

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. NO.1088/I&BP/2017

Under section 9 of the IBC, 2016

In the matter of

Power House
18, Jai Ganesh Varadhaste
Opp. Kamgar Bhavan,
Near Dr. Ambedkar Statue,
Pimpri Chowk, Pune – 411 018.
....Applicant

v/s.

Nutri First Agro International Pvt. Ltd.
Plot No. A-13/1, Talegaon Industrial
Area (MIDC) Village Navlakh Umbre,
Tal. Maval Pune, Pune – 410 507.
....Respondent

Order delivered on: 31.07.2017.

Coram:

Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. Chaitanya Nikte, Advocate
For the Respondent : Mr. Rajesh Lanjekar, Advocate

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

It is a Company Petition filed u/s 9 of the Insolvency and Bankruptcy Code by the Operational Creditor namely **Power House** against the Corporate Debtor namely **Nutri First Agro International Pvt. Ltd.**, stating that this Corporate Debtor availed supply of goods and labour services valuing for an amount of ₹55,28,864/- thereafter, this Corporate Debtor having failed to make payment for the same except a payment of ₹6,75,000/-, this Operational Creditor

filed this Company Petition to initiate Insolvency Resolution Process against this Corporate Debtor company stating that the amount claimed to be in default as on 02.07.2016 is ₹48,53,864/-.

Brief facts of the case:

2. The Operational Creditor herein submits that since the Creditor is in the business of electrical works and also supply of labor in relation to installation of the electrical equipment to the customer whoever approached this company, this Corporate Debtor approached this Operational Creditor with a Purchase Order dated 27.11.2015 for supply of electrical material for an amount of ₹25,31,250/- with payment terms saying that this Corporate Debtor would advance 30% of the basic order value along with Purchase Order, thereafter 60% with 100% taxes after inspection against Proforma Invoice, prior to dispatch and then final payment of 10% of the basic order value after installation and commissioning against submission of 10% Corporate Performance Guarantee/Directors' Indemnity Bond for performance varying for 18 months from the date of delivery or 12 months from the date of commissioning whichever is earlier. It is also pertinent to mention that it has been mentioned in his agreement, if at all any issue arose in between, it has to be referred to mutual resolution before an Arbitrator within the territorial jurisdiction of Pune Court.

3. The Operational Creditor soon after receipt of this Purchase Order from this Corporate Debtor, issued Proforma Invoices giving description of the materials and value of the materials on 30.11.2015, soon thereafter, as they earlier agreed in between them a joint inspection, it was conducted on 11.03.2016 prior to dispatch and mentioned in the joint Inspection Report that the material inspected is clear and found satisfactory to the Corporate Debtor. In view of the same, the Corporate Debtor instructed the Operational Creditor to dispatch the panel to the Corporate Debtor, accordingly the Operational Creditor delivered the goods to the corporate Debtor and obtained Delivery Challans dated 16.03.2016 duly acknowledged from the Corporate Debtor. Since

the Tax Invoice also to be raised soon after supply of this goods, Tax Invoice was raised on 13.04.16 for the total amount of ₹25,31,250/-. In the said invoice, it has been mentioned that the Operational Creditor is entitled to @24% interest per annum on the cost of the material supplied to the Corporate Debtor, if it is not paid within due date as mentioned in the Purchase Order. Soon after supply of these goods, when the Corporate Debtor had again come up to the Petitioner with a Letter of Intent dated 29.03.2016 seeking labor assistance for installation of the material for site electrification with payment terms of 80% advance, 15% after erection completion, remaining 5% of Order Value would be held with the Debtor till completion of defector liability period as retention money. Since this Corporate Debtor was in need of further material, it has issued another Purchase Order on 29.03.2016 for supply of the material for an amount of ₹19,25,085.20, on the said Purchase order, this Operational Creditor again supplied goods and obtained Delivery Challan on 28.07.2016 from this Corporate Debtor. On the Purchase Order made by the Corporate Debtor, this Petitioner again raised Proforma Invoice on 02.08.2016 for an amount of Rs. 19,25,085.20 towards the goods supplied by this Petitioner. Since there is a miscellaneous supply in between, they have also been annexed to this Company Petition. For the total amount towards the supply of goods and services to the Petitioner herein comes to ₹55,28,865/-, the Corporate Debtor made a payment of only ₹6,75,000/- on 01.12.2015. This payment came on 01.12.2015 because the Corporate Debtor was to make first advance towards Purchase Order made by it. He paid that money; thereafter no payment has been made by this Corporate Debtor till date, though this Petitioner issued notice u/s 271 of Companies Act 2013 on 01.02.2017. The Petitioner perhaps realizing that the said notice is not in accordance with law, it did not proceed further on the said notice. Though the Petitioner mentioned about the due outstanding and giving details of the debt payable by the Corporate Debtor, the Corporate Debtor instead of giving any reply to the said notice, remained silent until notice u/s 8 of The Insolvency and Bankruptcy Code received on 23.04.2017 from the Petitioner.

4. While looking at this case, this Corporate Debtor for the first time sent a reply through e-mail dated 04.05.2017 admitting that this Corporate Debtor

issued Purchase Orders dated 27.11.2015, 29.03.2016 and Letter of Intent dated 29.03.2016, stating that Purchase Orders were issued for an amount of ₹55,28,864/- matching to the Work Orders given by the Corporate Debtor, invoices raised by the Petitioner herein. The Corporate Debtor also said that the Debtor made a payment of ₹6,75,000. Since this part payment above said, issuing of invoices and supply of material have been admitted by the debtor, there is nothing much to say over this aspect, unless the debtor comes forward with a strong rebuttal to the facts admitted by the debtor. In the remaining part of the e-mail, this Corporate Debtor has first time raised defense saying that it has accepted invoices to the goods for an amount of ₹27,14,858 only, not for the entire Purchase Orders i.e. ₹55,28,864. The defense that has been taken up in this mail is that the Corporate Debtor returned some of the goods supplied by the Petitioner propping up a challan purported to have been signed by one of the Partners of the Petitioner. In the same breath, it is also said that this petitioner has not sent Credit Note to this Corporate Debtor towards the material returned to it. The Corporate Debtor filed a Delivery Challan dated 13.12.2016 as if some of the goods have been returned to the Petitioner herein showing that the same has been acknowledged by one of the Partners namely Umesh Shah. Whenever any challan issued by the Petitioner, it has been given with seal of the Partnership firm but whereas this challan is not reflecting anywhere the seal that normally appears on the challans issued or received by the Petitioner herein.

5. To the defense raised by this Corporate Debtor, the Counsel appearing on behalf of the Petitioner Counsel submits that this is a defense taken for the sake of setting up defense because this delivery challan has not been mentioned the value of the goods purportedly returned to the Petitioner herein, and this point has not been mentioned anywhere. The Petitioner Counsel further submits that none of the Partners of the company has signed on the challan that is annexed to the reply whereby the Petitioner submits that this is only a defense set up to frustrate the case of the Petitioner.

6. Looking at the averments and submission of the Petitioner's side, it appears that this Corporate Debtor issued Work Orders from time to time

mentioning amounts and payment timelines consequent to the Work Orders, the Petitioner accordingly raised invoices and supplied goods simultaneously after getting Purchase Orders from this Corporate Debtor, not only that, this Corporate Debtor availed labor services from this Petitioner itself for electrification of the plant. Since the material for erection has been taken from this Petitioner itself, hiring labor from this Petitioner confirm that labor Work Order taken to install the electrical goods supplied by this Petitioner. The supply of labor by this Petitioner being subsequent to supply of goods and these two being consequent to the Orders during March-April 2016 (supplied goods and Services), had the material to be returned to the petitioner for whatsoever ground it is, the debtor should have done it far before engaging labor or at least immediately after labor worked for installation. There was no whisper from the side of the Corporate Debtor saying either goods supplied by them are of inferior in quality, until before notice u/s 271 of Companies Act 2013 went to the debtor from the petitioner. It appears that the Petitioner sent notice u/s 8 on 18.04.2017 and same was received by the Corporate Debtor on 21.04.2017 but whereas no reply came from this Corporate Debtor within 10 days as envisaged u/s 8 of the Insolvency and Bankruptcy Code. This reply came only on 03.05.2017 by e-mail with a defense saying some of the material had been returned. This Corporate Debtor has not even made any effort to place material from their company's side at least to say that the Debtor company records showing such and such liability alone is payable to the petitioner.

7. When this Bench put it to the Counsel appearing either side as to whether the Debtor Company doing business, it has been stated that Balance Sheet has also not been filed for the year 2016. It appears from the submission made by the Corporate Debtor that the company is not doing any business at this juncture.

8. The Corporate Debtor put up a defense saying that Arbitration Clause is existing in the Purchase Order given by the Debtor company, the Petitioner for his claim should go before the Arbitrator but not before this Bench for initiation of Insolvency Resolution Process. It is not that the Petitioner alone should go before Arbitrator, the Corporate Debtor as well could proceed against this

Petitioner before the Arbitrator but Corporate Debtor has not made any such effort despite notice came from the Petitioner to the Corporate Debtor on 01.02.2017.

As to Delivery Challan raised by the Corporate Debtor saying that some goods are returned to the Petitioner if at all goods are not required or if at all goods are defective, this Corporate Debtor should have mentioned to the Petitioner immediately after supply has been received by this Corporate Debtor. Moreover, the signature showing in this Delivery Challan filed by the Corporate Debtor has not been appended with any Partner firm seal as appearing in all the challans given by this Petitioner. It has become a regular practice in these cases to come up with a statement that either goods or services are defective or of inferior in quality without any justification.


9. To prove the case of the Petitioner herein, it has filed Work Orders, Invoices, Challans, Bank Statements, and also bank certificate reflecting that debt availed by the Corporate Debtor and thereafter this Corporate Debtor defaulted in making payments, therefore, this Bench is of the view that this Petition deserve admission.

10. In respect to the challan for the first time annexed to the reply filed by this Corporate Debtor has not infused confidence in this Bench to believe that some of the goods have been returned to the Petitioner, moreover, since the Corporate Debtor himself admitted in his e-mail saying that he had only paid ₹6,75,000/- though according to his admission the company, according to the debtor itself, owes to pay ₹27,14,858/-, we have not noticed any credence to the case on belatedly filed so called challan. Since the Corporate Debtor has admitted issuing Purchase Orders and work order, thereafter the petitioner raising invoices and acknowledging Delivery Challans with signature of the Corporate Debtor side, in case if the Corporate Debtor is to prove some of the goods returned, the burden is cast upon this Corporate Debtor to prove that some of the goods have been returned, since this Corporate Debtor has not made any such efforts to prove to the satisfaction of this Bench that some of the

goods have been returned, we have not found any merit in the defense first time set up by the Corporate Debtor, hence, we admit this petition with the reliefs as follows:

- i) That this Bench 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; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- ii) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- iii) That the provisions of sub-section (1) of Section 14 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 have effect from 31.07.2017 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- v) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

11. This Bench makes a reference to the Insolvency and Bankruptcy Board of India (IBBI) for the recommendation of Insolvency Professional for appointment as Interim Resolution Professional.
12. The Registry is directed to forward a copy of this order to IBBI and post this matter after receipt of reply from IBBI for the appointment of IRP.
13. The Registry is hereby directed to communicate this order to both the parties.
14. Order pronounced on 12.07.2017 and delivered on 31.07.2017.



V. NALLASENAPATHY
Member (Technical)



B. S.V. PRAKASH KUMAR
Member (Judicial)

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