facts.
- Excise duty was exempted in respect of three Purchase Orders (POs) dated 09.07.2015, 09.07.2015 and 04.11.2015. Operational Creditor has filed invoices corresponding to those POs, but failed to produce POs. It was deliberate attempt to extract money (quantum of excise duty).

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- Claim is barred by limitation. Petition is filed three years beyond the Invoices related to years 2015-16.

The amount claimed of Rs.25,71,223/- consists of :

Recovery towards EDEC exemption	..	Rs.22,35,961/-
Deduction towards shortage of material	..	Rs.01,86,261/-
Payment made after receipt of notice	..	Rs.01,49,001/-

The amount of Rs.22,35,961/- is the amount of excise duty, which is exempted, which was wrongly paid. Thus, the Operational Creditor has to claim refund from the Tax authorities. Amount of Rs.01,86,261/- is towards short supply of materials, which is not payable to Operational Creditor. Balance of Rs.01,49,001/- has been paid to the Operational Creditor on 23.10.2019.

6. The Operational Creditor has averred in its Rejoinder as following:

- The issue of illegible invoice has been resolved.
- Nexo Industries Ltd (earlier name) and Nexo Industries Pvt Ltd (existing name) are one and the same having CIN U28939PB1998PTC021859. Conversion of name took place on 20.08.2015 as can be found from the Certificate of Incorporation.
- It was inadvertence. The invoices in question were issued prior to 02.01.2016, viz. before excise exemption certificates were forwarded to the Operational Creditor vide Inter Office Memo dated 02.01.2016 (copy enclosed at page 19 of the Rejoinder).
- Excise duty exemption was thrust upon Operational Creditor post realisation of mistake of non-communication by the Corporate

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Debtor. Further, Corporate Debtor has acknowledged the debt vide e-mail dated 30.03.2017.

As regards shortage of material and claiming an amount of Rs.1,886,261/-, Operational Creditor contends that such a contention is raised for the first time. It is baseless and false. Corporate Debtor while admitting the claim has paid Rs. 1,49,001/- Inter Office Memo dated 02.01.2016 is crucial. EDEC exemption certificates were submitted on 02.01.2016 and supplies made thereafter attract no excise duty. However, invoices prior to 02.01.2016 attract excise duty and Corporate Debtor is liable to pay the same.

7. Learned counsel for the Corporate Debtor also filed Written Submissions broadly contending that,

- The Corporate Debtor is not insolvent. The Corporate Debtor has not admitted its debt and refuted the claim of the Operational Creditor. Thus, the present petition is required to be dismissed as this forum cannot be used as a recovery mechanism. In support of its contention the Corporate Debtor has relied on decision of the Hon'ble Apex Court in the matter of Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conductors and Cables Limited, MANU/ SC. 1192/ 2018.
- Provision towards exemption of excise duty is mentioned in Purchase Order itself. Thus, the Operational Creditor was aware of the same from day one. Yet the Operational Creditor has paid excise duty and claimed it through invoices.

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- Refund of excise duty is in the jurisdiction of Tax Authorities. It is not known why the Operational Creditor has not claimed tax refund.
- Claim towards interest is not tenable since no principal amount is outstanding against TPL.
- The claim is barred by limitation as the invoices pertain to the year 2015-16, and deduction towards excise duty was made by the Operational Creditor during November 2015 and February 2016. Thus, limitation, which is being 3 years, commencing in the year 2015 and ended in November 2018 and by February 2019. However, Form-3 Notice was sent on 01.07.2019, long after the expiry of period of limitation. On this ground alone the petition is liable to be dismissed.
- In support of this contention the Corporate Debtor relied on decision of the Hon'ble Apex Court in the case of Sesh Nath Singh and others Vs. Abaidyabati Sheoraphuli Cooperative Bank Ltd. & others, MANU/ SC/ 0205/2021, wherein it was held that,

“48. The insolvency Committee of the Ministry of Corporate Affairs, Government of India, in a report published in March 2018, stated that the intent of the IBC could not have been to give a new lease of life to debts which were already time barred. Thereafter Section 238A was incorporated in the IBC by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Act 26 of 2018), with effect from 6th June 2018. Section 238A provides as follows: -

“238A. The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.”

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49. The language and tenor of Section 238A is significant. The Section reads that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals inter alia before the NCLT/NCLAT.”

- The Corporate Debtor has also relied on decision of the Hon'ble Supreme Court in Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt Ltd & another, (2020) 15 SCC 1, wherein it was held that, .

8. In light of the afore-stated rival contentions, the points that emerge for consideration by the Tribunal are:

- (i) Whether the application is barred by limitation?
- (ii) Whether the Operational Creditor has made out a case for ordering initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor?

We have heard the Ld. Counsels for both sides at length, perused the record and the case law.

POINT No.(i) :

9. It is needless to say that it is for the suitor/ applicant to establish that the debt claimed as due and payable by the Corporate Debtor herein is not barred by limitation, whether or not the Corporate Debtor has raised the said plea. Learned counsel for the Operational Creditor submitted that the subject claim pertains to Purchase Orders (POs) dated 09.07.2015, 09.07.2015 and 04.11.2015 respectively and the payments in respect of same were made by the Corporate Debtor in parts in between June 2015 and 30th March 2017 as is evident from the undisputed ledger account (page 23 of the application), the present application having been

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filed on 15.10.2019 is well within the prescribed period of limitation. As such the contention that the debt is barred by limitation is baseless.

Per Contra, the learned Senior Counsel for the Corporate Debtor submitted that the amount claimed as due and payable since it relate to Purchase Orders of the year 2015 and deduction of excise duty has been affected on 01.02.2016, 06.11.2015 and 07.11.2015 respectively, the present application having been filed on 16.10.2019 for recovery of the excise duty amount is barred by limitation, as such the application is liable to be dismissed.

10. In light of the contest as afore stated, we have carefully perused the Purchase Orders which are filed by the Corporate Debtor along with its counter (pages 20 to 25) besides the undisputed ledger account of the Corporate Debtor filed by the Operational Creditor in respect of three Purchase Orders referred to above. As rightly contended by the learned counsel for the Operational Creditor the said ledger account discloses that the Corporate Debtor has been making part-payments for the supplies made under the aforementioned three Purchase Orders until 30.03.2017. By virtue of the said payment the period of limitation prescribed stands extended by 3 more years from the date when the last payment was made. The prescribed period of limitation for filing the Application for recovery of amount due being 3 years which period is to be reckoned from 30.03.2017 the argument that the present application is barred by limitation becomes wholly unsustainable and unacceptable. That apart, it is to be noted that soon after filing the present application, the Corporate Debtor made payment of Rs.1.49 lacs on 23.10.2019, as is evident from the counter filed by the Corporate Debtor. This payment undoubtedly amounts to acknowledgment of liability by the corporate debtor herein. Therefore, viewed from any angle the sum claimed as due and payable by the Corporate Debtor is well within the period of limitation



as on the date of filing this application. The Tribunal, therefore finds no force in the contention of the learned Senior Counsel for the Corporate Debtor that the debt claimed as due and payable by the Corporate Debtor in this application is barred by limitation.

The point is answered accordingly.

POINT No.(ii) :

11. The applicant has claimed that in all a sum of Rs.44,20,909/- is due and payable i.e., an amount of 25,71,244/- with interest at the rate of 18% amounting to Rs.18,49,665/- as on 30.09.2019. The said liability of Rs.25,71,244/- consists of the following:

- Recovery of EDEC exemption .. 22,35,961/-
- Deduction towards shortage .. 01,86,261/-
Of material.
- Payment made after receipt .. 01,49,001/-
Of notice.

TOTAL .. 25,71,223/-

12. Learned counsel for Operational Creditor submitted that the supply of the material covered under the afore stated purchase orders attracts payment of excise duty by the corporate debtor and in order to avail exemption from payment of excise duty the corporate debtor shall comply Clause 4.0 of the Purchase Order, which is as follows:

“4.0 Excise Duty: Excise Duty shall be exempted vide Excise Duty Exemption Certificate (EDEC) under Excise Notification 108/95-CE through RRVPNL issued in name of M/s Nexo Industries Limited. TPL

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shall furnish EDEC for availing the excise exemption in advance prior to dispatch.”

13. Relying on the aforesaid clause, learned counsel for the operational creditor submitted that as the Corporate Debtor failed to submit Excise Duty Exemption Certificate for short “EDEC”, prior to dispatch of material as envisaged under the clause 4.0 supra, the Operational Creditor was compelled to pay the same as such the Corporate Debtor is bound/liable to reimburse the said amount to the operational creditor.

14. Per Contra, this claim of Rs. 22,35,961/- towards reimbursement of excise duty has been seriously disputed by the Corporate Debtor, contending mainly that the corporate debtor has been exempted from payment of excise duty in respect of items supplied by the Operational Creditor to the corporate debtor vide Excise Duty Exemption Certificate (EDEC) for Bhadla – Jodhpur & Ramgarh – Akal, Projects, effective from 27.05.2015 and the said certificate has already been submitted to the applicant, as such when the payment of excise duty itself is exempted and clause 4.0 of the purchase order has been complied with the question of non-payment of the same by the corporate debtor or claim for reimbursement of a sum of Rs. 22,35,961/- towards excise duty does not even arise.

15. In light of these rival contentions, we have carefully examined the record filed before us in respect of exemption from payment of excise duty. It cannot be denied that the Corporate Debtor has been granted exemption from payment of excise duty by Rajasthan Rajya Vidyut Prasaran Nigam Limited for the supplies meant for its construction works at the places referred to and covered by the purchase orders referred supra, and the said exemption applies to the principal contractor the



corporate debtor herein as well as to the vendors including the Operational Creditor herein effective from 27.05.2015. Thus, undoubtedly the above exemption from payment of excise duty has been granted prior to issuance of all the three Purchase Orders referred to supra.

16. So much so what is required to be seen is whether the corporate debtor has submitted the exemption certificate to the operational creditor before the Operational Creditor had dispatched the material as mandated under clause 4.0 of the purchase order. Here it is necessary to refer to clause 2.0 of the Purchase Order which relates to delivery schedule. Clause 2.0 stipulates that the entire material shall be delivered on or before 31.10.2015 or within 30 days from the date of issue of last Periodic Project Release Indent (PRI) along with required technical clearance/ approval, whichever is earlier. As per Clause 8.0 transportation of material from works to site store shall be arranged by the operational creditor. The Operational Creditor has produced LRs showing that the material was dispatched as per the above terms of the conditions of Purchase Orders dated 09.07.2015, 09.07.2015 and 04.11.2015.

17. Therefore, in the above backdrop of undeniable factual matrix, it is to be seen whether the plea of the Corporate Debtor that it has submitted Excise Duty Exemption Certificate (EDEC) well before placing the relevant purchase order has been established. In this context it is to be noted that it is the specific plea of the Operational Creditor that the Corporate Debtor, for the first time vide Office Memorandum dated 02.01.2016 has submitted EDEC by which time supplies were admittedly made by the operational creditor as such the claim for payment of excise duty amount is very much sustainable.

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18. It is pertinent to state that in the counter filed by the corporate debtor, the date of submission of the EDEC by the corporate debtor to the applicant is conspicuously absent. The counter states that,

*“18. That in pursuance of the terms and conditions of the purchase orders for Bhandla-Jodhpur and Ramgarh-Akal Projects, the corporate debtor obtained two EDEC’s both dated 27.05.2015 from Rajasthan Rajya Vidyut Prasaran Nigam Limited and **given to the operational creditor**. Similarly, for Tapovan Pipalkot project (Srinagar transmission line), Power Transmission Corporation of Uttarakhand, had issued EDECs which **had been given** to the operational creditor”.*

However, contrary to the above plea, in para 8 of the Written Submissions filed by Corporate Debtor it has been stated as follows:

*“8. The Excise Duty Exemption Certificate (EDEC) for Bhadla – Jodhpur & Ramgarh – Akal, Projects that the EDEC(s) were effective from 27.05.2015, i.e. before placing the relevant Purchase Orders on 09.07.2015 upon Nexo for the respective projects. The EDEC for Tapovan- Pipalkoti Project was effective from 09.10.2015 and the **same was provided to the Operational Creditor well before placing the relevant Purchase Order.**”*

19. Be that as it may, even in the Written Submissions filed by the Corporate Debtor, it has been merely stated that *“the same (EXEC) was provided to the Operational Creditor well before placing the relevant Purchase Order.”* and the corporate debtor failed to state **how and when** the same was “provided/submitted” to the applicant. It is pertinent to note that no correspondence evidencing *submission* of EDEC prior to the despatch of material by the applicant has been filed by the corporate debtor. When the Operational Creditor had come out with specific date on which it has been supplied with the EDEC by the corporate debtor and also filed Office Memorandum from the Corporate Debtor which is not disputed, it is for the Corporate Debtor to establish its plea of complying

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clause 4.0 of the purchase order by producing acceptable record/material. However, as already noticed, except orally contending that Excise Duty Exemption Certificates (EDECs) was “provided/submitted” prior to despatch of the material no document in support of the said contention has been filed by Corporate Debtor. So much so, the belated plea of the corporate debtor that it had complied Clause 4.0 of the Purchase Order as such the claim for reimbursement of excise duty is unsustainable is devoid of any acceptable basis hence is liable to be rejected, and we accordingly hereby do so. Consequently, we hold that the debt of Rs.22,35,961 being the amount paid by the applicant is liable to be discharged by the corporate debtor herein as per the terms of the purchase order(s).

20. It is trite to say that establishment of legally enforceable debt and default in payment of the said debt by the corporate debtor is the *sine qua non*, for setting the corporate insolvency resolution process in motion against the corporate debtor. The applicant in this case has convincingly established the same. Therefore, the petition deserves to be allowed and Corporate Insolvency Resolution Process against the respondent corporate debtor shall be ordered.

21. Insofar as the ruling in *Sesh Nath Singh and others*, supra, relied on by the corporate debtor is concerned, it may be stated that the said ruling lays down the law as regards the condonation of delay while filing an application under section 7 of the I&B Code, 2016, in absence of an application being filed under section 5 of the Limitation Act, besides as to the application under section 14 of the Limitation Act. These two legal issues since not involved in the case on hand, we are of the opinion that this ruling is not applicable to the facts of the case.

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22. Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions: -

- (A) Corporate Debtor, M/s Tata Projects Limited is admitted in Corporate Insolvency Resolution Process under section 9 of the Insolvency & Bankruptcy Code, 2016.
- (B) The Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor.
- (C) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (D) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated

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on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

- (E) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (F) That the order of moratorium shall have effect from the date of this order till the 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, whichever is earlier.
- (G) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.
- (H) That this Bench hereby appoints Shri **Krishna Komaravolu** having IBBI Registration No. IBBI/ IPA-002/IP-N00562/ 2017-2018/ 11699 as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code. He has filed Form-2. His Authorisation for Assignment is valid upto 06.01.2022. This information is also available in IBBI Website. Thus, there is compliance of Regulation 7A of IBBI (Insolvency Professionals) Regulations, 2016, as amended. Therefore, the proposed IRP is fit to be appointed as IRP since the relevant provision is complied with.

23. Accordingly, this Petition is admitted.

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24. Registry to send a copy of this order to the Registrar of Companies, Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.



VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)



DR. N.V. RAMAKRISHNA BADARINATH
MEMBER (JUDICIAL)

Karim