

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP 456/I&BP/NCLT/MAH/2018

Under Section 9 of the I&B Code, 2016

In the matter of

M/s Satec Envir Engineering (India) Pvt. Ltd.

...Operational Creditor

v/s.

M/s Waaree Energies Limited

.... Corporate Debtor

Order reserved on :28.09.2018

Order dated: 5.10.2018

Coram: Hon'ble Mr V.P. Singh, Member (Judicial)
Hon'ble Mr Ravikumar Duraisamy, Member (Technical)

For the Petitioner: Adv. Hemant Sethi

For the Respondent: Adv. Ieshan Sinha a/w Ms Varada Balachandra i/b Wadia
Ghandy & Co.

Per V.P. Singh, Member (Judicial)

ORDER

1. It is a Company Petition filed u/s 9 of Insolvency & Bankruptcy Code, 2016 by Operational Creditor, namely M/s Satec Envir Engineering (India) Pvt. Ltd. against Corporate Debtor, namely M/s Waaree Energies Limited stating that the Corporate Debtor failed to make payment of Rs. 61,49,666/- (Rupees Sixty One Lakh Forty Nine Thousand Six Hundred and Sixty Six Only) along with interest @24% per annum for supply of Module Mounting Structure relating to Solar Power Structure to the Corporate Debtor.
2. The background of the case is that the Operational Creditor supplied goods to the Corporate Debtor under two purchase orders. Consequently, invoices worth Rs. 63,80,154/- were raised by the Operational Creditor and the Corporate Debtor has made part payment of Rs. 2,30,488/-.

3. The Petitioner has through advocate sent a notice dated 8.9.2017 calling upon the payment of Rs. 61,49,666/-. On 22.9.2017, the Operational Creditor issued a demand notice under Section 8 of I&B Code, which the Corporate Debtor denies having received. Subsequently, the Petitioner sent a demand notice dated 16.12.2017 under section 8 of the I&B Code. The Corporate Debtor replied to the demand notice on 30.12.2017 and stated, *among other things*, that the demand notice was received on 21.12.2017.
4. In its reply dated 30.12.2017, *inter-alia*, the Corporate Debtor denied existence of any debt and noted that the part payment of Rs. 2,30,488/- was towards advance under the 2nd Purchase order. The series of events detailed by Corporate Debtor commence by stating that the parties had entered into two contracts for supply of materials for two project sites. The details regarding the first project are as follows:

S.No.	Date	Particulars
1.	28.10.2016	1 st Letter of Intent issued by the Corporate Debtor, <i>inter-alia</i> , provided a) Delivery time-frame: 5.12.2016-25.12.2016 b) Delivery period was essence of the contract c) Total basic value for supply: Rs. 2,52,45,076/- d) In case of delay of more than one month, the Corporate Debtor has a right to cancel the order and make purchase from alternate vendor at Operational Creditor's risk and cost.
2.	3.11.2016	1 st Purchase order issued by the Corporate Debtor, revised a) Delivery time-frame: 8.12.2016- 30.12.2016 b) Total basic value: Rs. 2,72,82,64.80/-
3.	7.11.2016	1 st Letter of Intent was amended by revising, <i>inter-alia</i> , a) Delivery time-frame b) Total basic value: Rs. 2,52,62,641.60/-
4.		1 st Purchase order was revised for averaging unit price
5.	29.12.2016	1 st Letter of credit opened by the Corporate Debtor to make payment
6.	6.1.2017	2 nd Letter of credit opened by the Corporate Debtor to make payment
7.	21.2.2017	Due to little progress, meeting was conducted at Corporate Debtor's office, wherein the last delivery date was revised to 7.3.2017.
8.	4.3.2017	Corporate Debtor deputed its engineer to check on the practical

		status of the material and expedite the deliveries. However, it was learnt that the raw material for manufacturing of the goods was not available at Operational Creditor's work place.
9.	25.3.2017	Operational Creditor made the first delivery of goods and raised an invoice for Rs. 13,6437/-
10.	27.3.2017	Corporate Debtor sent an email to the Operational Creditor regarding, <i>among other things</i> , (a) cancellation of 1 st Purchase Order, (b) purchasing the material from alternate vendor, (c) informed the Operational Creditor that it was liable to the Corporate Debtor for the losses and damages.

The details regarding the second project are as follows:

1.	27.12.2016	2 nd Letter of Intent issued by the Corporate Debtor
2.	23.1.2017	2 nd Purchase Order issued by the Corporate Debtor, inter-alia, provided a) Delivery date: 13.2.2017, in any case by 15.2.2017 b) Corporate Debtor has right to cancel or amend the 2 nd Purchase Order without assigning any reason.
3.	March 2017	Operational Creditor made delivery of goods in excess supply and raised six invoices.

The terms of the purchase orders, *inter alia*, provided that (a) due date for payment was 45 days from Letters of Credit, (b) the goods were to be delivered timely and in case of failure, the Corporate Debtor was entitled to liquidated damages, (c) in case the delivery is delayed by more than a month, then the Corporate Debtor reserves the right to cancel the order or make purchase from an alternate source at the risk and cost of the Operational Creditor. Consequent to the non-adherence of the obligations under the contracts, the Corporate Debtor wrote an email dated 18.4.2017 calling upon the Operational Creditor to make a payment of Rs. 76,15,313.47/- as costs incurred by the Corporate Debtor. A reminder email was again sent on 23.6.2017. The Operational Creditor replied to the Corporate Debtor's email and acknowledged outstanding due by it to the Corporate Debtor.

5. It is argued by the Operational Creditor that there is clear acknowledgment of debt of Rs. 56,07,208.70/- by the Corporate Debtor in the Accounts Payable/ Receivable Confirmation Letter-Balance issued by the Corporate Debtor. The

- Operational Creditor argued that the petition should be admitted given acknowledgment of debt and the judgment '*SRL Limited vs Techtrek India Limited*' of the Hon'ble Bombay High Court, which is a case for a decree on admission under Order XII Rule 6 of the Code of Civil Procedure, 1908.
6. Another argument advanced by the Operational Creditor is that the Corporate Debtor could not have made the risk purchase before expiry of 10 days grace period calculated from the last date of delivery and a further period of one month as per the purchase orders.
 7. Further, the Operational Creditor argued that it is not liable to pay liquidated damages for delay in delivery of goods instead of delay in opening the Letters of Credit by the Corporate Debtor. As per the terms of purchase orders, since the Letter of Credit was not opened on time, the Corporate Debtor has forfeited its right to claim liquidated damages.
 8. It has also been brought to the notice of the Bench that arbitration proceeding has been filed by the Corporate Debtor before the Hon'ble Bombay High Court after the filing of the section 9 petition by the Operational Creditor.
 9. The Counsel for the Operational Creditor also argued that the dispute raised by the Corporate Debtor in its reply to the demand notice is not tenable and the defence is moonshine.
 10. The case of the Corporate Debtor is that a dispute regarding the debt has been raised on 27.3.2017, which is prior in time to the demand notice. Further, the demand notice was replied to within ten days and reiterated the existence of dispute. With regards to the Accounts Payable/ Receivable Confirmation Letter-Balance issued by the Corporate Debtor, the Corporate Debtor argued that it was sent by error during reconciliation of accounts. The Debtor has tendered the judgment of '*Mobilox Innovations (P) Ltd. v Kirusa Software (P) Ltd*'¹ to support its case and prays that the petition is liable to be dismissed.
 11. The Hon'ble Supreme Court in the case of '*Mobilox Innovations (P) Ltd. v Kirusa Software (P) Ltd.*' noted,

"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

¹ (2018) 1 SCC 353

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."

12. Given Section 9(5)(ii)(d) and the judgment of the Hon'ble Supreme Court, a petition is to be dismissed in case of 'existence of a dispute' is brought to the notice of the Creditor and the dispute is not patently feeble. In the present petition, the Corporate Debtor *vide* its email dated 27.3.2017, disputed the amounts due and cancelled the 1st Letter of Intent and 1st Purchase order due to non-adherence to the timeline for supply and further called upon the Operational Creditor to make good the loss suffered by the Corporate Debtor due to breach and purchase from alternate vendor. The Corporate Debtor has written email on 18.4.2018 to the Operational Creditor, *among other things*, to resolve the issues and sharing of the cost recovery worked out by the Corporate Debtor. Another email was written by the Corporate Debtor on 23.6.2017 to the Operational Creditor requesting for payment. Subsequently, the Operational Creditor replied on 19.7.2017 sending across the claim file, comments on accepted deductions, assuring discounts in future to make good the loss and proposing a plan for the same. From the material on record, the alleged dispute has been communicated by the Corporate Debtor to the Operational Creditor, and the dispute does not look patently feeble.
13. Accordingly, this Petition is dismissed.
14. The Registry is hereby directed to immediately communicate this order to the Operational Creditor and the Corporate Debtor.

SD/-
RÀVIKUMÀR DURÀISAMY
Member (Technical)

SD/-
V.P. SINGH
Member (Judicial)