

**NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
5, ESPLANADE ROW (WEST)
KOLKATA 700001**

January 12, 2018

NOTE

It has been pointed out by the Ld. Advocate that there is an error in the Tribunal's Order dated 09.01.2018 to the extent that on one hand, Registry has been directed to make a reference to the Insolvency & Bankruptcy Board of India for the appointment of an Interim Resolution Professional as per section 16(4) of I&B, Code and on the other hand, Shri Arun Kumar Gupta has been appointed as the Interim Resolution Professional. Accordingly, under Rule 154(1) of the National Company Law Tribunal Rules, 2016, we are rectifying the order dated 9th January, 2018 and the sentence "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 forthwith" **is hereby deleted**. Amended Order is enclosed herewith. The Office is directed to upload the Amended Order.

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(Jinan K.R.)
Member(J)

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(V. P. Singh)
Member (J)

2/1/18

In the National Company Law Tribunal¹
Kolkata Bench
Kolkata

CP (IB) No.513/KB/2017

In the matter of:

Maldar Barrels (P) Ltd.

.....Operational Creditor

-Versus-

Pearson Drums & Barrels(P) Ltd.

.....Corporate Debtor

Order Delivered on: 9th January 2018

Coram:

V. P.Singh, Member (J)

Jinan KR, Member (J)

Mr Ratanko Banerjee, Sr. Advocate,} For the Operational Creditors

Mr Mayur Khanderparkar, Advocate }

Mr Rishabh Jaisawl, Advocate }

Ms. Labanyasree Sinha, Advocate }

Mr Jyotirmoy Bagchi, CFO } For the Corporate Debtor

Mr A.K. Upadhyay, Advocate }

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ORDER

Per Se: 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 Adjudicating Authority Rules, 2016) for initiation of corporate insolvency process against corporate debtor, Pearson Drums & Barrels (P)Ltd.

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

The applicant operational creditor is Maldar Barrels (P) Ltd. whose identification No. is U28129MH1986PTC039258 and having its registered office at Maharashtra 410208. The Corporate debtor is Pearson Drums & Barrels Private Ltd. whose identification No. Is U28992WB1989PTC046520 having its registered office at Kolkata. The petitioner is engaged in the business of manufacturing and trading of metal and plastic barrels and drums and trading of iron and steel products, and in the usual course of business, the corporate debtor approached the operational creditor for the purchase of C.R Coils. The petitioner had supplied the goods to the corporate debtor and had raised invoices upon the corporate debtor from time to time. True copies of the invoices are annexed and marked as Annexure 'B'.

3. The petitioner has stated that the Corporate Debtor made default in the payment of Rs.8,82,11,723(Rupees Eight Crores Eighty-Two Lakhs Eleven Thousand Seven Hundred Twenty Three only) inclusive of interest @21% p.a

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as on August 09, 2017. All the details of the amount in default and dates on which default occurred is marked and annexed as Annexure-'A'. The petitioner has further stated that the corporate debtor has to make payment to the petitioner creditor. Pursuant to the said purchase order/contract the petitioner had supplied the goods to the Corporate Debtor worth approx. Rs.2,40,08,624/- (Rupees Two Crores Forty Lakhs Eight Thousand Six Hundred Twenty-four only) and initially the respondent corporate debtor was making part payment of the said invoices for a sum of Rs. 20,04,79,817 (Rupees Twenty Crores Four Lakhs Seventynine Thousands Eight hundred Seventeen only) wherein the last of such part payments, being an aggregate sum of Rs.27,50,000/- (Rupees Twentyseven Lakhs Fifty Thousands only) was received by the petitioner between April and July 2017, leaving a principal sum of Rs.4,75,28,807/- (Rupees Four Crores Seventy-five Lakhs Twenty-eight Thousands Eight Hundred Seven only) as outstanding dues payable to the petitioner. The petitioner has also issued the VAT confirmation certificate to the corporate debtor in respect of all the goods supplied to the Corporate Debtor, and the corporate debtor has also claimed CENVAT (Credit of Excise Duty) and VAT set off on the basis of the VAT Confirmation Certificate on entire amount/value of the goods supplied by the petitioner and to which the corporate debtor has never sought any reversal /variation of the CENVAT credit of Excise Duty and VAT Set off claimed by the Corporate Debtor. True copies of the VAT Confirmation Certificates issued by the Operational Creditor to the Corporate Debtor for the Years 2010-11,2011-12,2012-13 and 2013-14 are marked as Annexure 'C'.

4. The petitioner has further stated that sometimes in October 2015, the corporate Debtor had furnished duly stamped, and signed copies of petitioner's ledger account maintained in the books of corporate debtor for the Financial Year April 2013 to March 2014 and April 2014 to March 2015 and it appeared from the said

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ledger copies submitted by the corporate Debtor, that two wrongful and unilateral debit entries were made by the Corporate Debtor. The fact of such wrongful debit entries upon pointing by the petitioner/applicant/operational creditor was assured to be rectified. True copies of the ledger are marked as Annexure-'D'.

5. The petitioner has further stated that by way of an e-mail dated 14th December 2015, the petitioner sent to the corporate debtor a detailed statement of accounts for the period 2010-11 up to November 30, 2015, pertaining to the sale and supply of the goods to the corporate debtor and the statement of accounts was received and accepted by the corporate debtor without any protest/ demur. True copy of the email dated December 14, 2015, along with its attachments is marked as Annexure 'E'. The petitioner has further stated that the corporate debtor did not pay the outstanding dues in spite of receiving demand notice dated 09/08/2017. A copy of the demand notice is annexed with the application as Annexure L. The petitioner has stated that total outstanding dues in the notice were Rs.8,82,11,723/- (Rupees Eight Crores Eightytwo thousands eleven thousand Seven hundred twenty-three only). A copy of the statement of account from Bank/Financial Institutions showing the due is annexed with the application and marked as Annexure N. 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.

6. Petitioner has also filed the authorisation letter which shows that the petitioner company by its resolution dated 02/08/2017 had authorized Mr Haresh J Dharmani, Director to institute an application of this nature. Petitioner has further stated in the affidavit that corporate debtor has failed to bring to the notice of the applicant an existence of a dispute or the pendency of a suit or arbitration proceeding filed before the service of the demand notice.

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7. The petitioner has delivered demand notice of unpaid operational debt/copy of Invoices on 09th 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-'L'. Further, the petitioner has enclosed the proof of service of Demand Notice vide Annexure-'L', which indicates that the demand notice was duly served upon Corporate Debtor on 11.08.2017 vide Track Consignment Report which is on page 94 of the petition.
8. Petitioner 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 petitioner has further stated in the affidavit that corporate debtor has failed to bring to the notice of the operational creditor an existence of a dispute or the pendency of the suit or arbitration proceedings filed before the service of the demand notice. Petitioner has further alleged that even ten days after the date of delivery of the demand notice, he has not received any payment or notice of a dispute regarding the pending amount from the corporate debtor. Petitioner also proposes one insolvency professional Sri. Arun Kumar Gupta for appointing as Insolvency Resolution Professional, along with Form 2. Upon the above said contention applicant prays for admission of the application under section 9 of I&B, Code.
9. The corporate debtor has filed reply contending, in brief, is the following:-

The Petitioner has filed reply wherein it has been stated that it had supplied some material during the period commencing from 14.09.2010-05.02.2014 and the corporate debtor had discharged all of its dues payable to the operational creditor against the supply of the material. Now the operational Creditor has claimed certain amounts purported to be dues

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against principal outstanding together with interest for the delayed receipt of payment against supply and has approached this Hon'ble Tribunal for a declaration of the corporate Debtor as Insolvent and Bankrupt.

10. The corporate debtor also stated that the Petitioner had not submitted any VAT audit report in form 704 prescribed by MVAT Act, 2002 and more particularly declaration in Format J, thus making it uncertain whether set off credit is available to the corporate debtor for such collection of the VAT. The corporate debtor also stated that list of invoices was erroneous and therefore, not tenable. The corporate debtor lastly, submitted that the petitioner has submitted forged tax invoices and thus has committed a criminal offence which is subject to serious legal action.

11. Heard arguments of both the parties at length. On the side of one Mr Jyotirmoy Begchi, CFO of the corporate debtor appeared and argued the case for and on behalf of the corporate debtor. Upon hearing the argument and considering the contentions and on perusal of the records the point that arises for consideration is:

Whether the corporate debtor succeeded in proving discharge of outstanding dues as alleged? If not whether there exists a genuine dispute as alleged by the corporate debtor as alleged?

12. The petitioner has filed this petition under Sec.9 of the I & B Code, 2016. Here, in this case, the ingredients as provided under section 9(5) (a to c) are satisfied by the petitioner for admission of this petition under section 9 of I&B Code. The Form 2 contains written communication from the proposed insolvency professional. The Insolvency Professional has given a declaration that no disciplinary

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proceeding is pending against him. Therefore, requirement under section 9(5)(e) of I&B Code also complied in the case in hand.

13. Before going into details of objections stressed on the side of the corporate debtor at the time of argument, it is good to read the reply notice issued by the corporate debtor to the petitioner. It read as follows:-

"We receive your demand notice dated 09.09.2017 (from now on referred as the, "said notice") wherein you have made certain demands which are finalised in our view.

Prima facie, we say that your demand is far-fetched and is not based on the reality. You have relied on fabricated documents.

We say that you have submitted documents which are manufactured at your end and which can be proved before adjudicating authority at the appropriate time. We say that by your own admission your dues are much lesser than the amount demanded for.

We say that you have submitted documents which contradict your claim.

We say that you have established your propensity to submit manufactured and falsified documents to us, your banker and other identities, we shall submit relevant documents to adjudicating authority at the appropriate time."

14. In the above-referred reply notice, the corporate debtor did not mention the existence of any genuine dispute. It is a vague reply to the demand notice received by the corporate debtor. However, filed reply affidavit raising several disputes. But none of it supported with proof. Most of the contentions raised by the corporate debtor doesn't sound worthy of consideration at all. The corporate debtor contended that claim of the petitioner is based on forged tax invoices and also contends that petitioner habitually exercises fraudulent practices and had defrauded its bank and bank-initiated criminal prosecution against the petitioner and produced a copy of publication marked as **Annexure A-5** for showing that petitioner is a declared willful defaulter and Bank of Baroda issued the above-said publication.

15. Learned C.F.O mainly attempted to prove that petitioner approached this Adjudicating Authority with malafide intention to grab money from the corporate debtor and not attempted to substantiate its claim that any pre-

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existing disputes are in existence. No supporting proof produced to prove that corporate debtor had discharged all of its dues payable to the petitioner as alleged in the para 7 of the reply. Nothing produced to prove that claim is barred by limitation as alleged in para 5 of the reply. The attempt of the Ld. CFO was that claim made by the petitioner is against specific bills which are more than three years old and therefore, time-barred as per provisions of the Limitation Act, 1962. As per the averment in the reply affidavit, the corporate debtor raised no serious disputes against the statement of account issued to it on 20.08.2017 against the invoices raised by the petitioner showing the default of debt due in the instant case. The corporate debtor has stated in the reply that the statement so made though matches with the record available to the corporate debtor but contradicts with the claims made earlier on 26.07.2017.

16. It has come out in evidence that petitioner has also issued a demand notice on 26.07.2017 (**Exhibit J at page 85**) claiming the very same amount with 21% interest. To the said demand notice the corporate debtor issued reply which was produced by the petitioner. It is **Exhibit K on page 90**. In the said reply also no series dispute regarding the demand made by the petitioner seems to have raised. In the said reply also corporate debtor wish to challenge the very existence of the petitioner. It contends that petitioner itself is at the virtue of insolvency and bankruptcy, that petitioner is making a false claim, that petitioner is quoting the statutes for threatening the corporate debtor with malafide intention to make an unlawful monetary claim. However to support the said contentions that claim preferred by the petitioner is false no supporting evidence. On the other hand, the petitioner's ledger account copy maintained in the books of the corporate debtor **Exhibit D**, and **Exhibit F** the corporate debtor expressly acknowledged the debt claimed by the petitioner. Exhibit F is a statement of account for the financial

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year April 2015 to March 2016. The above-said acknowledgement itself disprove the contention of the corporate debtor that this claim is barred by Limitation. Moreover, the law regarding the application of law of Limitation in an application like in hand has been settled. Hon'ble NCALT has held in **Neelkanth Township and Construction Pvt.Ltd Vs. Urban Infrastructure Trustees Ltd (CA (AT) (Insolvency) No. 44 of 2017**, that " *if there is a debt which includes interest and there is the default of debt and having a continuous course of action, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.*" In the case, in hand, the last part payment seen paid by the corporate debtor in the month of July, 2017. Thus the plea of limitation is found devoid of any merit.

17. Whether the petitioner is an insolvent and a willful defaulter to is a bank is not a factor to be considered by this Adjudicating Authority. One another contention on the side of the corporate debtor is that petitioner failed to submit VAT audit report to claim set off by the corporate debtor. By filing a supplementary affidavit on 13.11.17, the petitioner produced proof to prove that corporate debtor availed VAT set off for the period between 1.04.2010 and 31.03.2014. The reply along with a copy of Form E-704, given to the petitioner dated 29.11.17 from the Joint Commissioner of State Tax (GST ADM), Maharashtra proves the contention on the side of the petitioner that corporate debtor availed st off from the said authority for the purchase of goods made from the Petitioner. It is an indication that the goods which were delivered to the corporate debtor and the demand made by the petitioner is genuine and those entire goods purchased by the corporate debtor was utilized by it. Raising of quality issue and the alleged return of goods and sending debit notice are all factors seems to have raised in the reply for the sake of objection. No materials are available to prove that any further investigation regarding the demand made is necessitated or that the dispute

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raised is genuine. What is meant by existence of dispute to be established on the side of the Corporate Debtor in a case of this nature is dealt with in **Mobilox Innovations Private Limited Vs Kirusa Software Private Limited** (C.A.No/405 of 2017 SC) by the Hon'ble Supreme Court. It is significant to read Para 40 of the said Judgement. It reads as follows:

"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 notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that 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 that the "dispute" is not a patently feeble legal argument or an assertion of a 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 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."

18. In the case in hand learned C.F.O failed to convince us that a dispute regarding plea of discharge is true or that the dispute raised in the reply is genuine which require further consideration as held in the above-cited judgment of Hon'ble Supreme court.

19. In the present case, the Respondent-Corporate debtor not at all succeeded in proving the existence of a dispute regarding the supply of goods

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received by him whereas corporate debtor committed default by not making payment of outstanding dues along with interest to the operational creditor.

20. The above-said discussion leads to a conclusion that the objection raised by the corporate debtor is mere objection raising a dispute for the sake of dispute and unrelated to clause (a) or (b) or (c) of sub-section 6 of section 5 of the 'I & B Code'. It appears to us that raising a dispute in the reply is for the sake of dispute and is vague and motivated to evade the liability.

21. Given the above-said discussion, we have no hesitation to hold that this petition deserves admission under section 9 of I&B, Code. ✓

In the result we admit 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 judgment, 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.

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- (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 the date of passing of the order till the completion of the corporate insolvency resolution process as prescribed under section 12 of the Code.
- (v) That Shri. Arun Kumar Gupta referred in Form 2 is hereby appointed as Interim Resolution Professional ✓
- (vi) That this Bench hereby directs the IRP to cause public announcement of the corporate insolvency resolution process as specified under section 13 (b) of the Code. ✓
- (vii) That moratorium is declared for the purposes referred to under 14 of the IBC Code.

Amended
12/1/18
12/1/18

~~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 forth with.~~

List it on 29.01.2018.

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

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(V.P.SINGH)

Member (Judicial)

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(JINAN.K.R)

Member (Judicial)

Signed on 9th day of January, 2018.

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