

16.

BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD

C.P. (I.B) No. 20/9/NCLT/AHM/2017



Coram:

Present: Hon'ble Mr. BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 24.05.2017

Name of the Company: R.L. Steel & Energy Ltd.
V/s.
Shyam Industries Ltd.

Section of the Companies Act: Section 9 of the Insolvency and Bankruptcy Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.	SHASHVATA SHUKLA FOR MR. P.P. MAJUMDAR	ADVOCATE	RESPONDENT	
2.	MS. NIKITA MEHTA	ADVOCATE	PETITIONER	

ORDER

Learned Advocate Ms. Niketa Mehta present for Operational Creditor/ Petitioner.
Learned Advocate Mr. Shashvata Shukla present for Corporate Debtor/ Respondent.

Order pronounced in open Court. Vide separate sheet.

After order is pronounced Learned Counsel for Corporate Debtor requested to stay the operation of the order at least for a period of one month. There are no grounds to consider the request of the counsel for the Corporate Debtor.


BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

Dated this the 24th day of May, 2017.

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AHMEDABAD BENCH
AHMEDABAD**

C.P. No. (IB) 20/9/NCLT/AHM/2017

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER JUDICIAL

Date: 24th day of May, 2017

In the matter of:

R.L. Steel & Energy Limited
Registered Office at
C-1/A, Opposite to Arya Samaj
Mandir, Nizammuddin (East).
Mathura Road,
NEW DELHI-11013

: Petitioner.
Operational Creditor/

Versus

Shyam Industries Limited.
Registered Office at
4th Floor, Madhukunj,
Rajmahal Road,
Vadodara-390001
Gujarat

Respondent/
: Corporate Debtor.

Appearance:

Shri Rahul Totala, i/b Ms. Nikita Mehta, learned Advocate for
Petitioner Operational Creditor.

Shri Hardik Karathiya, i/b Shri Panthil Majmudar, learned
Advocate for Respondent Corporate Debtor.

FINAL ORDER

Pronounced on 24th day of May, 2017

1. M/s. R.L. Steel & Energy Limited filed this Petition under
Section 9 of The Insolvency and Bankruptcy Code, 2016
[hereinafter referred to as "the Code"] read with Rule 6 of The

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [hereinafter referred to as "the Adjudication Rules"].

2. The claim of the Petitioner is that goods were supplied to the Corporate Debtor, namely Shyam Industries Limited as per Invoices dated 28.02.2013; 5.3.2013; 5.3.2013 and 20.3.2013. According to the Petitioner, an amount of Rs. 33,35,410/- which comprises of Rs. 19,37,025/- towards Unpaid Invoices; and Rs. 13,98,391/- towards aggregate interest payable on each of the Unpaid Invoices at the rate of 18% per cent per annum from the date of receipt of the Unpaid Invoices till 15th April, 2017. Petitioner issued first Demand Notice dated 15.1.2017 to the Corporate Debtor demanding payment of Rs. 26,74,481/- towards unpaid amount on the Invoices and Rs. 17,96,816/- towards interest thereon along with the copies of Invoices. On 19th January, 2017 Corporate Debtor addressed a letter stating that as per the discussions with Mr. Sushil Singh, General Manager between 17th January, 2017 to 19th January, 2017, the Settlement Agreement between Petitioner and Corporate Debtor, the settlement agreement was reached on 17th January, 2017. It is also stated in the Reply Notice that as per the account books of the Corporate Debtor, outstanding due to the Petitioner is Rs. 24,00,510/-. It is also mentioned in that letter that they are sending an amount of Rs. 3,20,000/- by way of RTGS to the Petitioner and the balance is only Rs. 20,80,510/-. It is further stated that the balance outstanding amount was divided into 25 cheques of Rs. 80,000/- each and the last cheque which is of Rs. 80,510/- was issued. It is also mentioned that any discrepancy in the outstanding balance will be resolved before 31st March, 2018. Corporate Debtor also enclosed the Settlement Agreement which is not signed by anybody on behalf of the Petitioner Company.



3. Again, in reply to the notice dated 15.1.2017, Corporate Debtor sent another notice on 7.2.2017.
4. On 17.2.2017, Petitioner got issued another notice by way of Reply to the 19th January 2017's letter of the Corporate Debtor and the reply notice dated 7th February, 2017 of the Corporate Debtor. In the said letter, the Petitioner denied the alleged Agreement dated 17th January, 2017. It is also stated in that notice that the so-called alleged Settlement Agreement dated 17th January, 2017 is not signed by anybody on behalf of the Petitioner Company. Petitioner also denied that Mr. Sushil Singh, representative of the Petitioner Company has not entered into any alleged Settlement Agreement with the Corporate Debtor. It is also stated in the notice dated 17th February, 2017 that Corporate Debtor admitted the liability to make payment towards the outstanding dues in respect of the Invoices already raised. In the said Notice Petitioner demanded the Corporate Debtor to pay Rs. 20,97,025/- along with interest at 18% which came to Rs. 14,46,441/- totalling to Rs. 35,43,466/-.
5. Thereafter, again on 18.2.2017, Petitioner issued another Demand Notice attaching copy of Invoice which is in Form No.4 of the Adjudicating Rules. In reply to the said Notice, the Corporate Debtor issued Reply dated 23rd March, 2017 reiterating about the Settlement Agreement dated 17th January, 2017.
6. This Petition has been filed before this Adjudicating Authority on 11th May, 2017. The matter was listed before this Adjudicating Authority for the first time on 12.5.2017. This Adjudicating Authority directed the Petitioner to file proof of service of demand notice and to serve notice of date of hearing. The matter was again listed on 18.5.2017. Petitioner filed proof of despatch of demand notice by Speed Post. Proof of service of



demand notice by E-mail is filed. The Corporate Debtor appeared through his learned counsel and filed Reply. This Adjudicating Authority heard the arguments of the learned counsel for the Petitioner and learned counsel for the Corporate Debtor.

7. In order to pass an order under Section 9(5) of the Code, the Adjudicating Authority shall necessarily give a finding on the following aspects;

- i. Whether the claim of Petitioner is an 'operational debt or not;
- ii. Whether Petitioner is 'Operational Creditor';
- iii. Where there is occurrence of default;
- iv. Whether Operational Creditor delivered Demand Notice on the Corporate Debtor;
- v. Whether there is existence of dispute and record of pendency of suit or arbitration proceedings; and
- vi. Whether there is compliance of sub-sections (1) to (4) of Section 9 of the Code.

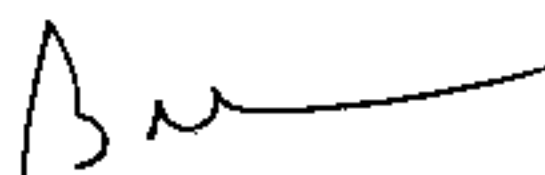
8. A perusal of the notices clearly goes to show that Petitioner supplied goods to the Corporate Debtor. Therefore, the claim of the Petitioner is an operational debt.

9. Since the operational debt is due to the Petitioner from the Corporate Debtor, Petitioner is an 'Operational Creditor'. A perusal of the Invoices, details of transactions, Certificate issued by Punjab National Bank on 15.4.2017; Statement of Account of the Petitioner Company; the Reply Notice dated 19th January, 2017 issued by the Corporate Debtor to the



Petitioner/Operational Creditor clinchingly establishes the occurrence of default.

10. Petitioner issued the first Demand Notice on 15.1.2017 claiming Rs. 26,74,481.75 ps. towards Unpaid Invoices and Rs. 17,96,816.40 ps. towards interest. The Reply to the said notice was issued by the Corporate Debtor on 7.2.2017. Even before 7.2.2017, a letter was addressed by the Corporate Debtor to the Operational Creditor on 19th January, 2017 wherein Corporate Debtor put forward the Settlement Agreement between the Operational Creditor and the Corporate Debtor. In the said letter, Corporate Debtor pleaded that outstanding due is Rs. 24,00,510/- only. Corporate Debtor also stated that they paid Rs. 3,20,000/- by way of RTGS on 19.2.2017 to the Petitioner.
11. In this context, it is necessary to refer to the limitation aspect with respect to the 'operational debt'. The Invoices, in respect of which the amount is claimed, are of the year 2013. However, in the letter dated 19th January, 2017, Shyam Industries Limited (Corporate Debtor) admitted the liability as Rs. 24,00,510/- and made payment of Rs. 3,20,000/- by way of RTGS and also issued cheques for the balance amount. This can be treated as confirmation of balance. Therefore, the operational debt claimed is within limitation period.
12. Thereafter, on 17.2.2017 Petitioner issued a Reply to the letter dated 19th January, 2017 and the Reply dated 7.2.2017 to the Demand Notice dated 15.1.2017 wherein the Petitioner denied the Settlement Agreement. In the Notice dated 17.2.2017, Petitioner demanded Rs. 20,97,025/- along with interest at 18% p.a. amounting to Rs. 14,46,441/- totalling to Rs. 35,43,466/-. Thereafter on 18.2.2017 another Demand Notice was issued along with Invoices in Form-4 as provided by



Rule 5(1)(b) of the Adjudicating Rules. According to the Petitioner, it was received by the Corporate Debtor on 20th February, 2017. Petitioner filed copy of the Demand Notice sent by Mail to the Corporate Debtor on 18.2.2017. Corporate Debtor gave Reply to the Demand Notice dated 18.2.2017 only on 23rd March, 2017. Here, it is pertinent to point out that Corporate Debtor was supposed to have given Reply to the Demand Notice dated 18.2.2017 within 10 days from the date of receipt of the notice as required by Section 8(2) of the Insolvency Code stating about existence of dispute, if any, and the record of pendency of any suit or arbitration proceedings filed before the date of receipt such notice or invoice in relation to such dispute.

13. In the case on hand, Corporate Debtor did not issue Reply within 10 days, because Corporate Debtor issued reply notice only on 23rd March, 2017. Demand Notice dated 18.2.2017 was sent by Speed Post and as well as by e-Mail on 18.2.2017 itself. Therefore, the notice dated 23rd March, 2017 issued by the Corporate Debtor was not within 10 days from the receipt of Demand Notice dated 18.2.2017.

14. In any of the Reply Notices so far issued by the Corporate Debtor, the Corporate Debtor had not referred to pendency of any suit or arbitration proceedings filed before the receipt of the first Demand Notice dated 15.1.2017 or second Demand Notice dated 18.2.2017. But Corporate Debtor raised a dispute regarding the amount claimed and put forward the Settlement Agreement dated 17th January, 2017. A perusal of the copy of the Settlement Agreement filed along with the Petition discloses that it is not signed by any one on behalf of the Petitioner Company. Moreover, Petitioner Company in its Notice dated 17th February, 2017 denied the alleged Settlement Agreement.

It is also stated that no such Settlement Agreement was entered into.

15. It is contended by the learned Counsel for the Corporate Debtor that the very acceptance of RTGS amount and the acceptance of the cheque amounts to acting as per the Settlement Agreement, and when there is no breach of the Settlement Agreement, there is no occurrence of default.

16. No doubt, it is a dispute raised by the Corporate Debtor. But such dispute has to be raised in a suit or arbitration proceedings initiated by the Corporate Debtor or in a suit or arbitration proceedings initiated by the Operational Creditor. Learned Counsel appearing for the Corporate Debtor relied upon the following two decisions on the aspect of the offer and acceptance in respect of the alleged Settlement Agreement dated 19th January, 2017;

1. *Hindusthan Co-Operative Insurance Society Ltd., Vs. Shyam Sundar Das Praharaj Bidyadhar and Ors.*, reported in AIR 1952 Cal. 691;
2. *Bharat Sanchar Nigam Limited and Another Vs. BPL Mobile Cellular Limited and Others*, reported in (2008) 13 Supreme Court Cases 597.

In the decision in the case of *Hindusthan Co-Operative Insurance Society Ltd.*, (Supra), there is a clear indication on the part of the deceased saying "take the cheque if you accept the proposal, or otherwise return it to me." In the case on hand, in the alleged Settlement Agreement that is not signed by the Petitioner there is no mention in the offer of part payment was made only if the other terms in the deed are accepted.

Moreover, Petitioner promptly denied the Settlement Agreement. Therefore, on facts, the said decision is not applicable to this case. The decision in the case of *Bharat Sanchar Nigam Limited and Another (Supra)* relates to Section 8 of the Contract Act. It clarifies that Section 8 is based on the principle that if an offer is made subject to a condition, the offeree cannot accept benefit under an offer without accepting the condition. It is further clarified that the offeree cannot take the attitude "I shall accept the benefit but reject the condition". First of all in the alleged Settlement Agreement, there is no conditional offer. As already said, the Settlement Agreement is not signed by the Petitioner, more so denied by the Petitioner. Therefore, the above said decision is also not applicable to the facts of the case.

- 16.1. In this context, it is also necessary to refer to certain statements made in the Reply. On 8.3.2014, Petitioner issued a Notice for winding up and it was replied by the Corporate Debtor on 16.4.2014. It is stated in the Reply that meetings were held on 7.4.2015 and 5.5.2015 between Operational Creditor and Corporate Debtor and the copy of the Minutes of the Meetings are filed along with Reply. Corporate Debtor also filed the cheque for Rs. 10,00,000/- issued by it on 10.5.2015. It is a fact that all those meetings, even according to the Corporate Debtor were before the Settlement Agreement was entered into on 17th January, 2017 (Refer to the notice of the Corporate Debtor dated 19th January, 2017) and therefore there is no need to consider the Minutes of the Meetings dated 7.4.2015 and 5.5.2015. Those Meetings are held for the purpose of entering into an understanding between the Petitioner and Corporate Debtor for repayment of amounts outstanding as per Invoices.



17. Coming to the legal aspect, the question is whether the alleged Settlement Agreement dated 17th January, 2017 which is not signed by any one on behalf of the Petitioner/Operational Creditor can be treated as an Agreement or not. The argument of the learned Counsel for the Corporate Debtor, relying upon the decisions referred to above is that when once the Operational Creditor accepted the payment of Rs. 3,20,000/- and also encashed some of the cheques, it must be deemed that the Operational Creditor accepted the offer and it becomes an Agreement, and unless breach of such Agreement is there, it cannot be said that there is an occurrence of default.
18. The claim of the Operational Creditor is based on Invoices. No doubt, the Operational Creditor is relying upon the confirmation of balance made by the Corporate Debtor in the Notice dated 19th January, 2017 and the RTGS payment of Rs. 3,20,000/-. But Operational Creditor is denying the entering into of any Settlement Agreement. Moreover, the Settlement Agreement is not signed by the Operational Creditor. It is not a case where one of the parties to whom offer is made acted upon a part of it and kept silent. In this case, Petitioner, although accepted payments, denied the Settlement Agreement by way of Notice dated 17.2.2017. Even such dispute relating to the Agreement has to be raised in a suit or arbitration proceeding before the receipt of the Demand Notice. This Petition is based upon the 2nd Demand Notice dated 18.2.2017 which is issued in Form-4 of the Adjudication Rules, enclosing the Invoices. Therefore, the plea of the Corporate Debtor that there was a breach of the Settlement Agreement dated 17th January, 2017, which is not signed by the Operational Creditor, cannot be taken into consideration for coming to a conclusion that there is no occurrence of default, as contemplated under Section 8(1) of the Code. In the case on hand, the default is non-payment of debt either wholly or in part as per the Invoices. The

Settlement Agreement put forward by the Corporate Debtor is denied by the Operational Creditor. Therefore, it cannot be said that no default of debt occurred and the debt has not become due and payable. Therefore, the findings of this Adjudicating Authority is, there is occurrence of default in payment of operational debt either in whole or in part. No notice was issued by the Corporate Debtor within 10 days from the date of receipt of Demand Notice dated 18th February, 2017.

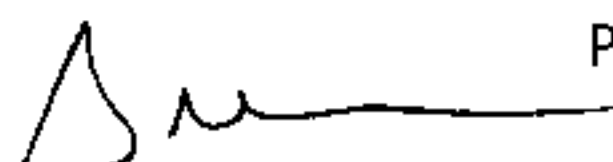
19. Even assuming that the Reply dated 23.3.2017 is a reply within 10 days from the date of receipt of the Notice, there is no reference to the pendency of any suit or arbitration proceedings filed before the receipt of the Demand Notice or the Invoices attached to the Demand Notice in relation to the dispute.

20. The Operational Creditor further complied with Sections 19(1) to (3) (a) (b) of the Code. In the case on hand, Operational Creditor did not propose a Resolution Professional to act as an Interim Resolution Professional as required by sub-section (4) of Section 9 of the Code. Here, it is pertinent to refer to sub-section (3) of Section 16 of the Code. It says, in an application for corporate insolvency resolution process filed by an operational creditor, if there is no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board, namely Insolvency and Bankruptcy Board of India, for the recommendation of an insolvency professional who may act as an interim resolution professional within ten days from the date of receipt of the reference. Therefore, on the ground that Operational Creditor did not comply with sub-section (4) of Section 9 of the Code, the Petition cannot be rejected. This Adjudicating Authority shall follow the procedure laid down under sub-section (3) of Section 16 of the Code, and the Insolvency and Bankruptcy Board of India shall follow sub-section (4) of Section 16 of the Code. Therefore, this Adjudicating Authority, by this

order passed under sub-section (5) of Section 9 of the Code, is admitting this Petition. This Adjudicating Authority is also of the view that it is necessary to make a Reference to the Insolvency and Bankruptcy Board of India established under the Code to recommend the name of an Insolvency Professional, against whom no disciplinary proceedings are pending, to this Adjudicating Authority, within ten (10) days from the date of receipt of the Reference.

21. Section 13 of the Code enjoins upon the Adjudicating Authority to exercise its discretion to pass an order to declare a moratorium for the purposes referred to in Section 14, to cause a public announcement of the initiation of corporate insolvency resolution and call for submission of claims as provided under Section 15 of the Code. Sub-section (2) of Section 13 says that public announcement shall be made immediately after the appointment of Interim Resolution Professional. In the case on hand, simultaneous with the admission order, this Adjudicating Authority is not going to appoint Interim Resolution Professional because the Applicant did not propose the name of Interim Resolution Professional. But, this Adjudicating Authority is going to appoint Interim Resolution Professional after the same is recommended by the Insolvency and Bankruptcy Board of India under Section 16(4) of the Code.
22. (a) In view of the above discussion, the Petition is admitted.
- (b) This Adjudicating Authority hereby order reference to Insolvency and Bankruptcy Board of India to recommend the name of Insolvency Professional against whom no disciplinary proceedings are pending to this Authority within 10 (Ten) days from the date of receipt of reference.


- (c) This Adjudicating Authority hereby declares moratorium under Section 13(1)(a) prohibiting the following as laid down in Section 14 of the Code;
- i. 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;
 - ii. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - iii. 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
 - iv. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (d) However, the supply of goods and essential services to the corporate debtor shall not be terminated or suspended or interrupted during moratorium period. The moratorium order in respect of (i), (ii), (iii) and (iv) above shall not apply to the transactions notified by the Central Government.
23. This order of moratorium shall be in force from the date of order till the completion of Corporate Insolvency Resolution



Process subject to the Proviso under sub-section (4) of Section 14. This Adjudicating Authority shall give separate order for public announcement at the time of appointment of an Interim Resolution Professional after the proposal is received from the Insolvency and Bankruptcy Board of India.

24. This Petition is ordered accordingly.

25. Communicate a copy of this order to Operational Creditor and Corporate Debtor. List the matter after receipt of proposal from the Insolvency and Bankruptcy Board of India.


BIKKI RAVEENDRA BABU
ADJUDICATING AUTHORITY
MEMBER JUDICIAL

*Pronounced by me in open court on
this the 24th day of May, 2017.*

RmR