

**NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

CORAM:

**Shri V. P. Singh,
Hon'ble Member (J)
&
Shri Jinan K.R.
Hon'ble Member (J)**

Company Petition No. 440/KB/2017

In the matter of:

Section 9 of the Insolvency and Bankruptcy code;
-And-

In the matter of :

AGARWAL COAL CORPORATION PRIVATE LIMITED
Matra Kripa, 2, Chameli Park, Near Goyal Nagar, Ring Road,
Indore-452016-MP-IN.

....Petitioner Company / Operational Creditor

-Versus-

IMPEX FERRO TECH LTD.
35, C.R Avenue, 4th Floor, Kolkata-700012-WB-IN.

....Respondent Company / Corporate Debtor

For the Petitioner/Operational Creditor

Mr S.K Tiwari, Advocate

For the Respondents/Corporate Debtor

Mr. Bidyut Dutt, Advocate

Mr. Anirudhya Dutta, Advocate

Judgement/Order delivered on 9th November 2017

ORDER

Per: Shri V.P Singh Member (J)

The Operational Creditor has filed the present application for initiation of Corporate Insolvency Resolution Process in respect of Corporate Debtor under Section 9 of the Insolvency and Bankruptcy Code, 2016.

The petitioner, operational creditor namely Agarwal Coal Corporation Pvt. Ltd. has filed an application Under Section 9 read with Rule 6 of the Insolvency and Bankruptcy Code 2016 for (hereinafter called as "Code") initiating Insolvency Resolution Process against the respondent Company/ Corporate Debtor Impex Ferro Tech Limited, claiming that the petitioner is an Operational Creditor within the meaning of Section 5 (20) of the Code and the respondent owes operational debt to the petitioner within the meaning of Section 5 (21) of the Code. It has also been claimed that the respondent is a defaulter in making the payment of operational debt and the claim is within the period of limitation and well within the jurisdiction of this Bench.

The Petitioner/Operational Creditor is engaged in the business of supplying steam coals. He has submitted that at the request of the respondent/Corporate Debtor, the operational creditor provided and delivered the said goods on 10th June 2016 and 15th June 2016 to a corporate Debtor for an aggregate quantity of 135.890 Mt and 92.730 Mt of the said goods at the agreed rate of Rs. 2,761 and 2,724 per MT and VAT at the rate of 5% ad valorem on credit of 90 days and raised two commercial tax invoice No HLD/TI/JUN-16/118 and HLD/TI/JUN-16/122 upon the corporate Debtor on that very day for an aggregate sum of Rs.672142.80.

It is further submitted that out of the total payment due against two invoices to the tune of Rs. 672142.8 **only** part payment of Rs.349281.66/- was made. After that balance amount to the tune of Rs.322861.14 remained due and payable by the corporate debtor to the operational creditor, but the corporate debtor failed to do so. Therefore, the operational creditor is entitled to the balance payment and interest on

the outstanding dues. The computation of the amount in default is annexed and marked as **'Annexure-VI'.at page 26**

Particulars of the claim

(a) Amount due to the Corporate Debtor Rs.3,22,861.00

4. On perusal of the records it manifests that:

(a) The applicant / operational creditor has delivered demand notice of unpaid operational debt/copy of Invoices on 13th April, 2017 to Corporate Debtor in prescribed manner as specified in Rule 5(2) of Insolvency and Bankruptcy(Application to Adjudicating Authorities) Rules, 2016 under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 vide **Annexure - I**. Further the petitioner has enclosed the proof of service of Demand Notice vide **Annexure-III**, which indicates that the demand notice was duly served upon Corporate Debtor on 13.04.2017 vide Track Consignment Report which is on page 12-13 of the petition.

The respondent entered an appearance and filed a reply in the form of an affidavit in opposition contending that no debt is due and payable by the company to the petitioner. The corporate debtor has further stated in its reply that he sent his reply to the demand notice on 26.4.2017 well within the time limit prescribed under the IBC,2016 disputing the whole claim. It is stated that the operational creditor is claiming such sum as debt whereas, such debt was never raised before.

After pointing out to the corporate debtor that reply to the demand notice was given in time, the supplementary affidavit was filed by petitioner in which it is stated that a letter DT. 26th April 2017 has been found at the head office of the petitioner at Indore .Petitioner has also annexed the **copy of email dt.7th Sept. 2017 (Annexure A) evidencing disclosure of letter DT.26th April 2017.**

In reply to the demand notice, it is stated that :

1. The unpaid amount of Rs 3,22,861 as mentioned in your Notice is not correct, and we are disputing the same.The tax invoice does not bear our signature as to receive of such tax invoices being Annexure B. Accordingly the same is disputed in question which cannot be decided in the instant rules, the same is

disputed in matter which cannot be determined in the instant Rules, the same can only be adjudicated in the suit or otherwise.

2. The purported amount of Rs 3,22,861 is not due in terms of purchase order and hence we are also disputing the same.
3. The purchase provides for dispute resolution through Arbitration before sending Notice under the Insolvency and Bankruptcy Code. In view thereof, the said purported demand notice is not legally binding in law.
4. The purported demand notice is unlawful, misconceived, erroneous, null and void and not tenable in the eyes of the law as per provisions laid down in the said rules.

We have heard both sides at length. Upon hearing the argument and considering the contentions and on perusal of the records the point that arises for consideration is:

Whether the respondent succeeded in proving the existence of a genuine dispute as alleged in the reply?

Admittedly above mentioned notice of dispute is raised only after receiving the demand notice issued by the petitioner under I&B Code. It is also important to point out that corporate debtor has not denied this fact that he has received the goods against the supply order but he has pleaded that the dispute should have been referred to Arbitration. The reply of the corporate debtor is self-explanatory which indicates that dispute is only raised to create a defence which is unsupported by any evidence. The purported dispute raised by the corporate debtor appears to be spurious, hypothetical or illusory.

Corporate Debtor at para 3 in reply to opposition contented that whole claim is frivolous as the invoices do not contain the signature of either Corporate Debtor or its representatives which shows the receipt/delivery of the goods to the Corporate Debtor.

(c) A copy of the certificate from the UCO Bank maintaining the account of the operational creditor confirming that there is no payment of an unpaid operational debt by the Corporate Debtor has also been enclosed vide **Annexure-VI** regarding sub-section 3(c) of Section 9 of the IBC, 2016.

Here, in this case, the ingredients as provided under section 9(5) (a to c) are satisfied by the petitioner. The petitioner did not suggest any insolvency resolution professional, name. Therefore, a requirement under section 9(5)(e) of I&B Code doesn't arise.

The Hon'ble Supreme Court has laid down the following principles of law to understand the term existing dispute.

The Hon'ble Supreme court in **Mobilox Innovations (P) Ltd. V. Kirusa Software (P) Ltd.** [2017]140 CLA123 (SC) has held that ***"So long as a dispute truly exist in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application for initiation of corporate insolvency resolution process."***

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)(2)(d) if the operational creditor has received notice of dispute or there is a record of dispute in the information utility. 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.

The Hon'ble Supreme court in **M/S Innoventive Industries Ltd. V.ICICI Bank.** [2017]SCC 1025 (SC) has held that ***"the moment there is the existence of such a dispute, the operational creditor gets out of the clutches of the code."*** To understand the principle laid down in the citation above referred it is good to read para 29 of the judgment. It read as follows: -

"29. The scheme of Section 7 stands in contrast to the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is the existence of such a dispute, the operational creditor gets out of the clutches of the Code.

Here in this case respondent not at all succeeded in proving the existence of a dispute regarding the supplying of coal received by him whereas corporate debtor committed default by not making payment of outstanding dues along with interest to the operational creditor even after getting demand notice issued under I&B Code.

To appreciate the nature of dispute, we have to discuss the provision of law including the expression 'dispute' as defined and inclusive definition as could be seen from sub-section 6 of section 5 of the 'I & B Code' and observed:-

"Dispute" includes a suit or Arbitration proceedings relating to:

- (i) The existence of the amount of debt;
- (ii) The quality of goods or service; or
- (iii) The breach of a representation or warranty;

The term "dispute" should not be a patently weak legal argument or an assertion of fact but must be supported by evidence on record.

Law is settled that mere mentioning in the notice that dispute is in existence, in the relation of impugned debt is not sufficient. The dispute should be pre-existing i.e. prior to receipt of the demand notice by the respondent. Such a fact not at all established in this case on the side of the respondent. Given the above-said factors and bearing in mind the principle laid down in the cases mentioned above the contentions of the respondent that there was a pre-existing dispute regarding the coal supplied by the petitioner to the respondent is found devoid of any merit.

One another contention raised by the respondent is that no debt is due and payable by the respondent. To substantiate the said contention respondent has not given any evidence whereas the bank statement produced by the petitioner strengthen the contention of the petitioner that the other than Rs. 349281.66/- paid by the respondent and no additional amount has been paid by the respondent. So, the contention on the side of the respondent that no amount is due to the petitioner is also found devoid of any merit.

On perusal of the records and the documents submitted above, we are unable to appreciate the submissions made by the Ld. Counsel for the Corporate debtor that there exists no debt, while a certificate from the bank also exhibits the presence of debt. As in the present case the Respondent/ Corporate Debtor does not qualify within the meaning of the word 'dispute' and the objection is merely an objection raising a dispute for the sake of dispute and /or unrelated to clause (a) or (b) or (c) of subsection 6, of section 5 of the 'I & B Code'. It is observed that the claim of the dispute was vague and motivated to evade the liability.

We, therefore reject the reply of the respondent with the observation that the reliance of the Respondent on the word 'dispute' does not qualify the meaning of the existing dispute.

Given the above-said discussion, we have no hesitation to hold that this petition deserves admission under section 9 of I&B, Code. Here, in this case, the petitioner did not utilise his option in proposing the name of an insolvency professional of his own choice to be appointed as Interim Resolution Professional regarding Section 9(4) of the Insolvency Code.

Therefore, we at this moment make a reference to the IBBI for the recommendation of the name of an Insolvency professional who may act as an interim resolution professional as per section 16(3) (a) of I&B code.

This Bench admits this Petition u/s.9 of the Code declaring a moratorium for the purposes referred to in section 14 of the Code with following directions:

- (i) That this Bench, subject to provisions of subsections (2) & (3) of section 14 of the Code, hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, Tribunal arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.
- (ii) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- (iii) That the provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (iv) That the order of moratorium shall affect 10.08.2017 till the completion of the corporate insolvency resolution process as prescribed under section 12 of the Code.
- (v) That his Bench at this moment directs to cause public announcement of the corporate insolvency resolution process upon the appointment of insolvency professional by IBBI immediately as specified under section 15 of the Code.

- (vi) That moratorium is declared for the purposes referred to under 14 of the IBC Code.

The registry is directed to make a reference to the IBBI for the appointment of an interim resolution professional as per section 16(4) of I&B, Code. The copy of the order may also be sent to IBBI through e-mail.

List the matter on 20/11/17 for F.O.

This order is communicated to the Operational Creditor as well as Corporate Debtor.

Sd/-
(Jinan K.R.)
Member (J)

Sd/-
(V .P. Singh)
Member (J)