

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH
KOLKATA**

C.P.(IB) No.35/KB/2018

Coram: Mr. Jinan K.R., Member (Judicial)

In the matter of:

An application 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:

ELECTRO POLES PRODUCTS PRIVATE LIMITED, a private limited Non-Government Company, limited by shares registered under the provisions of the Companies Act, 1956 having its registered office at 1B Ram Lochan Mullick Street, Room No.105, Kolkata 700 073 in the state of West Bengal within the aforesaid jurisdiction.

... Applicant / Operational Creditor

Versus

In the matter of:

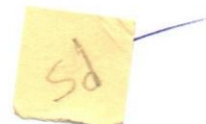
APE POWER PRIVATE LIMITED, a limited Non-Government Company, limited by shares registered under the provisions of the Companies Act, 1956 having its registered office at 1E Neelamber Building, 28B Shakespeare Sarani, Kolkata 700 017 in the state of West Bengal within the aforesaid jurisdiction.

... Respondent / Corporate Debtor

Counsel on Record:

Mr.Mahesh Joshi, Advocate] For the Applicant / Operational Creditor
Mr. Asif Ali, Advocate]
Ms. Neha Somani, Pr. C.S ... For the Corporate Debtor.

Date of Pronouncement of Order : 4th October, 2018



ORDER

1. This is an application filed by the Operational Creditor / Electro Poles Products Private Limited under Section 9 of the Insolvency and Bankruptcy Code 2016 (in short, I & B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of APE Power Private Limited/Corporate Debtor.

2. The Operational Creditor contends that the Company has supplied valuable materials to the Corporate Debtor on the basis of purchase order issued by Corporate Debtor in favour of Operational Creditor. The Corporate Debtor failed to pay the legitimate dues against the materials supplied to the Corporate Debtor as per the Purchase Order issued from their end in favour of the Operational Creditor. The Corporate Debtor being the respondent Company, in spite of demands being raised and notices issued, the respondent has failed to repay the entire amount since 2016. That on or about 23rd October 2017, Corporate Debtor issued a demand draft of Rs.6 lakhs out of the principal amount of Rs.7,05,987/- excluding over dues interest being a sum of Rs.5,88,480/- as on 30th April 2017 on account of interest @ 24% per annum. Thus, the applicant, having no other alternative left but to seek remedies under the Insolvency and Bankruptcy Code, 2016, is filing the instant application on the facts and grounds as stated in the application praying for the reliefs as sought for in the application.

3. The operational Creditor claimed the above said amount on account of supply of materials as per the Purchase Order dated 03.05.2014 (Annexure-B). On the strength of the Purchase Order, the materials were supplied by the Operational Creditor and Tax Invoice Challan has been raised for an amount of Rs.7,26,600/- (Annexure-F). Out of the total due of Rs.7,05,987/- of which the Corporate Debtor has paid Rs.6,00,000/- on 23.10.2017, the balance amount due is Rs.1,05,987/- with interest @ 24%



p.a. The Operational Creditor is entitled to claim interest @ 24% per annum up to the date of payment. Despite reminders, the Corporate Debtor has not paid the amount and, therefore, the demand notice was issued on 20th June 2017 demanding the amounts along with invoices. To the demand notice, the Corporate Debtor has sent reply dated 5th July 2017. The reply notice has been issued by the Corporate Debtor contending untenable contentions. An interest claim chart is annexed with the application and affidavit under Section 9(3)(b) and Statement of Bank accounts are also produced. Since the Corporate Debtor did not pay the amount due to the Operational Creditor, the Operational Creditor is entitled to initiate CIRP process as against the Corporate Debtor, and hence, this application is filed.

4. The respondent / Corporate Debtor filed reply affidavit contending in brief the following:

The applicant who has filed this application had not been given any specific authority so as to initiate CIRP as against the Corporate Debtor. Mr. Ajay Kumar Gupta who is appointed as the authorized signatory of the applicant Company had not been authorized to institute an application of this nature to initiate CIRP other than affixing his signature in the application. The demand of the Operational Creditor is that the total amount due is Rs.7,05,987/- and interest is charged @ 24% p.a., if due, and out of which the balance amount due is Rs.1,05,987/- towards the principal dues and Rs.5,88,480/- towards the alleged interest charged @ 24% p.a. which, according to the Corporate Debtor is not at all due to the Operational Creditor as the outstanding amount liable to be paid by the Corporate Debtor. The claim, if any, of the Operational Creditor is barred by limitation. The claim of interest at 24% by the Operational Creditor is illegal, denied and disputed. In the reply notice sent to the Operational Creditor, the Corporate Debtor informed that the Tax Invoice in which the amount allegedly due with 24% interest was not traceable with the Corporate Debtor and the Operational Creditor was requested to provide a copy, but it was not supplied. The Operational Creditor has manufactured Tax Invoice No.

EPLP/MFG/14-15/0049 dated 29th July 2014 so as to claim interest @ 24% p.a. It is a fake invoice and that fact was disputed by the Corporate Debtor. Other than the above mentioned invoice, no other invoice referred to the liability of payment of interest by the Corporate Debtor as claimed by the Operational Creditor. The Corporate Debtor has raised genuine disputes and, therefore, the application of this nature is liable to be rejected.

5. Heard the Ld. Counsel for the Operational Creditor and Ld. Pr. C.S. on behalf of Corporate Debtor. Perused the records.

6. This is an application filed under Section 9 by the Operational Creditor who admittedly supplied the materials to the Corporate Debtor as per Purchase Order dated 31.05.2014 (Annexure-B). A Purchase Order signed and executed by the Corporate Debtor as well as the Operational Creditor reveals that there is no agreement in between the parties to pay interest for the delayed payment, if any. The Operational Creditor contends that in view of the above said purchase order, the materials were supplied, and invoices were generated, and the copy of the invoices produced along with the application are annexed as **Annexure-F**. According to the Operational Creditor, the total amount due was Rs.7,05,987/- of which Rs.6 lakhs has been paid by the Corporate Debtor on 23.10.2017 subsequent to the demands made by the Operational Creditor. The balance amount, according to the Operational Creditor, due is Rs.1,05,987/- and that amount is due as per the Tax Invoice at Page No.43 dated 29.07.2014. The claim of this amount has been disputed by the Corporate Debtor. The Corporate Debtor also disputed the authority of the Operational Creditor to file an application of this nature. So also one another contention is that the claim is barred by limitation.

7. According to the Ld. Pr. C.S. for the Corporate Debtor, Mr. Ajay Kumar Gupta has not been given authorization to institute an application like the application for initiating CIRP as against the Corporate Debtor. According to her, copy of resolution supplied to her only reveals that he has given authority to sign the application and nothing else. Accordingly, she

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disputed the authority of the applicant. It is good to read copy of the resolution which is seriously under challenge. It reads as follows:-

"It was informed to the Board that it is considered necessary and expedient to execute authority on behalf of the company, for conducting legal proceedings and signing of different legal papers, Vakalatnama and documents, receiving of summons, adducing evidence either filed by the Company or filed against the Company at Calcutta High Court or at any judicial and / or Quasi-Judicial Authority and / or under Insolvency and Bankruptcy Rules, 2016.

After discussion, the Board passed the following resolutions:

RESOLVED THAT Mr. Ajay Kumar Gupta, son of Mr. Indra Chand Gupta aged about 32 years, by faith - Hindu, working for gain at the Company, be appointed as Authorised Signatory of the Company, through one of its Director, Shri Manick Chand Agarwal.

RESOLVED further that a copy of the above Resolution is duly certified by any Director be forwarded to all the concerned parties."

8. The resolution, though does not specifically mention that Mr. Ajay Kumar Gupta is authorized to initiate CIRP, it is clearly stated that he has been given authority to conduct legal proceedings before the Quasi-Judicial authority or under Insolvency and Bankruptcy Rule 2016. So, in the letter and spirit, it can be considered as authority to initiate proceedings before this Tribunal as well. Therefore, I do not find any significant defect in the resolution so as to hold that no specific authority has been given to the signatory of the applicant to initiate proceedings before this Tribunal under the I & B Code, 2016. Accordingly, the above said objection is found devoid of any merit.

9. The second contention on the side of the Corporate Debtor is that the amount demanded by the Operational Creditor with interest @ 24% p.a. is not due to the Operational Creditor and the claim for the interest @ 24% p.a. is disputed and that invoice through which the claim is raised is a manufactured invoice and its authenticity is disputed and, therefore, the

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Corporate Debtor had succeeded in proving the existence of genuine disputes and, therefore, the application is liable to be rejected.

10. I do find some force in the argument advanced on the side of the Corporate Debtor. The amount allegedly due as per tax invoice-cum-challan dated 29.07.2014 is claimed in this case. A copy of the Tax Invoice and Challan is annexed with the application at page No.43. At the bottom of the Tax Invoice, there is a recital that reads as "**interest will be charged @ 24% p.a. if not paid within due date / on presentation**". The Ld. Pr. C.S. brought to my notice the Tax Invoices annexed with the application at Page No.41 and 42 and Tax Invoice-cum-Challan as **Annexure-F** at page(s) No.55, 56 and 57.

11. The above said three invoices for supply of goods for an amount of Rs.7,26,600/- do not contain a recital as to the above referred liability to pay interest for the delayed payments as shown in Tax Invoice at Page No.43 and Page No.58. The Tax Invoice referred to at Page No.43 is the very same Tax Invoice as shown at Page 58. Adding a term to pay interest in one invoices alone leads to a suspicion regarding the liability to pay interest. The majority of the Invoices supplied to the Corporate Debtor do not include such terms to pay 24% interest as claimed by the Operational Creditor. Moreover, the claim of interest in the instant case is coming to the tune of Rs.5,88,480/- which is an exorbitant claim put forward by the Operational Creditor without any supporting documents other than the invoice referred to above. The said circumstances give rise to an inference that the dispute raised by the Corporate Debtor against the invoices require further evaluation regarding its genuineness and claim of interest at 24% p.a. No valid explanation forth coming to convince me that adding the terms of interest in the disputed invoice was with the consent of the Corporate Debtor.

In the reply notice sent by the Corporate Debtor on receipt of the demand notice, the Corporate Debtor disputed the above said invoice. The Corporate Debtor specifically contends that the claim for Rs.5,88,480/- on account of interest @ 24% p.a. is wrongful and illegal and is denied and

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disputed. At this juncture, the Ld. Counsel for the Operational Creditor refers to a copy of demand notice issued to Corporate Debtor on 05.05.2017 issued under Section 434 (A) of the Companies Act, 1956. In reply to the above said demand notice, the Corporate Debtor sent a reply and a copy of the reply notice is annexed at Page No.23 of the application. According to him, the Corporate Debtor admitted its liability to the tune of Rs.7,05,987/- and that the Corporate Debtor agreed to pay that amount which amounts to admission of its liability. From a reading of the above referred reply notice, it is also understood that the Corporate Debtor denies its obligation to pay interest @24% p.a. or at any other rate as demanded by the Operational Creditor. It is specifically mentioned in the reply that **“nothing contained herein should be considered admission in any manner of the allegations contained in your letter under reference”**. So, the claim of the balance amount due with interest @24% p.a. is clearly disputed by the Corporate Debtor prior to the demand notice issued in the instant case. The above said circumstances prove undoubtedly the existence of a dispute in regard to the outstanding amounts allegedly due to the Operational Creditor.

The last contention put forward on the side of the Corporate Debtor is that the claim is barred by limitation. The invoice on the basis of which the amount claimed is dated 29.07.2014. All together four invoices were issued, out of which, an amount of Rs. 6 Lakhs covering three undisputed invoices was paid by the Corporate Debtor. The last payment was on 23.10.2017. To settle the question of the application being barred by limitation, a timeline of the events is detailed as follows:-

Timeline:

Date	Item	Contents
03.05.2014	Purchase Order	Payment Terms – 2 Lakhs advance and balance against 30 days PDC from delivery.
15.05.2014	Advance payment	2 Lakhs advance paid
27.06.2014	1 st invoice	Rs. 7,26,600/-
01.07.2014	2 nd & 3 rd invoice	Rs. 7,26,600/- and Rs. 3,67,867/-

29.07.2014	4 th invoice	Rs. 1,05,987/-
06.02.2015	Part Payment – I	Rs. 10,21,067/-
05.05.2017	Demand Notice by Operational Creditor u/s.433 of the Companies Act, 1956	Demanding balance payment of the principal dues of Rs. 7,05,987/- alongwith a sum of Rs. 5,88,480/- as the interest @ 24% p.a. till date.
18.05.2017	Reply by Operational Debtor	Acknowledged the four invoices and balance dues of Rs. 7,05,987/- Rejected any obligation to pay any interest.
25.05.2017	Counter Reply by Operational Creditor	Same stand as before.
20.06.2017	Demand Notice as per Form 3 & Form 4 under Section 8 of IBC, 2016	Same stand as before.
05.07.2017	Reply by Operational Debtor	Disputed the principal amount in default to be Rs. 7,05,987/- by rejecting Invoice #4 dated 29.07.2014 for Rs. 1,05,987/- Disputed obligation to pay interest. Gave assurance to clear dues of 6 lakhs in two months.
24.07.2017	Counter Reply by Operational Creditor	Same stand as before.
23.10.2017	Part Payment – II	6 lakhs paid
21.11.2017	Application for CIRP as per Form 5 under IBC, 2016	Principal dues of Rs. 1,05,987/- along with interest of Rs. 5,88,480/- as on 30.04.2017 @ 24% p.a. and upto the date of payment.

The amount claimed by the Operational Creditor under the insolvency application is on the basis of one invoice dated 29.07.2014 for Rs. 1,05,987/-. The Operational Debtor acknowledged the four invoices and the dues including the invoice dated 29.07.2014 in its reply dated 18.05.2017. The application was filed on 21.11.2017. The acknowledgement on 18.05.2017 was before the expiration of limitation period of 3 years from 29.07.2014, and hence Section 18(1) of the Limitation Act, 1963 comes into operation as a result of which, a fresh period of limitation started from 18.05.2017, which implies that the application under IBC, 2016 to initiate CIRP against the Operational Debtor is not barred by limitation.

Borne in mind the principle laid down in the ***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. [2017] 140 CLA 123 SC***, it appears to me that the dispute raised on the side of the Corporate Debtor in this case, with regard to the last invoice dated 29.07.2014 and the obligation to pay interest is not “spurious, hypothetical or illusory” as held in the said decision and therefore, the application is liable to be rejected.

12. In view of the above said discussion, the application is liable to be rejected.

In the result, C.P. (I.B.) No.35/KB/2018 is rejected.

However, no order as to costs.

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4/10/18
(Jinan K.R.)
Member (J)

Signed this day of 4th October 2018.