

**IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH."
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) NO. 31/Chd/HP/2017

Under Section 9 of IBC, 2016

In the matter of :

Jeena and Co. having its registered office at
Elphinstone Building, 1st Floor, 10, Veer Nariman Road,
Horniman Circle, Fort, Mumbai-400001.

...Petitioner/Operational Creditor

Vs.

Inox Wind Limited having its registered office at Plot No. 1,
Khasra No. 264 to 267, Industrial Area, Village Basal,
Himachal Pradesh-174103, India

....Respondent/Corporate Debtor.

Order delivered on: 05.07.2017

Coram: Hon'ble Mr. Justice R.P. Nagrath, Member (Judicial)

For the Petitioner: 1. Ms. Samiya Singh, Advocate.
2. Mr. Bhupesh Gupta, proposed Interim Resolution
Professional.

For the Respondent: None.

Order (ORAL)

The petitioner as an 'Operational Creditor' has set in motion the corporate insolvency resolution process under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the 'Code') in relation to M/s Inox Wind Limited (for short, to be referred as the 'Corporate Debtor'). The petitioner is a partnership firm registered under the Indian Registration Act. The latest Deed of Partnership is dated 27.03.2004 (Annexure A-7) with five partners, namely Mr. Jehangir Nariman Katgara, Mr. Pallan Adi Katgara, Mr. Cyrus

Nariman Katgara, Mr. Sam Nariman Katgara and Mr. Homi Adi Katgara Annexure A-8 is the copy of Register of Firms issued by the Registrar of Firms, Bombay.

2. Learned counsel for the petitioner refers to the General Power of Attorney (Annexure A-6) dated 20th June, 2011 executed by three other partners of the firm in favour of Mr. Sam Nariman Katgara and Mr. Homi Adi Katgara authorising them jointly and/or severally to commence, institute and prosecute any action, suit or other legal proceedings civil or criminal and to carry on and continue all such suits and other legal proceedings which are already instituted or hereafter to be instituted in any Court of Law or equity as the Attorney may deem necessary etc. Clause 21 of the said Power of Attorney empowers the Attorney Holder as under:-

"21) For the better and more effectually doing, performing and executing the acts, deeds, matters and things aforesaid for the purposes of business of Jeena and Company, we do hereby jointly or severally grant to our said Attorneys full power and authority from time to time to appoint one or more substitute or substitutes to exercise all or any of the powers and authorities hereby conferred upon our said Attorneys and to revoke any such appointment and from time to time and to substitute and appoint any other or others as the said Attorneys shall from time to time deem proper."

3. Pursuant to the aforesaid authority, one of the General Power of Attorney holder, namely; Mr. Homi Adi Kartgara has executed Special Power of Attorney dated 21.07.2015 (Annexure A-5) in favour of Mr. Balbir Nath Mehanti through whom the instant petition has been filed. By this Power of

Attorney, Mr. Mehanti is authorised to file, institute, defend and prosecute, enforce or resist any suit or other action and proceedings, appeals in any court of law, **Tribunal**, Forum and/or initiate proceedings with respect to all Civil and Criminal matters and to represent the firm before Hon'ble Court in any part of Northern India and Hon'ble Supreme Court.

4. The Operational-Creditor has filed the instant petition in application Form No. 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity, 'the Rules') as provided in Rule 6 of the aforesaid Rules.

The Facts.

5. It is stated that the Corporate-Debtor was incorporated under the Companies Act, 1956 on 09.04.2009 with authorized capital of ₹500.00 crores and paid up capital of ₹2219182260/-. Before filing this application, the Operational-Creditor sent demand notice dated 05.05.2017 (Annexure A-1) in Form 3 as per requirement of Rule 5 (1) of the Rules. This Demand Notice is accompanied by the detailed notice dated 05.05.2017 stating the entire facts and background of the demand. The copies of invoices are at Annexure A-2 (pages 22 to 25). The facts of the case have been elaborated in the notice dated 05.05.2017 which is at page 18 of the Paper Book and is part of Annexure A-1. The Demand Notice is in Form No. 3. It is stated that the parties entered into a Service Agreement dated 01.04.2015 (Annexure A-14) whereby the Corporate-Debtor awarded the contract to the petitioner for providing customer clearance services for the import shipments to Nhava Sheva, Mumbai. As per clause (5) of the Agreement, the shipping charges, CFS and Detention Charges were to be paid in advance. It is further stated

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that as per the said Service Agreement the credit period of 90 days was provided for payment of the agency charges of the petitioner.

6. The petitioner also attached (Annexure A-10) the Ledger Account maintained by the petitioner in respect of the respondent for the period from 01.04.2016 to 31.03.2017 showing the outstanding amount against the Corporate-Debtor as ₹57,54,864/- as on 25.03.2017.

7. It is stated that the petitioner raised the following invoices to the respondent/Corporate Debtor:-

Invoice No.	Invoice Date	Amount(₹)
601163600103	20.03.2017	18,824/-
601163600102	20.03.2017	02,85,803/-
601163600101	20.03.2017	12,937/-
601163100411	20.03.2017	84,14,080/-
Total:		87,31,644/-

Out of the aforesaid invoices, the Corporate-Debtor paid only ₹29,76,780/-.

8. The petitioner also relied upon the Memorandum of Understanding dated 25.03.2017 reached between the parties whereby the respondent admitted the outstanding amount of ₹57,54,864/- for which the payment scheduled was also agreed. On the basis of the aforesaid understanding and the commitment of the Corporate-Debtor, the petitioner agreed to release bill of lading No.HAM178636979. Rest of the bills were retained by the petitioner as the Corporate-Debtor had agreed to make payment of the outstanding amount of the petitioner in advance. It is stated

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that as per Agreement dated 01.04.2015, the petitioner was to provide customer clearance services.

9. The learned counsel for the petitioner states that as per particulars mentioned in the application, the Corporate-Debtor admitted the delivery of the Demand Notice by sending letter dated 20.05.2017 (Anneure-9). The learned counsel for the petitioner submits that the Demand Notice was sent by Registered Post and postal receipts of the despatch of notice by registered post are at page 21 of the Paper Book. Since the outstanding amount was not paid, this petition has been filed.

10. Learned counsel for the petitioner submits that copy of the petition along with entire Paper Book was sent by Registered Post on 27.05.2017 at the registered office of the Corporate Debtor. The postal receipt is at page 85 of the Paper Book. This petition was listed for the first time on 27.06.2017 after the vacations. The petitioner was directed to file affidavit in support of despatch of the application with the Paper Book and Track Report with regard to the delivery of the envelope to the respondent. Further having heard the learned counsel for the petitioner, certain defects were noticed and the following order was passed on 27.06.2017:-

" it is found that the written communication in Form No.2 by the proposed Interim Insolvency Resolution Professional is not complete, so far as, it relates to para (vi) of the Form. The learned counsel for the petitioner submits that she would look into the format being accepted by this Tribunal and would make the compliance. Further the petitioner has also not attached the bills of lading and the service agreement statedly dated 01.04.2015 entered into between the parties. Even the

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applicant has not filed a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, in terms of Section 9 (3) (c) of the Insolvency and Bankruptcy Code, 2016. Notice of these defects as pointed out above is issued to the petitioner and the learned counsel appearing for the petitioner accepts notice of these defects. The same have to be removed within seven days and the documents to be filed along with the affidavit of the authorised representative. The affidavit shall also state as to whether any further reply to the demand notice has been received from the respondent.

The matter is fixed for hearing on 05.07.2017. Notice of the hearing be issued to the respondent. The petitioner shall collect the notice from the Registry by attaching extra copy of the petition and dispatch the same forthwith at the registered office of the respondent-company by speed post and file an affidavit stating the compliance along with the postal receipt and the track report of the postal department."

11. The petitioner filed affidavit dated 30.06.2017 of Mr. Balbir Nath Mehanti, Authorised Representative along with the documents as directed in the previous order. The Paper Book of additional documents contains the Track Report of the Postal Department showing delivery of the postal article containing a copy of the petition and the Paper Book to the Corporate-Debtor on 30.05.2017. The petitioner also filed written communication of the Proposed Interim Resolution Professional which is complete in all respects.

22/06/2017

The petitioner also filed the Bills of Lading/Bills of Entry and Service Agreement dated 01.04.2015 executed between the parties.


12. The respondent/Corporate Debtor has also been served of the notice of hearing of this petition but there is no representation from the respondent. There is postal receipt dated 30.06.2017 in proof of despatch of the notice with the copy of the petition by Speed Post at the registered office of the Corporate Debtor. The postal receipt is at Annexure 16 of the additional documents. The petitioner has filed the affidavit of Mr. Mehanti, the Authorised Representative stating therein that the notice of hearing was sent by Speed Post on 30.06.2017. Along with this affidavit, the Track Report of postal department is also attached in proof of delivery of the postal article to the Corporate Debtor on 04.07.2017.

13. I have heard the learned counsel for the petitioner and perused the record quite extensively with her able assistance. Section 9 of the Code reads as under:-

"After the expiry of the period of 10 days from the date of delivery of the notice or invoice demanding payment under sub-section(1) of Section 8, if the Operational Creditor does not receive payment from the Corporate-Debtor or notice of the dispute under sub-section (2) of Section 8, the Operational-Creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process."

14. Further Sub-section (5) of Section 5 further says as under:-

"The Adjudicating Authority shall, within 14 days of the receipt of the application under sub-section (2), by an order –

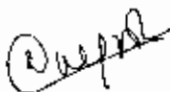


- i) *Admit the application and communicate such decision to the Operational Creditor and the Corporate Debtor, if*
 - a) *The application made under sub-section (2) is complete;*
 - b) *There is no repayment of the unpaid operational debt;*
 - c) *The invoice or notice for payment to the Corporate Debtor has been delivered by the Operational Creditor;*
 - d) *No notice of dispute has been received by the Operational Creditor or there is no record of dispute in the information utility; and*
 - e) *There is no disciplinary proceedings pending against any resolution professional proposed under sub-section (4), if any.*
 - ii) *Reject the application and communicate such decision to the Operational Creditor and the Corporate Debtor of, if*
 - a) *The application made under Section 2 is complete;*
 - b) *There has been repayment of the unpaid operational debt;*
 - c) *The creditor has not delivered the invoice or notice for payment to the Corporate Debtor;*
 - d) *Notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility; or*
 - e) *Any disciplinary proceeding is pending against any proposed resolution professional."*
15. One of the defects noticed in the order dated 27.06.2017 was to file a certificate from the financial institutions in terms of clause (c) of Section 9 (3) of the Code. The petitioner has filed the required certificate issued by the BNP Paribas Bank as Annexure A-15 with the additional documents. The certificate is dated 01.07.2017. The Bank has certified that based on record and the information available, no amount has been received from the Corporate Debtor other than the amount mentioned in the Current Accounts of

the petitioner for the period from 01.01.2016 till date. As per this certificate, there are five entries of ₹1 lac each cleared on 27.03.2017 and 29.03.2017. The learned counsel for the petitioner/Operational Creditor contends that this amount of ₹ 5 lacs has been reflected in the ledger accounts of the petitioner (Annexure A-10) for which the entries are made about the cheques deposited on 22.03.2017 though these were cleared later on. Apart from this, there is RTGS transfer of ₹20 lacs on 25.03.2017 and the certificate of BNP Paribas Bank takes care of that entry at Annexure-10.

16. Learned counsel for the Operational Creditor represents that all these payments were duly taken care of when the Corporate Debtor entered into Memorandum of Understanding acknowledging the outstanding debt of ₹57,54,864 whereby the petitioner was also authorised to retain four of the Bills of Lading till the dues are cleared. With the original application, the petitioner had attached copies of invoices for which the payment was raised and under the directions of Adjudicating Authority, the Bills of Lading/Bills of Entry pertaining to all the transactions (page 8 to 134 of additional documents) have also been filed

17. From the record, the possible defence of the Corporate Debtor could be the reply (Annexure A-9) dated 20.05.2017 to the Demand Notice dated 05.05.2017. In this letter, the Corporate Debtor simply stated that they not only deny all the allegations made in the Demand Notice but also reserve the right to suitably reply the allegations levelled against the Respondent/Corporate Debtor. It was further stated that without prejudice to any rights and remedies available to the Respondent, the Respondent was in the process of carefully examining the matter and were scrutinising the



documents at their end. The respondent sought three weeks time to file reply though the time permitted by the legislature as per Section 8 of the Code is only 10 days. The petitioner did specifically mention in the detailed Demand Notice asking the respondent to pay the amount within a period of 10 days from the date of receipt of notice failing which they shall take appropriate legal proceedings including winding up or the insolvency under the IBC.

18. Learned counsel for the petitioner has handed over affidavit dated 29.05.2017 sworn in by the Authorised Representative of the Operational Creditor stating specifically therein that there is no repayment of unpaid operational debt and no notice of dispute has been received by M/s. Jeena and Co. It is further stated that no notice of dispute has been given by the Corporate Debtor relating to the dispute of unpaid operational debt. Let this affidavit be taken on record.

19. In **Kirusa Software Private Ltd. Vs. Mobilox Innovations Private Ltd.** dated 24.05.2017, the Hon'ble National Company Law Appellate Tribunal has held as under:-

"Adjudicating Authority would examine whether the notice of the dispute in fact raises the dispute and that too within the parameters of two definitions – 'debt' and 'default' and then it has to reject the application if it apparently finds that the notice of dispute does really raise a dispute and no other factual ascertainment is required. On the other hand, if the Adjudicating Authority finds that the notice of dispute lacks in particulars or does not raise a dispute, it may admit the application but in either case, there is neither an ascertainment of the dispute, nor satisfaction of the Adjudicating Authority."



20. The term default is defined in Section 3 (12) of the Code as meaning non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the Debtor or the Corporate Debtor. The term 'Dispute' is defined in sub-section (6) of Section 5 of the Code as including a suit or arbitration proceedings relating to—

- a) The existence of the amount of debt;
- b) The quality of goods or service; or
- c) The breach of representation or warranty.

21. In the instant case except for a simple denial in the response sent by the Respondent, there are no other circumstances which can be considered to say that the Corporate Debtor has raised a dispute. The Operational Creditor not only relied upon the documents of Bills of Lading and the invoices but also on the acknowledgement of admitted liability (Annexure A-9) dated 20.05.2017.

22. It is pertinent to mention that the Corporate Debtor did not appear to oppose this petition, despite having been delivered copy of the petition along with entire Paper Book which was sent much before listing of the matter before the Adjudicating Authority. Further there is no representation from the respondent despite valid service and notice of hearing of this petition. Hon'ble National Company Law Appellate Tribunal further held in **Kirusa Software Pvt. Ltd.** (supra) that mere raising a dispute for the sake of dispute, unrelated or related to clauses (a), (b) & (c) of sub-section 6 of Section 5 of the Code if not raised prior to the application and not pending before any Court of Law or Authority cannot be relied upon to hold that there was a 'dispute' raised by the Corporate Debtor. It was also observed that mere a dispute giving a colour of

genuine dispute or illusory, raised for the first time while replying to the notice under Section 8 cannot be a tool to reject an application under Section 9 if the Operational Creditor otherwise satisfies the Adjudicating Authority that there is a debt and there is a default on the part of the Corporate debtor.

23. In view of the aforesaid discussions, the instant petition deserves to be admitted. The petition is, therefore, admitted declaring the moratorium with the following directions:-

i) That the 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.

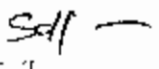
iii) That the order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of



- Section 31 or passes an order for liquidation of Corporate Debtor under Section 33 as the case may be.

24. The order of moratorium shall have the effect from the date of admission of application i.e. 05.07.2017. Further directions shall be issued on the date when the order for appointment of Interim Resolution Professional is issued.

List the matter on 11.07.2017.


(Justice R.P. Nagrath)
Member (Judicial)
Adjudicating Authority

July 05, 2017
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