

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

C.P. (IB) No. 415/KB/2017

Coram:

Hon'ble Shri Vijai Pratap Singh, Member (Judicial)

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

In the matter of:

An application under Section 8 & 9 of the Insolvency and Bankruptcy
Code, 2016;

And

In the matter of:

Anil Steels (Operational Creditor) ... Applicant/Petitioner

And

A.D.Electro Steel Company Pvt. Ltd. ... Respondent

Counsel last attended:

- | | |
|--|-------------------|
| 1. Mr. S.M.Gupta, FCS |] For Operational |
| 2. Mr. Arun Gupta, FCA |] Creditor |
| | |
| 1. Mr. Deepnath Roychowdhury, Advocate |] For the |
| 2. Ms. Anindita Ghosh, Advocate |] Respondent |
| 3. Mr. Aditya Garodia, Advocate |] |
| 4. Mr. Pintu Ghosh, Advocate |] |

ORDER

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

M/s Anil steels who is the petitioner/operational creditor filed this petition under section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 (in short I&BC, 2016) read with Rule 6 (1) of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating insolvency resolution process as against the respondent/ corporate debtor A.D Electro Steel Company Pvt. Ltd.

The operational creditor is engaged in business of manufacturing of alloy steels, plain and high carbon steel, SGI and graded casting etc. The operational creditor as per the purchase orders dated 29.10.2015, 21.12.2015 and 25.2.2016 for the purchase of Buffer Plunger Casting and Buffer Casting, supplied the same to the corporate debtor which would be valued for an amount of Rs. 56,94,977.00. In terms of the purchase orders operational creditor issued invoices against such supplies. The copies of the purchase orders produced and marked as Annexure II-D (page 48 to 50). The invoices issued against the supply of goods to the corporate debtor are produced and marked as Annexure II-E (page 51 to 57). The operational creditor alleged that the corporate debtor made payment of Rs 4,44,782/- against the invoice no. M-50 and after that made lumpsum payments of Rs. 10,00,000/-, Rs 5,00,000/-, Rs. 13,00,000/- and a cheque bearing No. 016246 dated 10.05.2016 for Rs. 20,00,000/- drawn on Bank of India. The said cheque was presented for clearing by the operational creditor but was returned unpaid with an endorsement "*Exceeds Arrangements*". The

operational creditor served a legal notice dated 15.06.2016 under section 138 of the Negotiable Instrument Act, to the corporate debtor. The corporate debtor failed to pay the amount pertaining to the said dishonoured cheque. The operational creditor filed a complaint before the Metropolitan Magistrate, Kanpur against the corporate debtor for realisation of the amount on the basis of dishonour of cheque.

Irrespective of notice under S. 138 of the Negotiable Instruments Act the corporate debtor failed to discharge the entire liability and thereby operational creditor issued demand notice in Form-3 under section 8(1) of the I&BC, 2016 demanding an amount of Rs. 25,36,087/-. In reply to the demand notice the corporate debtor raised untenable contentions and raised unlawful claims against the operational creditor. The dispute raised by the corporate debtor in the reply notice not at all amount to a bona fide dispute and raised for the sake of objecting the application filed under section 8 and 9 of Insolvency & Bankruptcy Code, 2016 contended by the operational creditor. Upon the said contentions, the operational creditor prays for initiating insolvency resolution process against the corporate debtor.

To substantiate the above said contentions the operational creditor produced copy of complaint filed under S. 138 of the Negotiable Instrument Act and marked as Annexure-II-C. A copy of the computation of default is produced and marked as Annexure II-B; a statement of bank account is produced and marked as Annexure III and produced the following documents for our consideration.

1) A copy of the Demand Notice in Form 3, Annexure-I, 2) The details of the transaction Annexure II-A, 3) Computation of working of Default Annexure II-B, 4) A copy of Complaint case filed by operational creditor Annexure II-C, 5) A copy of

complaint case filed by M/s Anil steels Annexure II-D, 6) A copy of invoices generated by Anil Steels and issued to A.D Electro Steel company Pvt. Ltd for purchase of Buffer Plunger and Buffer Casing Castings. Annexure- II-E, 7) A copy of letter issued by M/s Anil Steels (Operational Creditor) dated 03.03.2016 to A.D Electro Steel Company Private Limited for release of payments Annexure II-F, 8) A copy of letter dated 18/03/2016 issued by A.D Electro Steel Company Pvt. Ltd acknowledging the delay/due in payment by A.D Electro Steel Company Pvt. Ltd to M/s Anil Steels marked and annexed as Annexure II-G, 9) Copy of the cheque no. 016246 dated 10/05/2016 issued by A.D Electro Steel Company Pvt. Ltd in the favour of Anil Steels for Rs. 20,00,000/- in Annexure II-H, 10) A copy of the return memo dated 12/05/2016 and 09/06/2016 Annexure II-I, 11) A copy of reminder letter issued by M/s Anil Steels to A.D Electro Steel Company Pvt. Ltd for the payment of due amount of Rs. 24,50,195/- (Annexure II-J), 12) A copy of the legal notice dated 15/06/2017 under section 138 of the Negotiable Instruments Act served by M/s Anil Steels to A.D Electro Steel Company Pvt. Ltd (Annexure II-K), 13) A copy of the reply dated 28/06/2016 to the legal notice dated 15/6/2016 served by A.D Electro Steel Company Pvt. Ltd (Annexure- II-L), 14) A copy of the reply to the complainant dated 03/04/2017 filed by A.D Electro Steel Company Pvt. Ltd under section 138 of Negotiable Instrument Act (Annexure II-M), 15) A copy of the rejoinder dated 26/05/2017 filed by M/s Anil Steels (Annexure II-N), 16) A copy of the reply dated 15/07/2017 sent by A.D Electro Steel Company Pvt. Ltd to the demand notice dated 01/07/2017 (Annexure-O), 17) A copy of the ledger account (1st April 2016 to 6th July 2016) of M/s Anil Steels (Annexure II-P), 18) Certificate issued by Raman Aggarwal (Chartered Accountant) confirming and verifying a sum of Rs. 25,36,087 not paid by A.D Electro Steel Company Pvt. Ltd to Anil Steels (Annexure- II-Q), 19) A copy of Bank certificate issued by HDFC Bank confirming and verifying a sum of Rs.

25,36,087/- not paid by A.D Electro Steel Company Pvt. Ltd. to M/s Anil Steels (Annexure II-R), 20) A copy of statement of Bank account no. 02982320002841 maintained at HDFC Bank, Govind Nagar Branch, Kanpur- Uttar Pradesh by M/s Anil Steels for the period starting from 01st January , 2016 till 24th July, 2017. (Annexure-III).

The corporate debtor filed reply affidavit contending in brief is the following:

The petition is not maintainable under section 8(1) of the I&BC,2016 because it is incomplete. The operational creditor failed to produce English translations of the documents annexed to the petition. The contents narrated by the operational creditor in the petition is incomplete and therefore the petition is not maintainable. Since the respondent raised a dispute regarding the liability to make payment to the petitioner even prior to receipt of demand notice this Hon'ble Tribunal shall reject the petition. As per the terms of the purchase orders issued to the operational creditor the petitioner should have supplied the goods with Test Certificates and Guarantee Certificates of which the petitioner failed to comply and therefore there is breach of contract on the side of the petitioner. The petitioner failed to supply goods as per the specifications in the purchase orders issued by the respondent and therefore the respondent is not liable to pay the amount as demanded by the petitioner. In view of the non-supply of goods as per the specifications in the purchase orders a dispute arises for adjudication before appropriate authorities and therefore appointment of an interim resolution professional is not at all maintainable. Issuance of cheque for Rs. 20 lakhs don't amount to voluntary discharge of respondent's liability but issued keeping in view of the maintenance of cordial business relationships between the parties and also on the basis of a clear understanding between the

parties that the said cheques would be deposited subjected to the instruction of the respondent to that effect. The respondent however paid Rs. 13 lakhs through RTGS immediately after dishonour of cheque. The letter issued by the respondent through its advocates dated 28.06.2016 as well as letter dated 09.06.2016 raising disputes purposely did not produce by the petitioner before this Tribunal amounts to suppression of material facts. The contentions raised by the petitioner in the petition which are not admitted in the reply affidavit filed by the respondent or denied by the respondent. Upon the above said contentions, the respondent prays for rejecting the application under section 9(5) (ii).

Heard both sides. Upon hearing the argument and on perusal of the records the short point that arises for determination is whether the dispute raised by the respondent/corporate debtor comes under the definition of section 5 (6) of I&BC, 2016 or not.

Before going into the question it is significant to note here that the contentions raised against the non-production of English translation of certain documents and that some of the documents produced were not readable for want of legible copies are not sustainable at this juncture because petitioner as directed produced legible copies and English translation of the documents in Hindi.

Learned counsel for the petitioner/operational creditor submits that the respondent/corporate debtor was in receipt of the goods supplied without any protest at the time of supplying the goods and issued cheque promising to repay the amount due as per the invoices issued to the respondent. According to the learned counsel for the petitioner since the cheque presented for realisation of the money due as per supply of goods to the respondent was dishonoured a notice under section 138 of the Negotiable

Instrument Act has been issued to the respondent. A complaint under section 138 of the Act also has been filed before the criminal Court for realisation of the money due from the respondent (Annexure II-C).

The respondent main contention is that since the goods supplied to the respondent was not as per the terms stipulated in the purchase orders respondent is not liable for the payment of the amount as demanded. The learned counsel for the respondent highlighting the purchase orders and the invoice stressed an argument that as per the purchase orders (Annexure-C at p. 021, 023,024 is the English translation of purchase orders and Annexure II-E at page 051 to 057 is the invoices) what is ordered by the respondent is Buffer Plunger (wagon) Casting with Test Certificates and Guarantee Certificates along with the supply. As per the invoices referred by the learned counsel for the respondent (Annexure-II E) the description of goods read as "Rough Casting". Highlighting the above said disparity the counsel for the respondent submits that acceptance of goods by the respondent which was supplied by the petitioner not in terms of purchase orders amount to breach of contract and therefore whether there is breach is a question to be adjudicated by a proper legal forum and therefore this petition is not maintainable.

On a reading of the purchase orders and the invoices issued by the petitioner to the respondent it is understood that though there is some dissimilarity in regards description of items supplied to the respondent it has come out in evidence that the respondent received the goods without any protest. So also it has come out in evidence that cheque has been issued in terms of the invoices issued by the petitioner by accepting the goods received by the respondent.

The dates of events relating to the transaction between the petitioner and the respondent would throw light regarding the nature of disputes belatedly taken by the respondent. The purchase orders referred in the case in hand are dated 29.10.2015, 21.12.2015 and on 25.02.2016 (Annexure II-D). In pursuance of the purchase orders the petitioner supplied goods by issuing various invoices dated 09.02.2015, 23.12.2015 ,07.01.2016, 14.01.2016, 27.01.2016, 04.12.2016 and on 05.12.2016 respectively. As per the terms admittedly the respondent shall pay the amounts as shown in the invoices within 30 days of the receipt of the goods. The total amount due as per the invoices is Rs. 56,94,977/-. Out of that Rs. 1944782/- has paid by the respondent in three instalments. Rs. 4,44,782/- paid on 15.01.2016, 10 lakhs on 22.02.2016 and 5 lakhs on 22.02.2016. The balance outstanding as on 22.02.2016 was Rs.37,50,195/-. Out of that the respondent tendered Rs. 13 lakhs by way of instalments. (8 lakhs on 12.05.2016, 3 lakhs on 27.05.2016 and 2 lakhs on 3.06.2016). As on 03.06.2016 Rs. 24,50,195/- is remained to be paid to the petitioner as per the statement of account relied by the petitioner.

Admittedly on 10.05.2016 a cheque has been issued by the respondent to the petitioner for an amount of Rs. 20 lakhs and one another cheque for Rs. 4,50,195/-. Both cheques were presented for realisation of money to the bank. Both cheques were returned unpaid. This prompt the petitioner to issue notice under section 138 of the Negotiable Instruments Act (Annexure II-L) on 15.06.2016. It is pertinent to note here that on 3.03.2016 petitioner issued a letter to the respondent reminding him as to non-payment of balance outstanding in the name of the petitioner from the respondent (Annexure- II-F at P. 058) In reply to that letter dated 18.03.2016 respondent expressed it's inability

to pay the balance amount. It is good to read the relevant portion of the reply. It read as follows:-

"Owing to financial year ending, we are not getting our payment from our valued customers. This resulted in delay in your payment.

We are expecting to start receiving of payment from our client in April, 16 and we shall also clear your dues by April, 2016."

A reading of the above referred letter itself is self-explanatory. At an undisputed time, the respondent did not raise any challenge against the quality of goods or service. The respondent received the goods, accepted the goods without any protest and tendered payment by way of cheque. The above said conduct of the respondent shows that the dispute raised after service of notice under S.138 of Negotiable Instruments Act was raised with an ulterior motive.

It is significant to note that notice under section 138 was issued by the petitioner on 15.06.2016, probably before receiving that notice the above referred letter Annexure-II-G has been issued by the respondent to the petitioner expressing respondent's inability to pay for want of realisation of money from the retailer of the respondent. In the said circumstances, the contentions taken by the respondent that the supply of goods received by them is in violation of the terms of contract is found devoid of any merit. In the above said discussions we are of the considered view that the dispute raised on the side of the respondent is not at all bona fide .

Upon the above said discussions we are of a considered view is that the respondent raised the dispute in the instant case is for the sake of objection to see that petition of this nature is to be rejected. No doubts the

dispute raised by the respondent does not come under the purview of Section 5 (6) of Insolvency & Bankruptcy Code, 2016. Therefore, we hold that the objections raised by the respondent are unsustainable under law.

We found that the petition has been filed in the required format through a duly authorized person and the total amount claimed to be in default comes to Rs. 25,360,87. Admittedly there is no repayment of the unpaid debt by the respondent. Therefore, existence of default stands proved.

Being found that petitioner established existence of default the next question is whether the petition is complete. The petitioner also produced a certificate from the bank confirming that there is no payment of an unpaid debt by the respondent (Annexure-II-R at P. 083). The petitioner also complied section 9(3)(b) of Insolvency & Bankruptcy Code, 2016 (affidavit at Pg. 186). The petition being filed in compliance of section 8 and 9 of I&BC, 2016 and petitioner succeeded in establishing existence of default it appears to us that this petition is liable to be admitted.

The petitioner/operational creditor has also taken the consent of the proposed insolvency professional Mr. Anil Goel, AAA Insolvency Professional, LLPs, E-10 A, Kailash Colony, New Delhi 110048 having registration number – IBBI/IPA-001/IP-P00118/2017-18/10253 who has certified that there is no disciplinary proceedings pending against him and that he is duly empanelled with the IBBI. Therefore, we hereby appoint Mr. Anil Goel as Interim Resolution Professional.

In view of the above said discussions this petition for initiating insolvency resolution process is hereby admitted. Moratorium in terms of section 14 of the Code comes into effect. The interim resolution professional

is directed to take necessary steps as per sections 15, 17 and 18 and file his report within the statutory period.

Copy of the order be sent to both the parties.

List the matter on 22/09/2017 for progress report.

Sd/- 7/9/17

(Vijai Pratap Singh)
Member (Judicial)

Sd/- 7/9/17

(Jinan K.R.)
Member (Judicial)

Signed on this, the 7th day of September, 2017