

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

SPECIAL BENCH AT NEW DELHI

Present:SHRI R.VARADHARAJAN, HON'BLE MEMBER (JUDICIAL)&

Ms DEEPA KRISHAN, HON'BLE MEMBER (TECHNICAL)

INSOLVENCY APPLICATION NO.(IB)-47 (PB)/2017

**In the matter of :**

Section 9 and other applicable provisions of the Insolvency and Bankruptcy Code, 2016 read with the Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

**In the matter of :**

**NOIDA SOFTWARE TECHNOLOGY PARK LIMITED,**  
Having its Registered Office at :  
Scindia Villa, Sarojini Nagar, Ring Road,  
**New Delhi- 110023** .....Respondent/Corporate Debtor

**INGRAM MICRO INDIA PRIVATE LIMITED,**  
At : Godrej IT Park, B-Block, 5thFloor,  
Piroshanagar, LBS Road, Vikhroli West,  
**Mumbai – 400079** ....Operational Creditor/Applicant

Advocate for the Applicant : Mr. Saurabh Jain, Advocate.

Advocate for the Respondent : Mr. Krishnendu Datta, Advocate  
: Mr. Prachi Johri, Advocate,  
: Mr. Kushal Gupta, Advocate



## ORDER

1. This is a petition filed by the petitioner claiming to be an 'Operational Creditor' under Section 8 of the Insolvency & Bankruptcy Code, 2016 (IBC,2016) against the Corporate Debtor in view of a default arising out of non-payment of amounts allegedly owed by the Corporate Debtor in relation to procurement of set-up boxes. The supplies, it is claimed by the Operational Creditor were based on two purchase orders the details of which are listed in the application as given hereunder:

S.No.	Purchase Order No.	Date	Amount (Rs.)
<u>1</u>	NSTPL/PO/14-15/000129	17-08-2015	45,35,308/-
<u>2</u>	NSTPL/PO/15-16/00018	09-09-2015	4,55,82,539/-

As per the terms of the Purchase Order, it is claimed by the Operational Creditor, payments were required to be made within 90 days against the receipt of goods and also open a bank guarantee for 10% of the value of the purchase order was required to be operated by the Corporate Debtor as well as the issue of post-dated cheques for the full order value. Based on the Purchase Order as listed above, the Operational Creditor it is claimed had also supplied



the goods which had been accepted without demur by the Corporate Debtor and invoices were also raised for the value of goods supplied by the Operational Creditor as against the Corporate Debtor. In discharge of the above amount, it is claimed by the Operational Creditor that cheques were issued in favour of the Operational Creditor all dated 05.07.2016, but however, the same came to be dishonoured for reasons of 'Insufficient funds' vide intimation memo dated 08.07.2016 of the Bankers and in relation to the dishonor of cheque it is averred that the Operational Creditor has initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 as amended and the said proceedings are pending. Despite repeated reminders there yet remains an unpaid amount of Rs.2,44,06,031.80p and in the circumstances statutory notice under the provisions of Companies Act, 1956 was issued without much avail.

2. However, in the meanwhile the provisions of IBC, 2016 being brought into force, notice under Section 8 of IBC, 2016 was issued on the Corporate Debtor addressed to its registered office dated 01.02.2017 claiming the unpaid amount of Rs.2,44,06,031.80p along with interest of Rs.49,22,293/- in all aggregating to Rs.2,93,28,324.80p. Despite the service of notice of demand on 03.02.2017, the Corporate Debtor has failed to pay the amount



demanded nor has disputed the existence of debt within the statutory period of ten days and in the circumstances the above petition has been filed for initiating the Corporate Insolvency Resolution Process (CIRP) as contemplated under the provisions of IBC, 2016.

3. The above petition came to be listed before this Tribunal on 11.04.2017 and since notice of the petition as required to be given under Rule 6(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (`AAA Rules,) had not been given, the Operational Creditor was directed to serve notice of the petition as well as file the proof of dispatch and service of the same within a period of 2 weeks from the date of the order and the petition was posted to 24.04.2017. On 24.04.2017 the Corporate Debtor upon service had duly entered its appearance through its counsel and had also filed its objections to the petition and the matter was posted to 25.04.2017. On 25.04.2017, after hearing the matter at considerable length, the Counsel for the Corporate Debtor brought to the notice of this Tribunal the decision rendered by the Hon'ble NCLAT in JK Jute Mills Company Limited -Vs- M/s.Surendra Trading Company. Relying upon the said decision it was contended by the Learned Counsel for the Corporate Debtor that since compliance with the provisions of Section 8 & 9 of IBC, 2016 by an



Operational Creditor has been held to be mandatory and in the circumstances as the certificate from the financial institution as contemplated under clause (c) of sub-section 3 of Section 9 has not been produced, prima facie the petition is not maintainable and hence liable to be rejected in pursuance of Section 9(5)(ii) of IBC, 2016.

4. However taking into consideration proviso to Section 9(5)(ii) of IBC, 2016 an opportunity was given to the petitioner to rectify the aforesaid defect by filing the certificate in terms of Section 9(3)(c) of the Code and the petition was posted to 03.05.2017 on which date, the record of proceedings discloses that by virtue of production of Bank certificate the defect has been cured. However it is also observed from the said order dated 03.05.2017 that the Learned Counsel for the Corporate Debtor had taken an objection to the effect that the certificate as produced is also not in consonance with the requirements of Section 9(3)(c). Further it is also on record that an appeal has been filed in the matter before the Hon'ble NCLAT which has also passed an order dated 01.05.2017.
5. Against the above back drop, the petition came to be listed before this Tribunal on 17.05.2017 and the parties were heard at length. The counsel for the petitioner reiterated the facts as detailed in paragraph 1 above and also submitted that based on the directions



of this Tribunal on 11.04.2017, notice of the petition was taken on the other side and that subsequently in compliance with the directions of this Tribunal on 25.04.2017, the defects have also been cured. Further it was also vehemently stressed by the Learned Counsel for the Petitioner that despite the service of notice of demand, the Corporate Debtor has failed either to remit the unpaid amount nor bring to the notice of the Operational Creditor about the existence of any dispute, namely suit or arbitration proceedings and hence in the absence of either one of them, the Petition is liable to be admitted.

6. Learned Counsel for the Corporate Debtor strongly resists the initiation of CIRP at the behest of the Operational Creditor, firstly, based on procedural non compliance as provided under IBC, 2016 read with AAA Rules framed pursuant to it, and in addition as well as on merits vehemently disputing the quantum of debt owed as claimed by the Operational Creditor. In relation to procedural non compliance, the following points are put forth, namely:-

- i) Non compliance with provisions of Section 9(3)(c) of IBC, 2016 by production of certificate from the financial institution despite sufficient time being granted by this Tribunal coupled with, failure to rectify the same within the

  


time period specified in accordance with the provisions of IBC, 2016.

- ii) the Operational Creditor cannot rely on its Ledger Accounts to establish its claim as opposed to the certificate from the banker as contemplated under Section 9(3)(c) as above;
- iii) Further during the course of the arguments it was also submitted by the Counsel for the Corporate Debtor that the rectification of defects, if any, should have been complied with by the Operational Creditor in the first instance itself i.e on 11.04.2017 and within a period of 7 days thereafter and it cannot be complied in piecemeal, one commencing from 11.04.2017 and the other commencing from 25.04.2017 which gives repeatedly a time limit for each and every defect which in effect goes contrary to the time limits prescribed under IBC, 2016 and in the circumstances the petition is liable to be rejected;

7. On merits it is averred that there are glaring inconsistencies in relation to even the alleged ledger extracts of the account of the Corporate Debtor as reflected in the books of the Operational Creditor and as produced before this Tribunal and it is pointed out that certain amount paid by cheque by the Corporate Debtor or to its account has not been reflected, as instance in point being the



sum of Rs.2,40,000/- paid twice once by the Corporate Debtor on 08.12.2015 and one on 09.12.2015 on behalf of the Corporate Debtor and it is further pointed out that cheques have also not been issued by the Corporate Debtor towards repayment. It is also further averred that the supply of goods had been effected based on Bank Guarantees and that the same had been encashed by the Operational Creditor all of which has not been accounted for and not disclosed before this Tribunal.

8. In relation to the proceedings initiated, under Section 138 of the Negotiable Instruments Act, 1881 as amended, by the Financial Creditor vis-à-vis the Corporate Debtor, it is contended by the Learned Counsel for the Corporate Debtor that Revision Petitions have been filed on 08.03.2017 against the order dated 08.10.2016 questioning the order of Learned Metropolitan Magistrate, Vikhroli, Mumbai in taking cognizance of the complaint and issue of process thereon before the Learned Sessions Judge, Greater Bombay and the same is pending. It is further contended that the proceedings under Section 138 of NI Act being in the nature of a quasi civil proceedings this Tribunal must consider it as a preexisting dispute in relation to the debt claimed and must hence dismiss the petition.
9. Having noticed the facts and the rival submissions of the parties it is incumbent on this Tribunal before venturing into merits to deal first





with the preliminary objections as raised by the Corporate Debtor in relation to maintainability of the petition on the basis that whether non-compliance with provisions of Section 9(3)(c) will automatically result in rejection of the petition?.

10. It is also required to be considered whether the Operational Creditor have complied with the provisions of Section 9(3)(c) after having been granted time within the time limit of seven days as mandated under the provisions of IBC, 2016 and if not whether the petition is liable to be rejected?

11. A further question which is also required to be considered is as to when the 7 days period for rectification of defect is required to be considered to commence from, in the instant case whether from 11.04.2017 when the Operational Creditor was directed to comply with the Rule 6(2) of the AAA Rules or from 25.04.2017 when time was granted by this Tribunal, in view of the objections raised by the Corporate Debtor regarding the non-filing of certificate from financial institution, to rectify the defect.

12. In relation to compliance with the provisions of Section 9(3)(c) of IBC, 2016 and whether the said compliance is mandatory or directory is no longer res integra in so far as this Tribunal is concerned as in ***Company Appeal (AT)(Insolvency) No.28 of 2017 and in the matter of Smart Timing Steel Ltd -Vs-***

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**National Steel and Agro Industries Ltd**, the Hon'ble NCLAT vide its judgement dated 19.05.2017 has held the compliance to be mandatory. In the circumstance its non compliance will automatically result in rejection of the petition is by now trite law.

13. Further an Operational Creditor will be required to rectify the defect within a period of 7 days as provided under the proviso to sub section (5) of Section 9 has also been held to be mandatory by the Hon'ble Appellate Tribunal in the judgment rendered in the above cited Company Appeal(AT)(Insolvency) No.28 of 2017 following its earlier judgement rendered in the matter of **JK Jute Mills Company Limited -Vs- M/s.Surendra Trading Company in Company Appeal (AT) No.09 of 2017**.

14. Keeping in consideration the above judgements and upon a perusal of the certificate issued by HDFC Bank dated 27.04.2017 prima facie it is seen that it relates to dishonor of cheques and not in relation to non payment of unpaid Operational Debt by the Corporate Debtor as mandated under Section 9(3)(c) as evident from the following observations reflected in the last two paragraphs of the certificate:

"This is to confirm that as per the records available with the Bank, Rs.73,88,427/-, Rs.86,29,683/- and Rs.81,76,000/- has not been credited in the account No.09980310000052 from NSTPL HITS A UNIT OF NSTPL during the period of 5<sup>th</sup> July, 2016 to 26<sup>th</sup> April, 2017. A true copy of the bank statement for the period of 5<sup>th</sup> July 2016 to



26<sup>th</sup> April, 2017 in respect of the above Account is enclosed herewith. For details please refer to the statement of Account.

This certificate is solely issued at the request of INGRAM MICRO INDIA PVT LTD vide their letter dated 26<sup>th</sup> April, 2017 requesting the Bank to confirm as to whether a sum of Rs.73,88,427/-, Rs.86,29,683/- , Rs.81,76,000/- has been credited to the above account by NSTPL HITS A UNIT OF NSTPL during the period 5<sup>th</sup> July, 2016 to 26<sup>th</sup> April, 2017."

Even in relation to the submission of bank accounts of the Operational Creditor, if at all it can be considered as substitute for the certificate of the financial institution or in addition to the certificate as contemplated under Section 9(3)(c) , full accounts commencing from the date of transaction from 17.08.2015 has not been produced by the Operational Creditor as rightly contended by the Corporate Debtor, as it is seen that the bank statement has been produced only in relation to the period commencing from 01.07.2016 to 25.04.2017 and when queried it was represented by the Counsel for Operational Creditor that taking into consideration the issue of cheque by the Corporate Debtor dated 05.07.2016 bank statements for the relevant period alone has been produced and given a chance the Operational Creditor will produce for other periods as well.



15. It is pertinent to note in this regard that even according to the documents produced by the Operational Creditor, the Purchase Orders placed by the Corporate Debtor as well as the Invoices raised by the Operational Creditor pertains to August 2015 and November 2015 respectively and it is also seen that the amounts reflected therein is much higher than what has been claimed as amount due as debt from the Corporate Debtor, which prima facie establishes that substantial payments have been made by the Corporate Debtor or on behalf of it.

16. In the circumstances in the teeth of vehement opposition by the Operational Creditor that it is not incumbent for the Operational Creditor to file the Bank Statements at the very least, in the absence of certificate, for the entire duration commencing from the origination point of the transaction between the Operational Creditor and the Corporate Debtor commencing from August 2015 to till a proximate date of filing the petition before this Tribunal in the year 2017 which would obviate, in the exercise of summary jurisdiction under IBC, 2016 to expeditiously determine the payment or non-payment of debt claimed as due from the Corporate Debtor. Thus as rightly contended by the Counsel for Corporate Debtor the petition is required to be dismissed on this preliminary issue and in the circumstances it will not be necessary

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for this Tribunal to go into other issues raised by either of the parties.

17. Since we have not gone into the merits of the case and have dismissed the petition at initial stage itself any observations made in this order should not be construed as an expression of opinion on the merit of controversy and in the circumstances the right of the petition before any other forum shall not be prejudiced on account of dismissal of the instant petition.

For the aforesaid reasons we reject the instant application/petition but without any costs.

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(DEEPA KRISHAN)  
MEMBER (TECHNICAL)

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(R. VARADHARAJAN)  
MEMBER (JUDICIAL)

DATED : 25/5/2017