

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

C.P.(IB) No.699/KB/2017

Coram: Shri Jinan K.R., Hon'ble Member (Judicial)

IN THE MATTER OF :

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016.

IN THE MATTER OF :

GREENPLY INDUSTRIES LIMITED, a Company incorporated under the provisions of the Companies Act, 1956, and having its Registered Office at Makum Road, Tinsukia, Assam 786 125, within the aforesaid jurisdiction.

.....Operational Corporate Creditor/ Applicant

And

SOUTHERN COOLING TOWER PRIVATE LIMITED having its Office at 2, Chowringhee Terrace, Kolkata 700 020, within the aforesaid jurisdiction.

..... Respondent / Corporate Debtor

Order Delivered on 07th February, 2018.

For the Petitioner: 1. Mr. Rohit Jalan, Advocate

For the Respondent: 1. Ms. P. Banerjee, Advocate

2. Mr. A. Mukherjee, Advocate

3. Mr. Debsoumya Basak, Advocate

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ORDER

Per Shri Jinan K.R., Member (Judicial)

1. The petitioner has filed this application under Sec.9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as I & B Code) 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as Adjudicating Authority Rules, 2016) for initiation of corporate insolvency process against corporate debtor M/s Southern Cooling Towers Pvt. Ltd.

2. Brief facts of the case are the following: -

The applicant operational creditor is M/s Greenply Industries Ltd. whose identification No. is L20211AS1990PLC003484 and having its office at Village - Kriparampur, P.O.- Sukhdevpur, 24 Parganas(S), Kolkata-743503, West Bengal.

The Corporate debtor is M/s Southern Cooling Towers Private Ltd. whose identification No. is U63023WB1982PTC034674 having its registered office at 2, Chowringhee Terrace, Kolkata-700020, West Bengal.

3. The applicant has stated that it had trading relation with corporate debtor from time to time on the request from the corporate debtor, sold and delivered consignments of plywood of various specifications to the Corporate Debtor and in lieu thereof the corporate debtor duly

acknowledged receipt of the said goods and made some payments for the same.

4. Operational creditor has stated that the Corporate Debtor made a default in payment of Rs.62,12,142/- (Rupees Sixtytwo lakhs twelve thousands one hundred and fortytwo only) and liable to pay to the operational creditor the legitimate dues of the Operational Creditor for Rs.62,12,142/-. (Rs. 41,53,530/- being the principal dues along with interest of Rs 20,58,612/- till 28/08/2017 @ 18% per annum together with further interest from 29/08/2017 till actual payment). A copy of the worksheet showing computation of default marked as **Annexure P3**.

5. Pursuant to the request from the corporate debtor, the operational creditor had sold and delivered 4 consignments of plywood to the corporate debtor under 4 invoices bearing nos. 3101607,3101625,3101744 and 3101777 and reference no's 7023010115,7023010126,7023010210 and 7023010229 dated 14.11.2014,19.11.2014,06.12.2014 and 11.12.2014 for Rs 13,89,364/- Rs.13,89,364/-, Rs. 13,33,469/- and Rs. 6, 51,969/- respectively aggregating to a total sum of Rs.47,64,166/-. Out of total consideration value a part payment of Rs.6,10,636/- has been made by the corporate Debtor in favour of the operational creditor and this part payment was the acknowledgment of the balance due by the corporate debtor.

6. The operational creditor also submits that after considering all the part payment, a principle sum of Rs.41, 53,530 is due and payable by the corporate debtor on account of the price of goods sold and delivered to the corporate debtor along with interest @18% p.a being the contractual rate of the interest from the date of the invoice till actual payment. The

said goods was duly received, accepted and utilized by the corporate debtor. No goods or the parts of the goods were ever returned to the operational Creditor by the corporate debtor whatsoever.

7. Operational creditor has further stated that the corporate debtor did not pay the outstanding dues in spite of receiving demand notice dated 29/08/2017. A copy of the demand notice is annexed with the application as **Annexure P6**. The petitioner has stated that total outstanding dues in the notice was 62,12,142/-(inclusive of interest) occurred from 29.08.17. A copy of the statement of account from Bank/Financial Institutions showing the due is annexed with the application and marked as **Annexure P9**.

8. Even after receipt of the demand notice, the corporate debtor failed to make payment the outstanding dues. Therefore, the petition was filed for initiation of corporate insolvency process against the corporate debtor.

9. The applicant has annexed along with the petition copy of the demand notice issued under I & B Code, 2016 on 29.08.2017 Annexure-P6 along with copies of invoices, Delivery Challans and L.R Receipt. An Email dated 10.08.2015 and reply dated 08.09.2017 were produced and marked as Annexure-5 and 7. A statement of account where deposits are made, or credits received normally by the operational creditor marked as Annexure- P9, and Board Resolution Dated 11th August, 2017 also produced and marked as Annexure P8 in support of its claim.

10. The applicant has also stated that Mr. Madhup Bajoria, Assistant Manager of the Company has been authorized to act on behalf of the operational creditor. In support of its contention the petitioner has also

filed affidavit. Petitioner has also filed the authorization letter which shows that the petitioner company by its resolution dated 11/08/2017 had authorized Mr. Madhup Bajoria to sign, verify, appoint advocate, institute the petition or/execution case, give written statement and complaints, sign affidavits, replies, evidence on behalf of the company with the appropriate Court of law having jurisdiction on behalf of the applicant company.

11. The applicant has also proposed the name of Shri Prabhjit Singh Soni (Address: GG-1/144/C, Vikas Puri, Near PVR, New Delhi 110018m E-mail Address: psgurleensoni@gmail.com – Registration No.IBBI/IPA-002/IP-N00065/2017-18/10143) as Interim Resolution Professional in Form 2 and has certified that he is fully qualified and permitted to act as an Insolvency Resolution Professional. Shri Prabhjit Singh soni, the proposed Resolution Professional has given consent in Form 2, which has been annexed as **Annexure - P10** of the petition

12. The applicant / operational creditor has delivered demand notice of unpaid operational debt/copy of Invoices on 29th August, 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-'P6'**. Further the applicant has enclosed the proof of service of Demand Notice at page 56, which indicates that the demand notice was duly served upon Corporate Debtor on 30.08.2017 vide Track Consignment Report/Acknowledgment Receipt which is on page 56 of the petition.

13. Operational creditor has also filed an affidavit to the effect that no notice has been given by the corporate debtor relating to a dispute of the unpaid part of the debt. The applicant has stated in the affidavit that corporate debtor has failed to bring to the notice of the operational creditor existence of a dispute or the pendency of the suit or arbitration proceedings filed before the service of the demand notice. Operational creditor has further alleged that even 10 days after the date of delivery of the demand notice, he has not received any payment or a notice of dispute regarding the pending amount from the corporate debtor.

14. The Operational Creditor also filed a rejoinder to the reply affidavit filed by the respondent that the entire story of corporate debtor is false as the corporate debtor did not annex any single document so as to show that the corporate debtor informed the operational creditor that goods have been rejected by RIL or calling upon the operational creditor to take back the goods rather he has accepted the goods without any objection or demur. There was no written purchase order and the document annexed to the reply does not show that the same was ever send to the email of the operational creditor or not bears any seal of the operational creditor.

15. The operational creditor has also stated that no purchase order was ever received by the operational creditor and also denied that there existed any clause that the operational creditor will provide test certificate from any laboratory along with the materials to be supplied or the materials are to be a IS710 standard.

16. In reply to the application filed by the operational creditor, corporate debtor has filed reply wherein it has been stated that the corporate debtor through its Advocate issued the notice of dispute/replied to the demand notice dated 08/09/2017 which was duly received by the operational creditor.

17. The Corporate Debtor further stated that in the reply that the corporate debtor raised serious dispute relating to suppression of material facts like existence of purchase order in respect of the transaction in question and supply of defective material which are not in conformity with the standard of requirement by the corporate debtor and thus the material couldn't be utilized by the corporate debtor, who had to purchase the goods from the local market on urgent basis at an extra cost. Furthermore, he also added saying that the operational creditor duly accepted the purchase order on 22.10.14 and subsequently supplied materials to the corporate Debtor) A copy of the said receipted Purchase Order dated 21.10.14 is annexed here and marked **Annexure-A.**

18. The Corporate Debtor further stated that the operational creditor supplied the defective 9mm plywood to the corporate debtor total amounting to Rs.51, 47,120.47(as per operational Creditor) out of which the operational creditor itself took back 9mm plywood billed Rs.1, 39,290.00.the rest of the materials of 9mm plywood are lying at the site at the risk of the operational creditor, who is supposed to take back the same at its own cost as per the terms of the purchase order.

19. The Corporate Debtor also stated that the clause 5 of the purchase order contains a guarantee clause whereby the operational creditor

guarantees its product (as supplied) for three years from the date of erection at site. To substantiate its contention corporate debtor produced the following documents marked as Annexure-B to F.

B. Copies of test result dated 12.03.2015.

C. Copy of E-mail dated 20.03.2015 send by the corporate debtor to the applicant.

D. Copy of invoice dated 05.11.2014.

E. Statement containing Invoice No., Date, Challan No. Date, Recd Date, Material Description, Material Value, Tax payment, 9mm/550 plywood, 16mm/160 and Grand Total of Rs.75,15,933,28.

F. Satement showing that the Corporate Debtor has altogether paid Rs.31,61,507.00 to the Operational Creditor against the supply which contains an amount of Rs.9,43,638.95 against the said 9 mm plywood supplied in the 1st invoice and the rest Rs.22,17,866.25 was paid against the supply of 16 mm plywood.

Upon the above said contentions corporate debtor prays for rejection of the application.

20. Heard arguments of Learned Counsel on both side at length. Upon hearing the argument and considering the contentions and on perusal of the records the point that arise for consideration is:

(1) Whether the respondent succeeded in proving existence of a genuine dispute as alleged in the reply and whether there is existence of a dispute between the parties.

Operational creditor has filed this petition under Sec.9 of the I & B Code, 2016.

In the Company Appeal No.9405/2017 Kirusa Software Pvt. Ltd. vs. Mobilox Innovations Pvt. Ltd. [2017]140 CLA123 (SC) Hon'ble SC has held as under:-

“.....which clearly brought forward the fact that feeble and/or frivolous dispute being made by the Corporate Debtor for shying away from making a payment of the dues of the Operational Creditor its claim cannot be a cause of a “dispute” under the Insolvency and Bankruptcy Code, 2016....”.

21. Bearing in mind the proposition laid down in the above referred citation let me see whether the dispute raised by the corporate debtor falls with in the ambit of section 5(6) of the I&B, Code.

22. The corporate debtor in its reply mainly raised objections to the claim on the basis of a purchase order allegedly issued to the operational creditor for buying the goods. Corporate debtor admittedly received the goods referred to in the four invoices annexed to the demand notice admittedly received by the corporate debtor. According to the learned Counsel for the corporate debtor the operational creditor committed breach of terms as per the purchase order and supplied sub standard Plywood of 9mm and supply of 16 mm was in conformity with the terms in the purchase orders.

23. To prove that the 9mm plywood received by the corporate debtor is substandard produced the test result Annexure- B. No supporting document produced to prove that Annexure A was actually served upon the applicant by hand delivery as alleged in the reply affidavit. Since the authenticity of Annexure A is challenged and the objection regarding its genuineness is found sustainable I find some force in the argument that the corporate debtor never issued purchase order as a precondition for

purchasing goods from the applicant. More over even if it is considered as a purchase order issued to the applicant no supporting documents produced to prove that in pursuance of the test result obtained by the operational creditor the goods received were returned because of inferior quality. No evidence also forthcoming to corroborate the contention that corporate debtor agreed to take back the goods as alleged. In the absence of existence of a purchase order there exist no written contract or agreement that applicant should supply goods of a particular standard or quality. That being so contention that corporate debtor cannot accept goods as per the terms of a non-existing contract has no legal force at all. Therefore, the contention of the respondent that Plywood received with a thickness of 9mm was of inferior quality and hence there is no liability to pay the amount demanded by the applicant is found devoid of any merit.

24. At this juncture learned counsel for the corporate debtor relied upon an E-mail Annexure C for stressing an argument that there exist a preexisting dispute regarding the quality of goods received by the corporate debtor. It has been admittedly received by the applicant on 31.08.2017. It is an e-mail informing the applicant that 9mm plywood supplied does not confirm IS standard and that it would be rejected by RIL who the customer of the corporate debtor is if the test result is given to RIL. In reply to the said mail the applicant replied that it may be due to nonconformity in regards the preservative chemicals and so applicant has send new samples for their testing. There is no further communication in this regard. So here in this case there is nothing to prove that there exists a genuine dispute regarding the goods purchased by the corporate debtor. It has come out in evidence that the goods delivered to the corporate debtor were received by the corporate debtor

without raising any objection. The test result seen obtained by the corporate debtor long after the receipt of the goods. The e-mail admittedly received by the applicant does not prove raising of any dispute regarding the quality of the goods received and accepted by the corporate debtor, but it indicates an apprehension of the debtor in regards rejection of the goods in turn supplied to RIL. There is no supporting proof to prove that RIL has rejected the alleged goods supplied to it. It is in the reply notice the corporate debtor raised objections regarding its liability. No pre-existing dispute as laid down in the above cited decision established in this case on the side of the corporate debtor. The Corporate Debtor is therefore, found does not qualify within the meaning of the word 'dispute' and the objection is mere objection raising a dispute for the sake of dispute and /or unrelated to clause (a) or (b) or (c) of sub-section sub-section 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. The objections to the claim put forward by the corporate debtor being not sustainable and since the ingredients as provided under section 9(5) (a to e) are satisfied by the applicant for admission of this petition under section 9 of I&B Code it deserves to be admitted.

25. The applicant proposed Shri. Prabhjit Singh Soni as the resolution professional. Annexure P-10 written communication shows that there is no disciplinary proceeding is pending against the resolution professional proposed by the applicant.

26. In view of the above said discussion this petition filed by the operational creditor under Sec.9 of the I & B Code, 2016 is liable to be admitted. Accordingly, the application is hereby admitted for initiating

the Corporate Resolution Process and declare a moratorium and public announcement as stated in Sec.13 of the IBC, 2016.

27. The moratorium is declared for the purposes referred to in Sec.14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

28. Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

1. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
2. Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
3. 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 (54 of 2002);
4. The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

29. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

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30. 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.

31. The order of moratorium shall affect the date of such order till the completion of the corporate insolvency resolution process.

32. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

33. Necessary public announcement as per Sec.15 of the IBC, 2016 may be made.

34. Mr. Prabhajit Singh Soni residing at GG-1/144/C, Vikas Puri, Near PVR, New Delhi 110018 e-mail Address: psgurleensoni@gmail.com Registration No.IBBI/IPA-002/IP-N00065/2017-18/10143 is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

34. The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

35. Let the certified copy of the order be issued upon compliance with requisite formalities and a copy of the order may also be sent to the

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Applicant/Financial Creditor as well as Corporate Debtor and IRP through email.

List the matter on 01.03. 2018 for filing of the progress report.

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Jinan K.R.
Member (J)

Signed on 7th day of February 2018.