

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 2673/IBC/MB/2019

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

Pacific Blue Cargo Private Limited

Having registered office at: Advance
House, Makwana Road, Marol,
Andheri (East), Mumbai

.....**Operational Creditor**

Vs

National Plastic Industries Limited

(CIN: L2500MH1987PLC044707)

Registered office at: Office No. 213,
214, 215, 2nd Floor Hub Town
Solaris, N.S. Phadke Marg, Andheri
(East) Mumbai 400069

.....Corporate Debtor

Order delivered on: 16.07.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Applicant: Ms. Bhavika Deora A/w Ms. Dhvani Parekh

i/b Jaykar & Partners

For the Respondent: Mr. Nirav Shah

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. This Company petition is filed by *Pacific Blue Cargo Private Limited* (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *National Plastic Industries Limited* (hereinafter called “Corporate Debtor”) alleging that the Corporate debtor committed default in making payment to the Operational Creditor for the provided by the petitioner to the Corporate Debtor. This petition has been filed by invoking the provisions of Section 8 and 9 Insolvency and bankruptcy code (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 7,26,729/- (Rupees Seven Lakhs Twenty-Six Thousand Seven Hundred Twenty-Nine only) along with interest at the rate of 24% per annum.
3. The brief facts of the Operational Creditor is as follows:-
 - a. In the year 2015, the Corporate Debtor approached the Operational Creditor for hiring its services viz. freight forwarding, through air and ocean. Accordingly, from time to time, as per the requirements of the Corporate Debtor the Operational Creditor imported goods for the Corporate Debtor, through air and sea.
 - b. Pertinently, no dispute with respect to deficiency in service was ever raised by the Corporate Debtor.

- c. Against the supply of the said services, the Operational Creditor raised various Air Cargo Arrival Notices cum Invoices/Ocean Cargo Arrival Notices cum Invoices/Debit Notes.
- d. The Air Cargo Arrival Notices cum Invoices/Ocean Cargo Arrival Notices cum Invoices/Debit Notes categorically provide that the goods must be cleared within 45 days of arrival failing which the consignment will be disposed off as per the provisions of the Customs Act. For the clearance of consignment, the Corporate Debtor had to obtain a Delivery order, which is issued by the operational Creditor only after the payments under the respective Air Cargo Arrival notices cum Invoices/Debit Notes is made.
- e. The due under the various Air Cargo Arrival Notice cum Invoices/Ocean Cargo Arrival Notice cum Invoices/Debit Notes raised by the Operational Creditor against the Corporate Debtor amounted to Rs. 10,10,786/- (Rupees Ten Lakhs Ten Thousand Seven Hundred Eighty-Six Only).
- f. The Operational Creditor time and again requested the Corporate Debtor to clear the outstanding amount. Accordingly, certain amounts were paid by National Plastic, which were adjusted against part payment of certain Air Cargo Arrival Notice cum Invoices/Ocean Cargo Arrival Notice cum Invoices.
- g. The various Air Cargo Arrival Notice cum Invoices/Ocean Cargo Arrival Notices cum Invoices/Debit Notes raised by the Operational Creditor under which the Corporate Debtor has

committed default and the amounts due under the said Air Cargo Arrival Notice cum Invoices/Ocean Cargo Arrival Notice cum Invoices/Debit Notes are as under:

Sr. No.	Date	Invoice No.	Amount (In Rupees)
1.	29.06.2015	AI/CAN/MUM/129/2015-16	1,713.00
2.	15.09.2015	SI/CAN/MUM/288/15-16	7,042.00
3.	18.09.2015	SI/CAN/MUM/293/15-16	2,39,472.00
4.	24.10.2015	SI/CAN/MUM/378/15-16	2,35,502.00
5.	31.10.2015	SI/CAN/MUM/395/15-16	2,39,020.00
6.	23.06.2016	AI/DN/MUM/19	3,980.00

- h. Prior to the issuance of a Demand Notice, the Operational Creditor has addressed various emails to the Corporate Debtor requesting it to clear the said outstanding amount. The Operational Creditor is in possession of the all e-mails addressed by it to the Corporate Debtor.
- i. Therefore, the Operational Creditor addressed a Demand Notice dated 13.05.2019 calling upon the Corporate Debtor to clear the debt of Rs. 7,26,729/- along with interest at the rate of 24% per annum from the date of the Invoices/Bill of supply till the date of realization within 10 days of receipt of Notice.
- j. Within 10 days of receipt of the Demand Notice and in fact ill date, the Corporate Debtor has not brought to the notice of the Operational Creditor: (a) the existence of a dispute, if any and record of the

pendency of the suit of arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute; and (b) the repayment of unpaid operation debt- (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or (ii) by sending an attested copy of record that the operational creditor has enclosed a cheque issued by the corporate debtor, as per Section 8(2) of the Code.

k. The Operational Creditor submitted that the Corporate Debtor is unable to pay its debts. The First Air Cargo Arrival Notice cum Invoices/Ocean Cargo Arrival Notice cum Invoices/Debit Notes under which the Corporate Debtor has committed default is 29.06.2015 and the last date of defaulted invoices is 23.06.2016. the payment from the Corporate Debtor was received by the Operational Creditor on 31.03.2016.

4. The Corporate Debtor has on the contrary, denied all the averments and allegations raised by the Operational Creditor. The contentions of the Corporate Debtor are summed up as follows:

- a. Corporate Debtor submitted that the Board Resolution, does not give the signatory, Mr. Satish A. Poorari, a specific authority to file the Company Petition and is thus liable to be dismissed in limine with costs.
- b. After service of the petitioner, the advocate of the Corporate Debtor by their letters dated 22.07.2019, 29.07.2019 and 13.09.2019 called upon the

advocates of the Operational Creditor to fix an appointment for inspection of all the original documents relied upon by the Operational Creditor in the petition, which had been refused by Operational Creditor's advocate vide their letter dated 20.09.2019. the Corporate Debtor therefore took out a Misc. Application No. 3565 of 2019 for the issuance of appropriate direction by this Tribunal to the Operational Creditor. This Tribunal vide order dated 05.12.2019 disposed of the said Misc. Application and recorded the undertaking on behalf of the Operational Creditor to give inspection. Pursuant to several letters exchanged between the advocates for the Operational Creditor and the Corporate Debtor, an appointment for inspection of documents was finally fixed for 15.02.2020.

- c. The Operational Creditor addressed a letter dated 15.02.2020 to the advocate for the Corporate Debtor, recording the documents of which inspection was given.
- d. The Corporate Debtor addressed a letter dated 17.02.2020, inter alia, recording that inspection of some of the documents as sought in the said Misc. Application was not given as they did not have it at all.
- e. There is no correspondence to show that the Corporate Debtor allegedly hired the services of the Operational Creditor with respect to the alleged impending amounts. The Corporate Debtor further submitted that there are no delivery orders allegedly issued by the Operational Creditor.

- f. It is evident that the very basis of the Operational Creditor's claims are photocopies of unsigned invoices. Further, the Operational Creditor does not even have any proof of having delivered such alleged invoices to the Corporate Debtor, which indicates the Corporate Debtor's contention that no such invoices were even raised or delivered to the Corporate Debtor since no such goods as mentioned in the invoices were ordered by the Corporate Debtor and/or delivered by the Operational Creditor.
- g. The Corporate Debtor submitted that the petition is liable to be dismissed for the following reasons.
- i. The petition as framed and filed is misconceived and not maintainable.
 - ii. The Operational Creditor's demand notice dated 13.05.2019 has been replied by the Corporate Debtor vide its letter dated 22.05.2019, which reached the address of the Operational Creditor on 31.05.2019, but however, was returned to the Corporate Debtor with the remark "Left".
 - iii. The Operational Creditor is, guilty of *suggestio falsi*. The Operational Creditor has made false and misleading statements, inter alia, that it had, after sending the Demand Notice to the Corporate Debtor, also sent several emails to the Corporate Debtor requesting it to clear the alleged outstanding amount. The Operational Creditor in its petition has craved leave to refer to and rely upon the said email. However when

specifically asked for inspection of the said alleged emails, the advocate of the Operational Creditor admitted that there are no such emails.

- iv. The claim in the petitioner are barred by law of limitation. It is the case of the Operational Creditor that as per the requirement of the Corporate Debtor, they imported goods for the Corporate Debtor through air and sea and accordingly the Operational Creditor called upon the Corporate Debtor to make the payment of amounts due to it. It is the case of Operational Creditor that the first Air Cargo Arrival Notice cum Invoice/Ocean Cargo Arrival Notice cum Invoices/Debit Notes under which Corporate Debtor had committed default is 29.06.2015 and the last date of default invoice is 23.06.2016. It is also the case of the Operational Creditor that the last payment from Corporate Debtor was received by it on 31.03.2016. The Petition filed in July, 2019, when the claim of the Operational Creditor is barred by law of limitation. The Petition is thus barred by law of limitation.
- v. The claim of the Operational Creditor under the alleged invoices being Invoice No. SI/CAN/MUM/293/15-16 dated 18.09.2015, Invoice No. SI/CAN/MUM/378/15-16 dated 24.10.2015, Invoice No. SI/CAN/MUM/395/15-16 dated 31.10.2015 and Debit Note No. AI/DN/MUM/19 dated

23.06.2016 (the said invoices) are barred by the law of limitation.

- vi. That there is no privity of contract between the Corporate Debtor and the Operational Creditor. The Corporate Debtor had not placed any purchase orders nor received any invoices from the Operational Creditor. The same is evident from the fact that during the inspection of documents on 15.02.2020, only unsigned photocopies of the alleged invoices were shown. Even there was no proof of delivery of the alleged invoices or acknowledgement of receipt thereof by the Corporate Debtor. It is therefore imperative to note that the Operational Creditor did not produce delivery orders allegedly issued by the Operational Creditor when called upon during inspection. Any prudent person would obtain some form of acknowledgement of confirmation of delivery or supply of goods or raising of invoices and acknowledgement thereof. The operational Creditor therefore has no right to sue the Corporate Debtor. Thus, there is no cause of action which has accrued in favour of the Operational Creditor against the Corporate Debtor.
- vii. The corporate further submitted that the invoices raised by the Operational Creditor and which have been received by the Corporate Debtor, pursuant to purchase orders placed by the Corporate Debtor, have

from time to time been cleared. The ledger statement annexed to the reply dated 22.05.2019 of the Corporate Debtor clearly shows that the Corporate Debtor has cleared all the invoices raised by the Operational Creditor between 01.04.2015 and 31.03.2016 pursuant to purchase orders which were raised by the Corporate Debtor.

- viii. In order to bring its claim within the period of limitation, the Operational Creditor has shown a bogus debit note dated 23.06.2016 (page 20 of the petition), which like other invoices was never delivered to the Corporate Debtor. Thus, the petition is barred by law of limitation.
- h. For the reason set out, the respondent submits that the present petition under section 9 of the Act shall be dismissed against respondent in interest of justice.

Findings

1. Heard both sides and perused the record. The main plea of the Corporate Debtor in the above Company Petition is that the claim of the Operational Creditor is barred by limitation. In order to examine the above issue, it is important to refer to part 4 of the petition in which the Operational Creditor has furnished the particulars of the claim in tabular form at page no. 5 of the petition. The bare perusal of the particulars of the claim clearly reveals that the claim of the Operational Creditor is basing on the invoices dated 29.06.2015, 15.09.2015, 18.09.2015, 24.10.2015, 31.10.2015 and 23.06.2016. It is also the pleading of the applicant at page no. 6 of

the petition that the default is from 29.06.2015 and last invoice is dated 23.06.2016. The above Company Petition being filed on 12.07.2019 is clearly barred by limitation in respect of all invoices the other than the invoice dated 23.06.2016 for Rs. 3,950/- which is less than the threshold limit for admission of the above company petition. The applicant did not place any document of admission of liability to prove that the debt is within limitation.

2. Hence, the above Company Petition is dismissed as barred by limitation.

Sd/-

**CHANDRA BHAN SINGH
MEMBER (TECHNICAL)**

Sd/-

**H.V. SUBBA RAO
MEMBER (JUDICIAL)**