

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENCH III  
NEW DELHI**

**CP -IB-403/ND/2018**

**IN THE MATTER OF SECTION 9 OF THE INSOLVENCY AND  
BANKRUPTCY CODE, 2016**

**In the matter of:**

**M/s Fairmate Chemicals Pvt. Ltd.  
1514, Ranchhod Bhuvan,  
Moti Vasan Sheri,  
Saraspura, Ahmedabad  
Gujarat.**

**... Operational Creditor**

**M/s NKG Infrastructure Ltd.,  
6, Todar Mal Lane,  
Ground Floor,  
New Bengali Market,  
New Delhi-110 001.**

**....Corporate Debtor**

**Coram:**

**R.VARADHARAJAN,  
Hon'ble Member (JUDICIAL)**

**Dr.V.K.SUBBURAJ  
Hon'ble Member (TECHNICAL)**



**Counsel for the Petitioners : Mr. Pravinchandra J. Shah,  
Advocate**

**Counsel for the Respondents : -**

**Order delivered On: 28 .08.2018**

## **ORDER**

The above Company Petition has been preferred under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC,2016) by an Operational Creditor (OC) namely Fairmate Chemicals Pvt. Ltd. against the Corporate Debtor (CD) namely NKG Infrastructure Limited categorized as its CD in view of default in payment of a sum of Rs.16,36,912/- arising out of supply of goods to the CD by OC under invoices. The goods supplied as per the averment of the OC is that of EPDM Membrane and that the goods which have been supplied to the CD have also been made use by it and that no dispute or issues with regard to quantity, quality or technical specifications of the material supplied were ever raised by the CD. It is also averred by the OC that as against the total outstanding payment of Rs.52,26,586/-,



the CD had paid a sum of Rs.35,89,674/- and the balance amount of Rs.16,36,912/- is outstanding as on 31.03.2016 as reflected in the instant application and as claimed and to be in default. From the records it is seen that the OC has been successful in serving the notice of demand under Section 8 of the IBC,2016 as it has managed to elicit a response from the CD dated 14.2.2018. However, not being satisfied with the notice of dispute as sent by the CD and disputes raised therein relating to the claim however, in view of non-payment of the sum in default, as claimed by the OC, the OC has sought to come before this Tribunal as stated earlier under the provisions of IBC,2016 seeking to initiate the Corporate Insolvency Resolution Process (CIRP) against the CD.

2. The matter was listed before this Tribunal for the first time on 18.4.2018 when a specific question was raised by this Tribunal in relation to the notice of dispute sent by the CD wherein, the quantity of goods supplied as well as the defective quality of workmanship has been raised in the notice of dispute. This



Tribunal directed the CD to come with full particulars about the specific allegations pointed out in the notice of dispute as also to quantity of material supplied as well as quality of workmanship and disputed amount as claimed from the OC by the CD. It is specifically referred in the notice of dispute that as against the material to be supplied of 7079.712 sqm. as claimed to have been supplied through two invoices, the actual material delivered was only to the extent of 5642 sqm and that in relation to the same however, excess payments have been received as if full quantity had been supplied. Further, the CD has stated that for work order to be executed the same was not done by the OC due to short supply of materials which will stand exposed and in view of the same, CD was forced to purchase the balance supply from Pidilite Industries Ltd. and Navbharat Trading Corporation for completing the project. Further, it is also stated in the notice of dispute that CD had specifically requested for rectification of work at site as contractually obligated to be performed on the part of OC to receive balance amount of Rs.7,17,573/-. However, since



the same has not been completed by the OC, the sum of Rs.7,17,753/- it is stated to the effect that it has been retained as the balance amount to be paid once rectification work, if carried out by the OC is done and to obtain the same.

3. Prima facie perusal of the notice of dispute discloses that there is a pre-existing dispute as between the parties in relation to the quantity of material supplied as also the work to be done as per the work order placed by the CD on the OC. Reference to Section 9 of IBC,2016 discloses that after the delivery of the notice demanding payment under sub-Section 1 of Section 8 if the OC does not receive the payment from the CD or the notice of dispute under sub-Section 2 of Section 8, the OC may file an application before the adjudicating authority, namely this Tribunal for initiating CIRP process. Perusal of the provisions of Section 9 discloses that CIRP process can be initiated against the CD on failure on the part of CD to do either of the following two acts namely:



- (i) Non-payment of the amount claimed as amount in default under notice sent and delivery of notice of demand by the CD at its registered office; or
- (ii) In the absence of any notice of dispute being sent to the OC by the CD.

4. In the instant case even though payment has not been made by the CD of the amount claimed however, the amount of claim is being disputed by the CD and the notice of dispute sent to the OC in response to the notice of demand received, discloses a pre-existing dispute in relation to quantity of material supplied as well as work which was required to be done by the OC and failure on the part of OC to carry out the same. Taking into consideration the judgement of Hon'ble Supreme Court in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited – 2017 SCC OnLine SC 1154, particularly para 40 which is extracted below for ready reference:

40. 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)(ii)(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.

This Tribunal is of the considered view that there is a pre-existing dispute in relation to the claim as disclosed in the notice of dispute and in the circumstances exercising the discretion as vested under Section 9(5)(ii)(d) of IBC,2016 dismisses the petition at the threshold stage itself but without cost. A copy of this order shall be duly communicated to the operational creditor and the corporate debtor by the registry in compliance with Section 9(5)(ii).

However, the order of dismissal of this petition will not preclude the OC from approaching other forums in relation to the claim, if so advised.

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(**DR. V. R. SUBBURAJ**)

**MEMBER (TECHNICAL)**

U.D.Mehta  
28/08/2018

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(**R. VARADHARAJAN**)

**MEMBER (JUDICIAL)**

28/08/18