

IN THE NATIONAL COMPANY LAW TRIBUNAL
SINGLE BENCH
NEW DELHI

No.(IB)-203(ND)/2017

Section: Under Section 9 of the Insolvency & Bankruptcy Code, 2016

IN THE MATTER OF

J.P. Engineers Pvt. Ltd.
3/8, IInd Floor,
Asaf Ali Road,
New Delhi-110002.

..... ..Operational Creditor/Applicant

V/s

Indo Alusys Industries Ltd.
606, Tolstoy House,
15, Tolstoy Marg,
Delhi-110001.

.....Corporate Debtor/Respondent

Coram:

R.VARADHARAJAN
Hon'ble Member (Judicial)

For the Petitioner

:Mr U.K.Chaudhri, Senior Advocate with
:Mr.Sharad Tyagi, Advocate
: Mr. Sameer Mahani, Advocate



For the Respondent

**:Mr ArunKathpalia, Senior Advocate with
:Ms.Ruchi Agnihotri, Advocate
:Ms.Anannya Ghosh, Advocate**

ORDER

Order delivered by: Shri R.VARADHARAJAN On: 05.09.2017

1. This is an application to initiate the Corporate Insolvency Resolution Process (CIRP) in respect of Indo Alusys Industries Ltd. (Corporate Debtor) under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC,2016) filed by one M/s J.P. Engineers Pvt. Ltd. as 'Operational Creditor'. In the prescribed form filed by the 'Operational Creditor' as provided under Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and in short 'AAA' Rules, the applicant states that the 'Corporate Debtor' was incorporated on 7.10.1979 with a share capital of Rs.15.00 crores and presently the paid up capital being Rs.8,50,79,000/-. It is also stated in the application that the registered office of the 'Corporate Debtor' is located at 606, Tolstoy House, 15, Tolstoy Marg, Delhi-110001.Under Part-III of the said application, no Insolvency Resolution Professional (IRP) has been proposed and in Part-IV details of transactions giving rise to debt and the amount due to the 'Operational Creditor' by virtue of the said transactions are given. It is averred therein that the 'Operational Creditor' had supplied aluminum ingots and scraps to the 'Corporate Debtor' based on



purchase orders placed by respondents vide numerous emails as well as based on telephonic conversations. Based on the same, it is averred by the 'Operational Creditor' that supplies were effected and invoices were also raised for the products supplied from time to time as detailed in Annexure-A to the application. An aggregate amount of the said invoices raised between 23.4.2016 and 6.12.2016 amounts to Rs.9,33,23,904/-.

2. Against the value of goods supplied, it is contended by the 'Operational Creditor' that 4 cheques dated 27.12.2016 by way of part payment in relation to the amount owed against the invoices annexed as Annexure-A the 'Corporate Debtor', issued 4 cheques of Rs.50,00,000/- each thereby aggregating in all to Rs.2.00 crores. It is also averred by the 'Operational Creditor' that as between parties to the application, subsequent to the issue of cheques a reconciliation statement as on 31.12.2016 was prepared and signed by the authorised signatory of the 'Corporate Debtor' under its letter head admitting that there yet remains a debit balance of Rs.11,55,87,461.80 and that the same has been annexed as Annexure-E to the application. Subsequent to the reconciliation statement, the 'Operational Creditor' claims that 4 more cheques were issued on 9.1.2017 by the 'Corporate Debtor', the value of each cheque being Rs.50.00 lakhs. However, all the 8 cheques when presented for payment, i.e. two cheques on 22.01.2016 (?) and the remaining 6 cheques on 23.01.2016 (?) were dishonoured for the reasons 'insufficient funds'. A legal notice it is claimed had been issued on 20.2.2017 under the provisions of Section 138 read with Section 141 of the

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Negotiable Instrument Act, 1881 by the 'Operational Creditor' through its counsel bringing to the notice of the 'Corporate Debtor' about the dishonoured cheques as well as demanding the payment of the amount due from the 'Corporate Debtor'. For the aforesaid notice issued under the hand of the legal counsel of the 'Operational Creditor', it is submitted by the 'Operational Creditor' that a reply notice dated 4.3.2017 was received from the 'Corporate Debtor' through its legal counsel dated 4.3.2017 wherein, the 'Corporate Debtor' had disputed the liability arising out of 8 cheques issued on the ground that there was a clear oral understanding between the parties that if the payment of the invoices raised by the 'Operational Creditor' are not cleared through LCs and only under the said circumstances the said 8 cheques shall be presented for payment and that 8 cheques have been sought to be encashed fraudulently with a view to blackmail the 'Corporate Debtor' and in the circumstances the 'Corporate Debtor' is not liable to pay any monies as claimed by the 'Operational Creditor'. After issuing rejoinder notice to the above reply dated 28.3.2017, it is averred by the 'Operational Creditor' that it was followed up with a complaint under Section 138 of the Negotiable Instrument Act, 1881 before Tis Hazari Court, Delhi in the month of June, 2017.

3. Meanwhile, it is averred that the 'Operational Creditor' had also issued a notice, as mandated under Section 8 of the IBC, 2016 bringing to the notice of the 'Corporate Debtor' about the default committed in Form-3 prescribed under AAA Rules, 2016

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demanding payment of an unpaid operational debt on 9.5.2017 under the hand of 'Operational Creditor' itself. In relation to the said notice of default, the 'Corporate Debtor' is said to have responded vide its reply dated 22.5.2017 issued under the hand of its counsel wherein, the amount claimed to be in default had been vehemently disputed and on the other hand a counter claim in a sum of Rs.1,54,55,652¹ is claimed to be due to the 'Corporate Debtor'. The 'Operational Creditor' as mandated under Section 9(3)(c) of IBC, 2016 has also filed as evidenced from Annexure-K a certificate from the bankers in relation to the unpaid liability of Rs.11,12,50,358/-.

4. In relation to the above application, the 'Corporate Debtor' has filed a detailed reply and has denied the liability as sought to be claimed by the 'Operational Creditor' and has stated that no monies are owed by the 'Corporate Debtor' to the 'Operational Creditor' and that on the contrary it is the 'Operational Creditor' who owes to the 'Corporate Debtor'. It is also contended by the 'Corporate Debtor' that it is not an insolvent company as sought to be portrayed by the 'Operational Creditor' but on the other hand has assets worth Rs.189.88 crores, as per the latest audited balanced sheet and that it also employs nearly 1100 employees and the financials disclose that it is a solvent company which is also vouched by its Chartered Accountant by way of certificate issued by him. The business relationship with the 'Operational Creditor' is not denied by the 'Corporate Debtor'. On the other hand, it is stated that for more than a period of 2 decades, there has been a close relationship between the 'Operational

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Creditor's group companies and firms belonging to the Group namely SMW Metals Pvt. Ltd., J.P.Engineers, the 'Operational Creditor' and though they are separate legal entities, they are under the same management and control. However, it is also claimed by the 'Corporate Debtor' that though they come under the same management and control, each of these entities are distinct and separate having their own PAN, VAT, TIN Nos. It is further claimed in the reply that prior to November, 2016 the 'Corporate Debtor' did not have any dealings with the 'Operational Creditor' and the dealings commenced only in the month of November, 2016 and continued till January, 2017 during which period, the 'Corporate Debtor' had purchased aluminum ingots and scraps to the tune of Rs.8,05,94,348/- from the 'Operational Creditor' and that too against oral orders placed by the 'Corporate Debtor' with the 'Operational Creditor' and in relation to the same invoices were also raised by the 'Operational Creditor' as evidenced by Annexure R-2 to the reply. In relation to the supplies made during this period it is claimed by the 'Corporate Debtor' that in accordance with the prevalent custom of the trade, LCs were opened for a total sum of Rs.9,60,50,000/- and after the receipt of payments by the 'Operational Creditor', a sum of Rs.1,54,55,652 is lying in balance to the credit of the 'Corporate Debtor' with the 'Operational Creditor' and in the circumstances, there is no default as nothing is due to the 'Operational Creditor' for and on behalf of the 'Corporate Debtor'.





5. From the records it is seen that the Petitioner has also filed rejoinder to the reply as filed by the 'Corporate Debtor'. Apart from reiterating the averments contained in the application/petition, the 'Operational Creditor' submits that by virtue of take over agreement entered into between J.P. Engineers (partnership firm) and the Corporate Debtor, the entire running business of J.P. Engineers namely the firm have been taken over by the 'Operational Creditor' on 4.11.2016 and in the circumstances it is contended by the 'Operational Creditor' that it has stepped into the shoes of the firm namely J.P. Engineers and hence is entitled to prosecute in relation to the outstanding balance in the books of the said firm in terms of the takeover agreement. It is further contended that in view of the reconciliation statements issued on 03.11.2017 as well as followed up with one dated 31.12.2016 wherein the debit balance vis-à-vis the 'Corporate Debtor' has been arrived at being the outstanding amount payable which includes the balance outstanding to the firm namely J.P. Engineers, the 'Corporate Debtor' is now acquiesced from pleading that it does not owe any money on the said count. It is also pointed out by the 'Operational Creditor' that the solvency of the 'Corporate Debtor' which is sought to be established through certificate issued by Company's Auditor may not be a good ground for avoiding CIRP once the 'Operational Creditor' is able to establish that there is an unpaid liability and the amount is in default.





6. This Tribunal has carefully considered the rival pleadings of the parties as well as heard elaborately the oral submissions piloted on behalf of rival parties by the respective Sr. Counsels. The main thrust on the part of the 'Corporate Debtor' put forward to stave the initiation of CIRP is twofold in nature – one relating to preliminary objections by way of non-compliance strictly with the provisions of IBC,2016 on the part of 'Operational Creditor' and the second in relation to the competency of the 'Operational Creditor' to sustain the claim for and on behalf of the firm namely J.P. Engineers and for which no proof has been adduced by the 'Operational Creditor' till the conclusion of arguments. In other words, the competency of the 'Operational Creditor' is challenged to sustain the claim of outstanding balance due to the said firm namely J.P. Engineers. Considering the technical/ preliminary objections as raised by the Ld. Sr. Counsel for the 'Corporate Debtor', it is contended that notice issued under Section 8 of IBC,2016 has not been issued by the 'Operational Creditor' under its hand but however has been addressed by an advocate for the 'Operational Creditor' in relation to whom no authorization has been produced by the 'Operational Creditor' authorizing him to issue such notice and in the circumstances it is squarely covered by the judgement rendered by Hon'ble NCLAT in Uttam Galva Steels Ltd. vs. D.F.Deutsche Forfail AG and Anr. Rendered on 28.7.2017 which has specifically held that in view of the provisions of IBC,2016 read with rules, an advocate or lawyer or Chartered Accountant or Company Secretary in absence of any authority of the Board of Directors

and holding no position in relation to the 'Operational Creditor' cannot issue any notice under Section 8 of IBC,2016 and a distinction has been drawn in the said judgement in relation to lawyer's notice and a notice given by an 'Operational Creditor'. In this connection, perusal of the application and annexure shows that notice under Section 8, as mandated, under IBC,2016 and required to be given by an 'Operational Creditor' enclosed as Annexure-I to the petition has been issued by one Mr. Sharad Tyagi, Advocate, on behalf of the Petitioner/'Operational Creditor' namely J.P. Engineers Pvt. Ltd which is evident from the signature on notice and vakalath. However, no authorization has been produced by the 'Operational Creditor' in terms of the above judgement referred to authorizing the said Advocate namely Mr. ~~Sharad~~  Tyagi  to issue the notice under Section 8 for and on behalf of 'Operational Creditor'. Thus, taking into consideration the provisions of IBC,2016 as well as the rules made there under and the decision of the Hon'ble NCLAT in Uttam Galva's case on 28.7.2017 as referred above, strictly speaking this Petition is not-maintainable on the said technical ground alone.

7. Even otherwise, on merits this Tribunal finds that the claim as made by the 'Operational Creditor' is not sustainable before this Tribunal under the provisions of IBC,2016. Reference to the pleadings particularly the rejoinder statement as filed by the 'Operational Creditor' discloses that this Petition has been filed not only on behalf of the 'Operational Creditor' in relation to its alleged outstanding owed from the 'Corporate



Debtor' but also for and on behalf of the firm namely J.P. Engineers in respect of its outstanding, taken over allegedly by the operational creditor as a going concern on and from 4.11.2016. However, as rightly contended by the Ld. Sr. Counsel for the 'Corporate Debtor', it is seen that no document to sustain or support the plea of the 'Operational Creditor' has been filed along with the typed set of documents annexed with the application. On the other hand, the plea of takeover of the firm M/s J.P. Engineers as a going concern has been only pleaded for the first time in the rejoinder and even in the rejoinder no document evidencing the take over and thereby the transfer of debt has been annexed to sustain the said plea. Even though the provisions of IBC, 2016 permit the assignees or transferees of a debt to file a Petition under IBC, 2016 as it is provided in terms of the definition of 'Operational Creditor' under Section 5(20) of IBC, 2016, however, it must be demonstrated before this Tribunal that there is a valid assignment or transfer atleast on or before the conclusion of the date of hearing ~~if~~ ^{or} not before and that too after due notice to the other side. Further, even assuming in this case that the 'Operational Creditor' can be considered as a transferee, no document evidencing the transfer was filed till the conclusion of the hearing demonstrating that the takeover of the business of the firm namely J.P. Engineers as a going concern by the 'Operational Creditor' had taken place. Curiously, it must be noted that only after completion of the pleadings as well as arguments and when the Petition was reserved for orders, on 01.08.2017, a written submission dated 10.08.2017 it is seen had been filed on the part of



the applicant in which a copy of the alleged takeover agreement dated 04.11.2016 was sought to be also included. However, this Tribunal is not inclined to take the said document into consideration as the same was filed subsequent to the order having been reserved and the same was not made available to the other side and thereby deprived of an opportunity to deny and counter the same. It is another matter that the respondent/'Corporate Debtor' has taken a plea that even after the alleged takeover date, the 'Corporate Debtor' claims that financial transactions have taken place between the said firm M/s J.P. Engineers and the 'Corporate Debtor' and that the said firm continues to exist even as of today. However, in the exercise of our limited jurisdiction we are not venturing into such exercise to ascertain the existence or not of the firm M/s J.P. Engineers.

8. Finally the reconciliation statements on which great reliance has been placed, in itself shows that the parties have not yet arrived at a definitive figure which can be considered as an ascertained debt payable as in the case of say a confirmation of balance statement or acknowledgment of debt given by a Debtor to a Creditor and which payment has been defaulted by the 'Corporate Debtor, thereby giving rise to CIRP under IBC, 2016. Even otherwise, in view of the summary jurisdiction as well as limited time period enjoined by IBC, 2016 on the Tribunal to either admit or reject, parties cannot seek to convert the proceedings before this Tribunal into a civil court proceeding akin to a trial making this Tribunal to go through each and every entry as



reflected in the respective account books and ascertain whether there is a 'debt' and a default has been committed warranting the initiation of CIRP. Taking into consideration all the above, this Tribunal is constrained to dismiss the application filed by the Petitioners but without costs.



5/9/17

(R.VARADHARAJAN)
MEMBER (JUDICIAL)

U.D.Mehta