

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, BENCH IV
COMPANY PETITION NO.IB-1324/ND/2019

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

SCHNEIDER ELECTRIC INDIA PVT. LTD.

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

APEX ELECTRO DEVICES PVT. LTD.

...RESPONDENT/CORPORATE DEBTOR

ORDER PRONOUNCED ON: 08.06.2021

CORAM:

DR. DEEPTI MUKESH
HON'BLE MEMBER (JUDICIAL)

MS. SUMITAPURKAYASTHA
HON'BLE MEMBER (TECHNICAL)

MEMO OF PARTIES

SCHNEIDER ELECTRIC INDIA PVT. LTD.

Having its office at:
10th Floor, DLF Building NO.10,
Tower C, Cyber City Phase -II,
Gurgaon - 122002

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

APEX ELECTRO DEVICES PVT. LTD.

Having its registered office at:
1809, 2nd Floor, Bhagirath Place,
Delhi -110006

Corporate office at: -
J-10, Sector-11,
Noida -201301

...RESPONDENT/CORPORATE DEBTOR

FOR THE APPLICANT :Mr. Vikas Tiwari, Adv.

Mr. Kumar Deepraj

FOR THE RESPONDENT: Mr. Dilip Agarwal Advocate

ORDER**Per-Dr. Deepti Mukesh, Member (Judicial)**

1. The Present Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by Mr. Vivek Chaudhary being the Authorized representative of Schneider Electric India Pvt. Ltd.(for brevity 'Applicant') authorized vide board resolution dated 18.04.2019 with a prayer to initiate the Corporate Insolvency process against Apex Electro Devices Pvt. Ltd. (for brevity ('Corporate Debtor')).
2. The Applicant is a private limited company incorporated on 24.02.1995 registered with Registrar of Companies - Delhi, under the provision of Companies Act, 2013 bearing CIN: V74899DL1995PTCCO65815 having its registered office at 10th Floor, DLF Building No10, Tower C, Cyber City Phase-II, Gurgaon - 122002. The applicant is a manufacturer of electrical equipment's and is worldwide brand in its own sphere and make.
3. The Corporate Debtor is a private limited company incorporated on 18.10.1994, registered with Registrar of Companies - Delhi, under the provisions of Companies Act, 1956 bearing CIN:UP74899DL1994PTC062178 having its registered office at 1809, 2nd Floor, Bhagirath Place, Delhi- 110006. The corporate debtor is involved in providing business service activities across India.
4. The applicant submits that both the parties were involved in business dealing, wherein the applicant supplied electric equipment/goods to corporate debtor in terms of various purchase orders issued from time to time. Invoices were raised against each purchase order and payments were

to be made accordingly. However, no payment was received against 366 invoices raised from March 2015 to December 2016.

5. The applicant states that the goods were supplied and duly received by the Corporate Debtor. The payment of the invoices was to be made within a period of 50 days, from the date of invoice. Since no payment were made, the accounts of corporate debtor were blocked for future business dealing. On 21.04.2016, a meeting was held, wherein the Corporate Debtor assured to make payment of Rs. 2 Crore. Thereafter, correspondences were exchanged between the parties through email but mere assurances and no payment was received from the Corporate Debtor against the unpaid invoices.
6. The applicant submits that on 16.09.2017 a legal notice was sent to the corporate debtor for payment of unpaid dues. However, no payment was received. Therefore, on 25.02.2019 the applicant issued a statutory demand notice under Section 8 of the Code, calling upon the corporate debtor to pay the total amount of Rs. 6,89,68,184/- being the amount payable inclusive of interest (amounting to Rs. 2,35,01,540/-) calculated @ 18% per annum from the due date of each invoices remaining unpaid, along with further interest @ 18% per annum on Rs 6,89,68,184/- till actual payment. It is stated that demand notice was sent at registered office of the corporate debtor and the same was returned with the remark "refused to accept." Thereafter the same was served at the corporate office of the corporate debtor at Noida. The copies of tracking report have been annexed. In spite of service no reply was sent by the corporate debtor.
7. The applicant filed an application under Section 9 and as per Form V, the total outstanding debt is Rs. 6,89,68,184/- being Rs. 4,54,66,644/- (Rupees Four Crores Fifty-Four Lakhs Sixty-Six Thousand Four Hundred Forty-Four Only) as the principal amount due along with interest of Rs 2,35,01,540/-

8. The corporate debtor filed an application seeking condonation of delay in filing reply. The said application was allowed vide order dated 30.08.2019.
9. The corporate debtor filed reply and raised the following objections:
 - a) That the demand notice was not served to them and the mandatory provision of acknowledgment of delivery of demand notice under Rule 5 sub rule (2)(a) of the Insolvency and Bankruptcy (Application to adjudicating authority) Rules 2016 has not been complied. The tracking report filed is not a conclusive proof and does not depict delivery at the address of the corporate debtor. Hence the service is a defective service. Further, objection is raised with regards the authorization of advocate to issue demand notice on behalf of applicant. It is also stated that the Demand notice is barred by limitation, as 216 invoices out of the total 366 invoices, with respect to which the debt fell due, is pertaining to the period of August 2015-May 2016. Moreover, the interest charged is exorbitant, unilateral, without any agreement between the parties.
 - b) That the applicant deliberately failed to annex all invoices/ documents along with the demand notice and the details of transaction on account of which alleged debt fell due. The affidavit filed is also not in the format as prescribed under IBC and NCLT Rules, 2016. The applicant has also failed to file the statement of account along with the application. Hence the application is incomplete and must be declared null and void. Accordingly, the application is not maintainable.
 - c) That the applicant and corporate debtor signed a Distributor Commercial agreement and as per Para No. 23 of the said agreement the disputes, or any nature be referred to arbitration. Hence this application is not maintainable and liable to be dismissed.

- d) That the applicant had waived off the interest loss but had not reflected in their books of accounts. Further, the applicant had failed to pay the loyalty incentive as per clause 2.6 & 2.7 of Distributor Commercial policy from 2012 to 2017 and credit notes issued by the applicant respectively.
- e) That the applicant had adopted an unfair business trend towards the corporate and losses were suffered, which was initiated as per email dated 04.11.2015 requested the applicant to consider the same.
- f) During the beginning of year 2017, the applicant and corporate debtor held various meetings and decided the strategy to revive the business which was recorded in the email dated 26.04.2017. The applicant failed to honor the commitments and the same was intimated by the corporate debtor in terms of email dated 01.05.2017. The copies of emails have been annexed.
- g) That various credit notes payable by the applicant are still pending and disputes with the regards the demands of the applicant had been raised by the corporate debtor. It is stated that after adjusting the credit notes an amount of Rs 1,42,87,068.32/- is payable to the applicant as per books. Hence there exists a pre-existing dispute since 2012, which had been highlighted time and again by the corporate debtor and efforts had been made to settle the said issue but the applicant, purposely to raise unlawful and illegal demand, had filed the said application.
12. The applicant filed rejoinder reiterating the averments of the application, and denying the contentions of the corporate debtor, stated the following:
- a) That the tracking report only reflects the post office zone and not the delivery address. Further highlighted that at the registered office of

- the corporate debtor as per the records of MCA, the demand notice was not accepted by the corporate debtor and was returned with an endorsement "Recipient refused to take the delivery", hence refusal to take notice is a good service.
- b) That the contention of corporate debtor that the notice was not as per Rule 5 of IBC(AAA) Rules, is invalid as it does not mandate that all invoices must be mandatorily sent along with the demand notice. Further it is stated that as per the case of Hon'ble Supreme Court in "*Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited*" 2018(2) SCC 674, it is clarified that the advocate can send demand notice. Hence, in the present case the notice send by advocate is not un authorized.
- c) The applicant has relied upon the case of Hon'ble NCLAT in "*Manjeet Kaur Sran Vs. Tricolite Electrical Industries Limited*" (CA(AT) Insolvency No 894 of 2019), wherein it has been clearly held that even if there is a legal notice or intimation regarding the dues within the period of limitation, the petition before NCLT will not be barred by limitation. In the present case the first invoice was raised on 05.03.2015 and the first notice was sent by the applicant through its advocate on 16.09.2017, which is well within the limitation period.

The applicant has also relied upon the case of Hon'ble High Court in "*Bhajan Singh Samra Vs. M/s Wimpy International Ltd.*" 2011(185) DLT 428, wherein it is held that liability in the balance of accounts will extend the period of limitation and constitute fresh cause of action. It is further stated by the applicant that even after limitation issued is considered, the default of corporate debtor is established as on date of filing of petition. Further the claim of the applicant is more

than 1 Lakh hence in terms of case of “*Innoventive Industries Ltd. Vs. ICICI Bank*” (2018) 1 SCC 407, the application must be admitted.

- d) The applicant states that there is no dispute with regards the default committed by the corporate debtor hence triggering the arbitration and conciliation Act, 1996 has no relevance.
- e) The applicant states that with regards the business losses incurred by the corporate debtor, the applicant had issued ‘Turnover discount’ for the year 2012 and 2013. It is further stated that the invoice raised are of the 2015-16 and the disputed transaction as raised by the corporate debtor pertains to the year 2012-13. The applicant states that with regards the losses incurred by the corporate debtor, the applicant had issued credit notes to support the corporate debtor.
- f) The applicant states that the corporate debtor in para 20 of the reply had admitted that there is a default of more than 1 Lakh and hence in view of *Innoventive* judgment, the CIRP must be initiated. Further the applicant states that no dispute had been raised with regards the delayed delivery of good or inferior quality of goods before the issue of demand. Hence there exists no pre- existing dispute.

13. The applicant filed written submissions supporting its contentions and stated the following:

- a) That good were supplied by the applicant to the corporate debtor and during the period of 05.03.2015 to 09.12.2016, invoices were raised against the corporate debtor amounting to Rs. 4,54,66,644/-, which is unpaid. The goods supplied were never returned nor questioned with regards the quality. Hence the unpaid dues qualify to be an operational debt as envisaged in Section 5 (21) of the code.

b) The applicant has relied upon the case of NCLAT, in the case of “*Vivek Jha Vs. Daimier Financial Service Inia Private Limited & Anr.*”[CA (AT) Insolvency 756/2018, wherein it is stated that if the addressee has left or have refused to take notice does not make any difference, the service must be done on the registered address of the corporate debtor as per ROC records.

The applicant states that the corporate debtor states that the corporate debtor has relied upon the Hon’ble NCLAT’ s case of “*Neeraj Jain Vs. Cloud Walker streaming*”, the same is misplaced in facts and circumstances.

c) The applicant has again relied upon the case of Supreme Court in *Macquarie Bank Limited Vs. Shilpi Cable Ltd* [2018(2) SCC 674], wherein it has been held that the advocate can send a demand notice without having actual authorization.

d) The applicant states that the corporate debtor has created a concocted story of credit note, inferior quality of goods etc, to create a pre-existing dispute. The dispute raised is of the period of 2012-13. Further also relied on email dated 14.01.2016 wherein the debt has been specifically admitted, the corporate debtor has promised to clear the debt of the applicant by paying a Rs 16.5 Lakhs per month to the applicant in the year 2016. Further as per email dated 21.04.2016 the applicant stated that as on 31.03.2016, the total outstanding of Rs46.6 crore is due and pending. The corporate debtor by replying to the said email stated ‘*all this is good*’ and did not disputed the quantum of debt. As per the reply the of the corporate debtor an amount of Rs 1,42,87,068.32/- has been specifically admitted.

- e) The applicant has relied upon the case of Hon'ble NCLAT in *Manjeet Kaur Sran Vs. Tricolite Electrical Industries Limited* [CA(AT)(Insolvency) No. 894/2019] with regards the limitation.

14. The corporate debtor filed written submissions and stated the following:

- a) Objection has been raised with regards the defective demand notice as it was not sent in Form-4, as per the nature of transactions. Further with regards the Pre-existing dispute with respect short supply of material, damaged material, inferior quality goods. The said disputes had been raised way before the issue of demand notice. It is stated that claim of interest is not an operational debt unless contractual with regards the goods and services in view of Section 3(11) and Section 5(21) of IBC. The applicant has also failed to produce any financial document to reflect accumulated interest. Hence the demand of interest is unfair and unilateral.
- b) The corporate debtor has relied upon the citation of Hon'ble supreme Court stating that the it is not permissible to rely on part of admissiononly, as the admission of the corporate debtor with regards the liability was conditional subject to reconciliation of accounts. Further credit notes were there which was not adjusted in the accounts of the corporate debtor. Also relied upon the citations of Hon'ble Bombay High Court it has been stated that the admission of the corporate debtor must not be treated as estoppel.
- c) The following citations has been relied upon various orders of Hon'ble Supreme Court, Hon'ble Delhi High Court, Hon'ble NCLAT and coordinate Mumbai Bench, Chandigarhbench and New Delhi Bench.

15. Though there is no specific date of default mentioned, the same issue was considered by the bench and vide order dated 30.01.2020, the bench has decided that the matter is within limitation. Further with regards the issue of limitation the case of Hon'ble NCLAT in "*Manjeet Kaur Sran Vs. Tricolite Electrical Industries Limited*" has been relied upon. Accordingly, demand notice was issued on 16.09.2017 and the present application is filed on 21.05.2019. Hence the application is not time barred and filed within the period of limitation.
16. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.
17. The present application is filed on the Performa prescribed under Rule 6 of the Insolvency and Bankruptcy Code, 2016 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 r/w Section 9 of the code and is complete.
18. Considering the documents on records and submissions made, it is observed that there exists an operational debt which is due and payable by the corporate debtor. An objection has been raised by the corporate debtor, with regards the service of the demand notice, which is not maintainable, as the demand notice was served at the registered office of the corporate debtor as per the MCA records and was returned with the remark 'refused to accept', which is considered as good service in the eyes of law as held by the Hon'ble Supreme Court time and again. Further, disputes have also been raised by the corporate debtor, but there is a clear admission of debt of more than 1 Lakh in reply filed by the corporate debtor in August 2019, at Para no. 20 which is reproduced as: -

"...The respondent further submits that after adjusting all credit notes worth of Rs 3,11,79,596.47/- towards demanded amount of Rs 4,54,66,664/- of the applicant, the respondent

/CD has a liability of Rs 1,42,87,068.32/- towards applicant as per the books of accounts of the respondent / CD.”

There is a clear admission of debt, as per the minutes of the meeting dated 07.04.2017 elaborated in email dated 26.04.2017. The relevant para of the minutes of meeting dated 07.04.2017 is reproduced as:

“Agenda of the meeting:

.....Total amount payable by Apex Electro Devices Private Limited to Schneider Electric India Private Limited as on 31.03.2017 is INR 4,54,66,644.22.

Discussion Points:

4.	<i>Payment plan to lower outstanding</i>	A	<i>Channel will give INR 14,50,000/- every month.</i>
		B	<i>Amount of April 2017 will be paid in advance and after that Apex will issue Cheque of 14,50,000/- every month in the name of SEIPL for with the last date of deposition as last working day of the respective month. This will help in lowering down current outstanding with SEIPL for Apex.</i>

With above plan channel has assured to drop his outstanding to INR 3,50,00,000/- and will have outstanding of Rs. 1,00,00,000/- by 31.12.2017.”

In our view, if the amount of a debt more than 1 Lakh, if admitted which in this case has also been admitted by the corporate debtor, in terms of email dated 26.04.2017 along with the confirmation in the ledger account filed by the corporate debtor and the said has become due as per their own averments in reply to this application at Para 20, leaving no scope for any further adjudication.

We are further strengthened by the law laid down by the Hon’ble Supreme Court in **“Innoventive Industries Ltd. Vs. ICICI Bank and Ors. – (2018) 1 SCC 407”** it is observed and held as follows: -

“The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an installment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.”

In view of the above discussion application is admitted.

19. The Applicant has not named an IRP, therefore, this bench appoints Mr. Akhil Ahuja is appointed as IRP of the corporate debtor, who is registered vide registration number IBBI/IPA-001/IP-P02072/2020-21/13213, having email id: akhil@ahujainsolvency.com and mobile no. 9911331599, subject to the condition that no disciplinary proceedings are pending against such an IRP named who may act as an IRP in relation to the CIRP of the Respondent. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016 are required to be complied with.

20. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.
21. We direct the Operational Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Akhil Ahuja to meet out the expenses and perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.
22. A copy of the order shall be communicated to the Applicant and the Corporate Debtor by the Registry. The said order shall be communicated to the IRP above named and intimate of the said appointment by the Registry. Applicant is also directed to provide a copy of the complete paper book with copy of this order to the IRP. In addition, a copy of said order shall also be forwarded to IBBI for its records and to ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Sd/-
SUMITAPURKAYASTHA
MEMBER (T)

Sd/-
DR. DEEPTI MUKESH
MEMBER (J)