

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

CP (IB) No.18/BB/2017

UNDER SECTION 9 OF THE (I&B) CODE, 2016

IN THE MATTER OF M/s.. Z-TRONICS INFRATEL PRIVATE LIMITED
AND
M/s. WIPRO ENTERPRISES PRIVATE LIMITED

Order delivered on 5th January, 2018

Coram: Hon'ble Shri Ratakonda Murali, Member (Judicial)
Hon'ble Shri Ashok Kumar Mishra, Member (Technical)

For the Petitioner : S/Shri Harsha H.M. & Chandrashekar S., Advocates

For the Respondent : M/s. SPJ Legal, Advocates.

BETWEEN :

M/s. Z-Tronics Infratel Pvt. Ltd.,
2,3, Malik Compound,
Opp. M.K. Studio, Chandivali Sakinaka
Andheri East,
Mumbai – 400 072, Maharashtra.

...

Petitioner

AND

M/s. Wipro Enterprises Pvt. Ltd.,
'C' Block, CCLG Division,
Doddakannelli, Sarjapur Road,
Bangalore – 560 035.

...

Respondent

ORDER

Per: Hon'ble Shri Ratakonda Murali, Member (Judicial) :

Heard on 20.04.2017, 28.04.2017, 31.05.2017, 07.07.2017, 27.07.2017, 09.08.2017,
30.08.2017, 20.09.2017, 17.10.2017, 14.11.2017 and 20.12.2017.

The Petitioner/Corporate creditor has filed Form No.5 under Rule 6 of the I & B Code,
being the Operational creditor to initiate Corporate Insolvency Resolution Process against the
Corporate Debtor/Respondent herein.

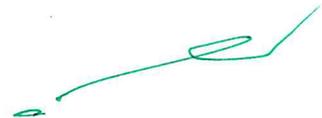
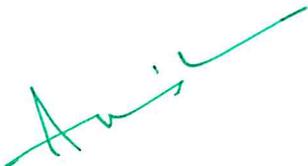
The Petitioner M/s. Z-Tronics Infratel Pvt. Ltd., has filed the petition against the Corporate Debtor, M/s. Wipro Enterprises Pvt. Ltd.

According to the Petitioner/Operational Creditor, the amount due by the Respondent/Corporate Debtor towards principal is Rs.38,65,155/- and towards interest is Rs.27,62,032/- totalling to Rs.65,98,187. It is averred in Form-5 that the Petitioner being the Operational creditor is a Registered Company and is a scrap dealer and is engaged in the business of purchase of industrial scrap material and supplying and selling to various smelting units

It is stated that the Corporate Debtor was engaged in the manufacture of sunflower oil and therefore, it was interested to sell industrial scrap material arising out of the manufacturing process. The Operational Creditor has further contended that M/s. Blue Star Alloys Pvt. Ltd., approached the petitioner along with Corporate Debtor for sale of industrial scrap. A purchase deal was entered between Operational Creditor and the Corporate Debtor under which the Petitioner/Operational creditor at the first instance, to provide in advance the Certificate of Remittance of the agreed consideration and then only it will be allowed to lift the industrial scrap on pro-rata basis. It is averred that the Operational Creditor has started remitting advances to the Corporate Debtor as per the understanding and it was allowed to lift such quantity of industrial scrap equivalent to the amount remitted.

It is averred that in all an amount aggregating to Rs.1,01,00,000/- was remitted by the Operational Creditor for the period from 11.10.2013 to 11.04.2014. Therefore, the Operational Creditor is entitled to lift the industrial scrap worth Rs.1.01 crores. However, it had only lifted the industrial scrap worth Rs.62,63,845/- and an amount of Rs.38,36,151/- is still lying with the Corporate Debtor. The Respondent/Corporate debtor did not allow the Operational Creditor to lift the industrial scrap equivalent to the above amount. Therefore, the petition is filed for initiating Insolvency Resolution Process against the Corporate Debtor.

The Respondent/Corporate Debtor has filed objections. The averments in the objections are briefly described hereunder:

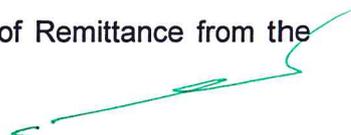


It is averred that there is no debt due by the Respondent/Corporate Debtor to the petitioner. It is stated that there is no privity of contract between the Operational Creditor and the Corporate Debtor. There is no agreement between the petitioner and the respondent and as such, there does not exist any liability to pay. The petitioner is not at all the operational creditor and as such the petition is liable to be dismissed.

It is averred that the respondent had entered into an agreement with M/s. Blue Star Alloys Pvt. Ltd., for the sale of Vanaspati plant equipment and dismantling of complete structure and its disposal outside the Wipro factory premises. The total sale consideration was fixed at Rs.4.15 crores. The copy of the agreement is shown as Annexure-R/1. As per the terms of agreement, M/s. Blue Star Alloys Pvt. Ltd., shall dismantle the Vanaspati plant and also the buildings up-to the ground level. Further the debris collected would be taken out from the premises and disposed of and the agreement provides that the work cannot be entrusted to any sub-contractor. It is further stated that M/s. Blue Star Alloys Pvt. Ltd., had to deposit Rs.1.00 crore as advance. Further, an amount of Rs.5.00 lakhs with applicable tax was to be paid before every despatch. Penalty is also provided that if the work is not likely to be completed by 31.12.2013.

It is stated that since M/s. Blue Star Alloys Pvt. Ltd., has failed to complete the terms of agreement, therefore, the agreement came to an end by lapse of time. Further, M/s. Blue Star Alloys Pvt. Ltd., had requested for extension of time. It was extended subject to mutually agreed conditions. This is transpired from the e-mails shown as Annexure-R/2. M/s. Blue Star Alloys Pvt. Ltd., had again committed default. Again, M/s. Blue Star Alloys had requested for extension of time.

Meanwhile, the Respondent Company had received a document said to be Power of Attorney on behalf of Blue Star Alloys Pvt. Ltd., executed in favour Mr. Mohammed Saleem Shaikh. Under the said document, he was only a representative of M/s. Blue Star Alloys Pvt. Ltd. It is stated that the Respondent Company had received the consideration for each work executed by M/s. Blue Star Alloys Pvt. Ltd. along with Certificate of Remittance from the



petitioner. The CORs are received for adjustment against the sale agreement entered between the Respondent Company and M/s. Blue Star Alloys Pvt. Ltd. Further, the deadline for completing the agreement was by 22.05.2014. Thereafter, the Respondent Company had issued a forfeiture notice as M/s. Blue Star Alloys Pvt. Ltd., had failed to honour the terms of the agreement. A copy of the notice is shown as Annexure-R/8.

On account of this failure on the part of M/s. Blue Star Alloys Pvt. Ltd., the Respondent Company was forced to take the services of a new scrap deal vendor for dismantling and disposal of the debris.

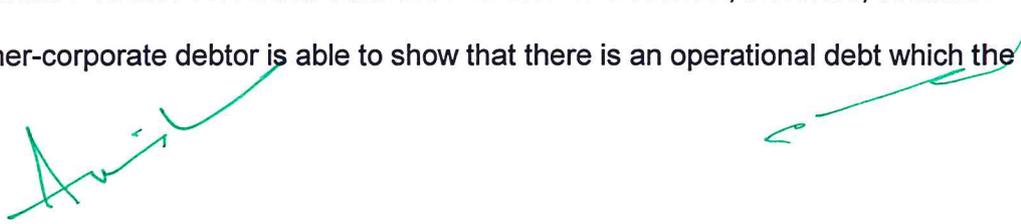
The Respondent Company had first received a notice from the petitioner for refund of Rs.30,85,178/-. The Respondent Company had replied to the same. The reply is shown as Annexure-R/9. Again, the petitioner had issued a winding-up notice. This time, the petitioner has sought refund of Rs.32,73,563/- along with interest aggregating to Rs.49,25,621/-. Sometime later, again a notice of demand was issued by the petitioner to the respondent demanding Rs.65,70,763/- consisting of principal amount + interest thereon. Thus, the respondent Company denies any agreement with the applicant/petitioner company and the respondent has contended that the petitioner is not at all an operational creditor for the respondent and as such, there is no debt and consequently there is no default of alleged debt by the respondent company.

The counsel for the Petitioner has filed written submissions. Similarly, the counsel for Respondent Company has also filed written submissions. We will consider the written submissions in the course of the order.

The case of the petitioner is that it is an operational creditor. The contention of the learned counsel for the petitioner is that a company by name M/s. Blue Star Alloys Pvt. Ltd., had introduced the petitioner – Operational Creditor to the Respondent Company and an agreement for lifting of the industrial scrap was duly entered into between them. The counsel would contend that the petitioner was allowed to lift the industrial scrap on payment of money



in advance to the Respondent corporate debtor which was made through certificate of remittances and the petitioner operational creditor was allowed to lift such quantity of industrial scrap equivalent to the value of amount remitted. The counsel contended that, in all, the petitioner operational creditor had remitted a sum of Rs.1.01 crores to the account of the respondent corporate debtor during the period from 11.10.2013 to 11.04.2014. The counsel would contend that the petitioner-operational creditor was allowed to lift the industrial scrap worth Rs.62,63,845/- only and there remained a balance of Rs.38,36,155/- with the respondent corporate debtor. The counsel would contend that if the respondent-corporate debtor has failed to supply the industrial scrap for the surplus amount lying with it, then, it ought to have returned the amount to the operational creditor. But, the respondent had failed to do so. Therefore, the petitioner-operational creditor had issued a demand notice dated 24.03.2017 under Rule 5 of I & B Rules. As per the demand notice, the operational creditor has demanded an amount of Rs.65,15,325/-. Counsel contended that the respondent-corporate debtor did not reply. Therefore, the application for initiation of Insolvency Resolution Process was filed by the petitioner-operational creditor. The counsel contended that the respondent-corporate debtor has admitted that it had received the remittance made by the petitioner-operational creditor, on 03.01.2014, 10.04.2014, 11.04.2014 and 12.04.2014. Therefore, it goes without saying that the petitioner-operational creditor has lifted the industrial scrap worth Rs.62,63,845/- only and the balance amount is still lying with the respondent-corporate debtor. The contention of the learned counsel that the petitioner-operational creditor is able to establish that it had remitted the amount to the account of respondent-corporate debtor and the industrial scrap worth Rs.62,63,845/- out of Rs.1.01 crores was only lifted. Therefore, it is contended that there is a direct contract between the parties and now the respondent-corporate debtor cannot dispute the contract which was acted upon. The counsel further contended that the respondent corporate debtor has failed to give any reply to the demand notice. The counsel has relied on the decision of the Hon'ble Apex Court reported in Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. The counsel, therefore, contended that the petitioner-corporate debtor is able to show that there is an operational debt which the



respondent-corporate debtor has failed to pay and has committed default. Therefore, the petition is to be admitted.

On the other hand, the counsel appearing for the respondent-corporate debtor would contend that the respondent-corporate debtor had in fact, entered into contract with M/s. Blue Star Alloys Pvt. Ltd. for sale of Vanaspati plant. The counsel contended that Annexure-R/1 is the copy of the contract between M/s. Blue Star Alloys Pvt. Ltd. and M/s. Wipro Enterprises Pvt. Ltd. Counsel contended that there is no privity of contract between the petitioner and the respondent company. Therefore, the petitioner has no locus standi to initiate Insolvency Resolution proceedings against the respondent. The counsel contended that there is no debit due by the respondent company to the petitioner and further that there is no operational debt. The counsel contended that debt is defined at Section 3 (11) of the I & B Code.

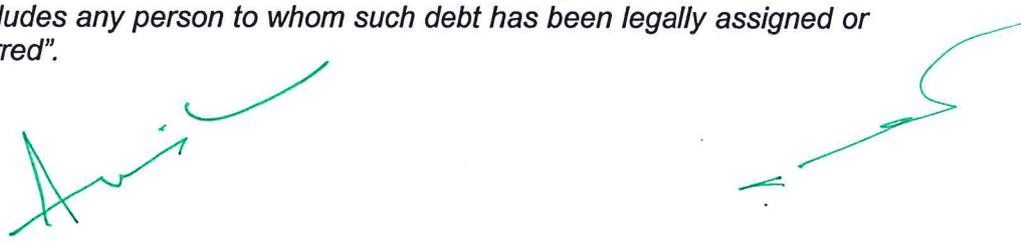
"As a liability or obligation respect of a claim which is due from any person and includes a financial debt or operational debt."

The counsel contended that operational debt is defined in Section 5 (21) of the Code, 2016 which is as under:

"as a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority."

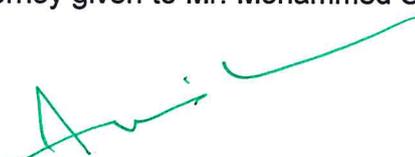
Counsel contended that there is no agreement for service in this case between the petitioner and the respondent per-se. Therefore, there does not lie any liability to pay. Counsel contended that the petitioner is not at an operational creditor as defined under Section 5(20) of I & B Code which is as under:

"operational creditor" mean a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred".



Counsel contended that the respondent company has entered into contract with M/s. Blue Star Alloys Pvt. Ltd. for sale of Vanaspati Plant equipment and dismantling of building structure and its disposal outside the wipro factor premises. The counsel has relied on the agreement between M/s. Wipro Enterprises Ltd. and M/s. Blue Star Alloys Pvt. Ltd. which is shown as Annexure-R/1 to the reply statement. It is true that Annexure-R/1 discloses that the contract was entered between the respondent company and M/s. Blue Star Alloys Pvt. Ltd. and that there are so many conditions in the work contract. The value of the contract is Rs.4.15 crores. The agreement does not permit any sub-contract and only authorised representative of purchaser to be present during execution of work. Annexure-R/1 clearly establishes that the respondent company provides that M/s. Blue Star Alloys Pvt. Ltd. to deposit Rs.1.00 crore as advance and the work to be completed by 31.12.2013 and in case of delay, penalty is provided. The contention of the learned counsel that M/s. Blue Star Alloys Pvt. Ltd. has failed to complete the work within the agreed period. The counsel contended that M/s. Blue Star Alloys Pvt. Ltd. requested extension of time and the time was mutually extended till 25.01.2014. This is evident from the e-mail from Annexure-R/2. It is true that the term of contract was extended till 25.01.2014 and the petitioner company is given a time schedule for completion of the contract in the memo attached. No doubt, this e-mail was also issued on behalf of the petitioner company signed by Mr. Mohammed Saleem Shaikh. The contract could not be completed even on the extended period. The counsel contended that again M/s. Blue Star Alloys Pvt. Ltd. had requested extension of time by sending e-mail, shown as Annexure-R/4.

We have seen Annexure-R/4. This e-mail is from Mr. Saleem to the Wipro Enterprises wherein it has clearly admitted that the contract could not be completed within the stipulated time. In this e-mail, the representative of M/s. Blue Star Alloys Pvt. Ltd. admitted balance of Rs.1.40 crores and agreed to pay the same and requested for extension of time. The contention of the learned counsel that M/s. Blue Star Alloys Pvt. Ltd. has given an irrevocable power of attorney shown as Annexure-R/5. We have seen the annexure and it is an irrevocable power of attorney given to Mr. Mohammed Saleem Shaikh. It is said to have been issued by



M/s. Blue Star Alloys Pvt. Ltd. As such, Mr. Mohammed Saleem Shaikh has to act on behalf of M/s. Blue Star Alloys Pvt. Ltd. The learned counsel has relied on Annexure-R/6 from which it is evident that the petitioner company represented by the authorised signatory had informed the respondent company that whatever amounts remitted should be adjusted against this sale order between M/s. Blue Star Alloys Pvt. Ltd. and the respondent company. Thus, it is very clear that the petitioner herein has clearly admitted that whatever amounts remitted are to be adjusted against the sale order entered between the respondent company and M/s. Blue Star Alloys Pvt. Ltd. Thus, the petitioner has unequivocally admitted that the remittances are with reference to the contract between the respondent company and M/s. Blue Star Alloys Pvt. Ltd. It goes without saying that there is no direct contract of service between the petitioner and the respondent company. But, the petitioner may be an agent of M/s. Blue Star Alloys Pvt. Ltd. and also a power of attorney holder for M/s. Blue star Alloys Pvt. Ltd. The letters are dated 03.01.2014. So, whatever amount is remitted by the petitioner herein to the account of the respondent company, it is towards the sale order between M/s. Blue Star Alloys Pvt. Ltd. and M/s. Wipro Enterprises Ltd. Further, it is clearly stated in the certificate of remittance transaction, that the petitioner will not claim refund. All the certificate of remittances are shown as Annexure-r/6 at pages 19 to 23 filed with the objections.

The respondent-corporate debtor has strongly disputed that any amount of the petitioner operational creditor is lying with the respondent company. The respondent company has further denied that the petitioner operational creditor had approached the respondent company with the representative of M/s. Blue Star Alloys Pvt. Ltd. The contention of of the respondent company is that the petitioner was never an operational creditor and that there was no operational debt due by the respondent company.

Section 5(20) of I & B Code deals with operational creditor. The question is whether the petitioner falls within the meaning of operational creditor.

Section 5(21) defines operational debt which reads thus:



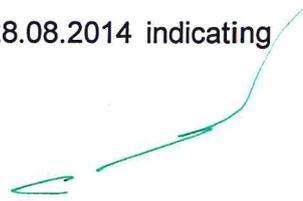
"21. Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority."

Now, the question is whether any operation debt is due from the respondent company to the petitioner. There is no direct contract between the petitioner-operational creditor and the corporate debtor-respondent company. The services of operational creditor herein was not directly engaged by the respondent company. M/s. Blue Star Alloys Pvt. Ltd. had entered into contract with the respondent company. At best, the petitioner has acted as an agent of M/s. Blue Star Alloys Pvt. Ltd. Therefore, there is no operational debt payable by the respondent company to the petitioner. May be, the petitioner has also remitted the amount to the account of the respondent company. But, whatever is done by the petitioner, it is with reference to M/s. Blue Star Alloys Pvt. Ltd. Further, the case of the respondent company is that there was violation of the terms of contract by M/s. Blue Star Alloys Pvt. Ltd.

Therefore, a dispute was existing before the petition was filed in the Tribunal by the petitioner. The dispute is with regard to the adherence to the terms of contract. When a dispute was pending, the present petition is not maintainable. Section 5(6) of the I & B Code defines the dispute.

"5.6 "dispute" includes a suit or arbitration proceedings relating to-
(b) The quality of goods or service;
(c) the breach of a representation or warranty."

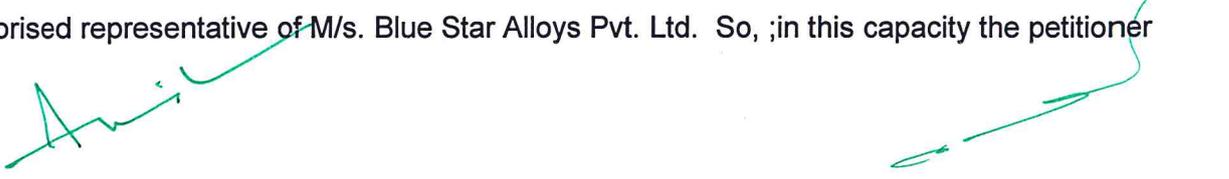
The contention of the counsel for the respondent company is that the deadline for completion of the agreement was 22.05.2014. This was not adhered to by M/s. Blue Star Alloys Pvt. Ltd. Thus, there was non-compliance of the terms and conditions of the agreement and that a notice was issued to M/s. Blue Star Alloys Pvt. Ltd. on 28.08.2014 indicating forfeiture of the security deposit. It is shown as Annexure-R/8.



We have seen Annexure-R/8. The contracted amount was Rs.4.15 crores and that it should have been completed by 30.12.2013. However, the time was extended till 22.04.2014 and thereafter, again extended up to 22.05.2014. It is clearly mentioned in this letter addressed to M/s. Blue Star Alloys Pvt. Ltd. that if the company failed to fulfil the obligation undertaken under the agreement, any amount available on account of this contract will be forfeited. However, in this letter, the respondent company has again extended the time till 15.09.2014 as a final chance. So, the correspondence was only between M/s. Blue Star Alloys Pvt. Ltd. and the respondent company. The respondent company has also issued reply notice to the winding up notice shown as Annexure-R/10. This is issued to the petitioner. It is made clear in this reply notice that the respondent company had never entered into any contract with the petitioner. So, right from the beginning, the respondent company has taken a stand that it had never entered into any contract with the petitioner and the contract was only with M/s. Blue star Alloys Pvt. Ltd.

On the other hand, the case of the petitioner is that it had remitted various amounts to the credit of the respondent corporate debtor and that it did not allow the petitioner to lift the industrial scrap even though the amount was lying with the respondent company. The petitioner has relied on Annexure-2B, which is a self-styled calculation sheet as if the respondent company was liable to pay a sum of Rs.38,36,155/- to the petitioner and the interest is Rs.,272,032/- totalling Rs.65,98,187/-. The petitioner has also relied on Annexure-2C to show that various amounts have been credited to the account of M/s. Wipro Enterprises Ltd. The amounts were sent through RTGS.

As already stated earlier, these amounts were remitted to the respondent company's account by the petitioner. Simply because the amounts were remitted by the petitioner to the account of the respondent company, it does not mean that the respondent company had a contract with the petitioner. We have already discussed that the petitioner may be an authorised representative of M/s. Blue Star Alloys Pvt. Ltd. So, ;in this capacity the petitioner



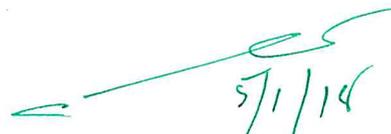
might have remitted the money to the account of the respondent company. But, the amounts are remitted only on behalf of M/s. Blue Star Alloys Pvt. Ltd.

The petitioner has further filed rejoinder contending that the objections raised by the respondent company are not true and correct. The contention of the counsel for the petitioner is that when the respondent company is accepting the payment made by the petitioner, then it goes without saying that the respondent company has committed default. Therefore, the petitioner is entitled to initiate the Insolvency Resolution Process against the respondent company.

We have seen the primary document, Annexure-R/1 which is entered between M/s. Blue Star Alloys Pvt. Ltd. and the respondent company. The respondent company has also relied on Annexure-R/5, the power of attorney given by M/s. Blue Star Alloys Pvt. Ltd., in favour of Shri Mohammed Saleem Shaikh wherein he was only an authorised representative to lift the scrap material from the respondent company and that too on behalf of M/s. Blue Star Alloys Pvt. Ltd. The same Mr. Mohammed Saleem Shaikh is representing the petitioner company in this petition. So, it is only a power of attorney of M/s. Blue Star Alloys Pvt. Ltd. The petitioner has no locus standi to initiate Insolvency Resolution Process against the respondent. The petitioner is not the operational creditor of the respondent. Therefore, the present petition is liable to be rejected.

In the result, the petition is rejected.


(ASHOK KUMAR MISHRA)
MEMBER (TECHNICAL)


(RATAKONDA MURALI)
MEMBER (JUDICIAL)

psp.