

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SINGLE BENCH
NEW DELHI**

No.IB-275/ND/2017

Section: Section 9 of the Insolvency and Bankruptcy Code, 2016 read with the Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

**Green Power Engineers (P) Ltd.
A-701, Hindon Apartment,
25, Vasundhara Enclave,
Delghi-110 096.**

... Operational Creditor/Applicant

**M/s Faith Merchantile(P) Ltd.
E-24, Basement,
Lajpat Nagar-III,
New Delhi -110 024**

..... Corporate Debtor



Coram:

**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

Counsel for the Petitioners: Shri Atul Kumar Sinha, Advocate

Counsel for the Respondents : None

Order delivered On:

ORDER

This is an Application filed by M/s Green Power Engineers Pvt. Ltd. representing itself to be a Creditor of M/s Faith Merchantile Pvt. Ltd. being its debtor in relation to a claim of Rs.21,70,092/-, as the amount in default along with interest and remains unpaid. The brief facts as can be culled out from the Application along with the synopsis filed is as follows:-

2. The Debtor, it is averred had placed a purchase order dated 10.1.2012 towards Scrubbing Systems, Balance of Plant and Heat Recovery System for 1200 KWeMWM Gas Genset for a sum of Rs.2,19,30,000/- subsequently amended vide letter dated 12.4.2012 by the Debtor bearing purchase order No. FMPL/2011-12 into two portions – one being supply of balance plant of value of Rs.24,50,000/- to be supplied by the Creditor. It is further averred by the Creditor that in consonance with the purchase



order dated 10.1.2012, supplies were duly effected and on instructions from the Debtor, invoices were raised aggregating to Rs.43,97,218.20 and in relation to the said invoices a sum of Rs.38,72,585/- on various dates commencing from 9.5.2012 to 1.4.2014 has been paid and their yet remains a sum of Rs.5,24,633.20 unpaid.

3. Despite repeated follow-up no payment was forthcoming and in the circumstances a statutory notice dated 30.04.2015 under the erstwhile provisions of Companies Act, 1956 was issued wherein the Debtor was called upon to pay the dues in a sum of Rs.12,40,345/- which includes interest at 24% per annum payable arising out of delayed payment. Statutory notice has been duly replied to on 08.7.2015. Consequently, in view of the denial of the liability, it is averred by the Creditor that winding up Petition under Sections 433 (e) and 434 of the Companies Act, 1956 was filed before the Hon'ble High Court at Delhi. However, subsequent to the filing of winding up Petition, in view of promulgation of Insolvency and Bankruptcy Code, 2016 hereinafter referred to IBC, 2016, the Hon'ble High Court at Delhi transferred the Company Petition for winding up in CP No.577/2015 to this Tribunal. It is further averred that even though specific directions were passed by this Tribunal on 15.5.2017 to comply with the requirement of notification issued by the Central Government in order to continue the matter with this Tribunal, however, due to laxity on the part of the Ld. Counsel the same was not followed up. However, it is averred that in any case the Creditor had issued a notice of demand against the Corporate Debtor in Form-3 dated 15.6.2017 which had also been replied to by the Debtor denying the liability on flimsy and false grounds and in the circumstances this Petition/application has been filed



under Section 9 of IBC,2016 as applicable to an Operational Creditor for initiating the Corporate Insolvency Resolution Process in relation to a Corporate Debtor.

4. Consequent to the filing of this Petition on 8.8.2017 by the Creditor, the same was listed before this Tribunal on 16.8.2017 on which date upon perusing the Petition and the documents annexed therewith, the Petitioner/Creditor was directed to produce banker's certificate, as mandated under the provisions of Section 9(3) (c) of IBC,2016 within a period of 1week and also to file an affidavit of service in relation to the service of Application on the Corporate Debtor and the Petition was posted to 29.8.2017. On 29.8.2017, from the perusal of the tracking report, as annexed along with the affidavit of service filed by the Petitioner/Creditor vide Dy.No.807 dated 28.8.2017, discloses that the item had been delivered and taking into consideration the affirmation made in the affidavit, this Tribunal chose to hear the matter despite the absence of Respondent/Debtor.

5. In relation to the production of banker's certificate, it was represented by Ld. Counsel for the Petitioner/Creditor that an affidavit duly sworn to by the advocate himself dated 23.8.2017 whereby and where under at paragraph 4 it has been stated that the bank has refused to issue any such certificate showing its inability due to procedural limitations and that there is no specific mechanism available with the bank to identify and compartmentalize different transactions between an Operational Creditor and Corporate Debtor. In the circumstances, the bank had chosen to issue only a certified statement of account. Ld Counsel for the Petitioner requested this Tribunal to



take the same on record in lieu of Banker's Certificate, as mandated under Section 9(3) (c) of IBC,2016. This Tribunal is afraid whether such a plea can be entertained as made by the Petitioner ignoring the statutory mandate as given under Section 9(3) (c) which is reproduced hereunder:

9 (1) ...xxxx

9 (2)xxxx

9 (3) (c)

"a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and"

Further Section 9(5) of IBC,2016also enunciates the circumstances under which the Adjudicating Authority can admit a Petition or reject a Petition and the said section is reproduced below:-

9 (5)

The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section(2), by an order-



(i) Admit the application and communicate such decision to the operational creditor and the corporate debtor if,-

(a) the application made under sub-section(2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section(4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if-

(a) the application made under sub-section(2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any resolution professional.

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

6. Taking into consideration the proviso to Section 9(5) of IBC,2016 the Petitioner was given an opportunity on 16.8.2017 to rectify the defect in complying with the



provisions of Section 9 (3) (c) and as well as for any other compliance. However, it is represented on behalf of the Petitioner that Banker's Certificate is not able to be produced. Thus only course this Tribunal can adopt in view of the above provision of IBC, 2016 and also as held by the Hon'ble NCLAT in the Judgement rendered in the case of Smart Timing Steel Ltd. vs. National Steel Agro Industries Ltd. in Company Appeal (AT)(Insolvency) No.28/2017 to the effect that failure to abide by the statutory mandate would result in rejection of the Application as filed by the Petitioner/Creditor by virtue of provision 9(5) of IBC,2016, as reproduced above. Hence, this Tribunal is constrained to reject the Application on the said ground alone. Even otherwise, it is seen from the typed set of documents as annexed by the Petitioner/Creditor that all the invoices relate to the year 2012 and the Debtor has categorically denied the liability in response to both the statutory notice sent under the erstwhile provisions of Companies Act, 1956 as well as to the Notice of Demand sent under the provisions of IBC,2016 read with attendant rules and has also raised a dispute to the effect that the Petitioner has directly dealt with the end user namely M/s Simbhaoli Sugar Limited without the knowledge of the Debtor. The above reply to the winding up Petition has been sent by the Debtor dated 8.7.2015. As held by the Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited vs. Kirusa Software Private Limited a judgement rendered on September 21st, 2017 in relation to a Debtor, it is enough that plausible dispute is projected to avoid the claim as made by the Corporate Debtor in relation to Insolvency process and this Tribunal is of the view that the same has been projected by the Corporate Debtor by the denial of liability and raising a dispute coupled with inaction on the part of Operational Creditor in diligently prosecuting for the recovery of amounts



alleged to be due to it since 2012. Hence, taking into consideration all the above aspects, this Tribunal is constrained to dismiss the Petition as filed by the Petitioner/Creditor. However, without costs.


(R.VARADHARAJAN)
MEMBER (JUDICIAL)

U.D.Mehta