

**In the National Company Law Tribunal  
Single Bench, Chennai**

**TCP/4/(IB)/CB/2017**

Under Section 9 of the IBC, 2016

**In the matter of**

M/s. CMI Energy India Private Limited

V/s

M/s. Easun Reyrolle Limited

Order delivered on: 12.10.2017

For the Petitioner/OC: Shri Shankarnarayana, Sr. Advocate

Shri Shivakumar & Suresh, Advocate

For the Respondent/CD: Shri P.H. Arvindh Pandian, Sr. Advocate

For M/s. S. Elambharathi

**Per: K. ANANTHA PADMANABHA SWAMY, MEMBER (J)**

**ORDER**

1. Under Consideration is a Company Petition filed by M/s. CMI Energy India Private Limited (in short, '**Petitioner/Operational Creditor**') against M/s. Easun Reyrolle Limited (in short, '**Respondent/Corporate Debtor**') under section 433 (e) and (f), 434 (i) (a) and 439 (i) (b) of the Companies Act, 1956 before the Hon'ble Madras High Court which has been transferred to this tribunal pursuant to the Companies (Transfer of Pending Proceedings) Rules, 2016. Now, pursuant to the Central Government notification number GSR 119(E) dated 07.12.2017, this petition needs determination as per the provisions of the Insolvency and Bankruptcy Code 2016 (In short, '**IB Code 2016**').

2. Before proceeding with this matter, this Adjudicating authority feels that it would be proper to make a note of background facts for the purpose of determination of this petition.
3. The petitioner was earlier known as Navratna Energy Cable Private Limited subsequently changed to Plaza General Cable Energy Private Limited and then to General Cable Energy India Private Limited and now its present name CMI Energy India Private Limited with effect from 09.03.2017 and copies of the fresh Certificate of Incorporation Consequent on Change of name have been filed with Form- 5 as Annexure A1 to A4.
4. Shri Shankarnarayana, the learned counsel appearing on behalf of the respondent submitted that the Petitioner is engaged in the business of manufacturing cables and the respondent had placed various purchase orders during the year 2012-13 for the supply of cables to its project sites. The Petitioner had supplied the cables as per the purchase orders and also raised invoices towards the value of the same. Towards supplies, the respondent was also required to furnish required C-Forms as per the then Central Sales Tax Act but the same were not furnished.
5. It is submitted that towards the supplies, the petitioner had sent an e-mail dated 14.09.2014, wherein the petitioner had enclosed the account statements in respect of the supplies and sought

confirmation from the respondent and in response to the same, the respondent sent a reply mail dated 18.09.2014 wherein it had confirmed that as per the respondent's records, a sum of Rs. 699.42 lakhs was payable to the petitioner and sought time to complete the process of bill-to-bill matching since the person handling the purchase was not available at that point of time. On 24.09.2014 the respondent had confirmed that a sum of Rs. 699 lakhs was due and payable to the petitioner and provided the summary of reconciliation of accounts for the supply made by the petitioner to the respondent. It is submitted that, thereafter the respondent had failed to clear the said outstanding amount, which forced the petitioner to issue the statutory notice under the Companies Act 1956 on 15.09.2016 calling upon the respondent to pay the outstanding amount of Rs. 7,88,54,073/- to the petitioner. In response to the same, the respondent had issued a vague reply notice dated 17.10.2016 denying its liability. Also, in the said reply notice, the respondent has not stated any existing dispute or any pendency of suit or arbitration proceedings. It is further submitted that in the said reply, the respondent raised the dispute only for the sake of dispute just to stall the winding up process at that point of time and the respondent has not raised any genuine dispute in relation to the said transaction.

6. It is submitted that these goods were supplied during the year 2012-13 and no disputes were raised in relation to the quality of the same. Even before this Adjudicating Authority, the respondent had failed to place any document immediately after the supplies that he has raised a dispute relating to the warranty or the quality to the cables supplied by the petitioner. The learned counsel also referred to Section 42 of the Sale of Goods Act, 1930 and submitted that the respondent had not intimated the petitioner that he rejected the goods, thus the same amounts to acceptance of the goods by the respondent.

Section 42 of the Sale of Goods Act, 1930 is reproduced below for ready reference:-

*“The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them”.*

Therefore from the reading of the section and from the facts of this case, it is clear that the respondent had accepted the goods and not

intimated the petitioner that he has rejected them and only to wriggle out from the payment obligation, they have raised the issue of warranty in the said reply notice.

7. Further, with regard to the warranty, the respondent neither raised any demand of express warranty prior to the said reply notice nor sought for replacement of goods supplied to the respondent. The respondent had accepted the supply of goods, admitted the outstanding dues and there is no existence of any dispute in relation to the goods supplied to the petitioner. Since the respondent had failed to comply with the said demand notice, the petitioner was left with no other option except to file a winding up petition before the Hon'ble High Court.

8. It is also submitted that subsequent to the filing of winding up petition before the Hon'ble High Court of Madras, on 15.03.2017, the petitioner had filed a Civil Suit before the High Court of Delhi bearing Dairy No. 1167 of 2017 for recovery of a sum of Rs. 11,65,95,344/- together with future interest and costs against the respondent and the same was numbered as C.S. No. 224 of 2017. The said suit was filed only after filing the winding up petition before the Hon'ble High Court to obtain a decree against the respondent for the admitted claim amount.

9. It is respectfully submitted that pendency of the said suit before the High Court of Delhi is not a bar to proceed under the IB Code 2016 against the same respondent. The respondent has relied upon the judgment of the Hon'ble NCLAT in case of **Kirusa Software Pvt. Ltd Vs. Mobilox Innovations Pvt. Ltd.**, to show that the pendency of the civil suit filed by the petitioner before the Delhi High Court is an existence of dispute and the present petition is not maintainable. The meaning of "existence of a dispute", if any, must be understood in the context of the dispute of 'I & B Code'2016 must relate to satisfy nature of Clause (a), (b) or (c) of Sub-section (6) of Section 5 (i.e.) existence of amount of debt or quality of goods or services or breach of representation or warranty. Such suit or arbitration proceedings should have been initiated against 'Operational Creditor' by the 'Corporate Debtor' in relation to the dispute raised by the Corporate Debtor prior to the receipt of Section 8 Notice.
10. Shri P.H. Arvindh Pandian, the learned senior counsel appearing on behalf of the Respondent/CD submitted that the instant petition is false, vexatious and not sustainable both in in eyes of law or on facts. It is submitted that the instant petition under section 9 of the Code is per se not maintainable, owing to the existence of a pending legal proceedings in C.S.No. 224 of 2017 on the file of the Hon'ble Delhi High Court, which has been filed by the Petitioner. It is submitted

that during the pendency of the aforesaid legal proceeding, there is no scope to provide an affidavit of no-dispute, which is a condition precedent for filing a petition u/s 9 of the IB Code 2016. In this regard, an argument has been raised on behalf of the Petitioner herein that the pendency of a suit filed by the Petitioner himself cannot be considered to be a “dispute” as contemplated under the IB Code 2016. The respondent’s counsel further submitted that this argument for the petitioner is untenable and has in fact already been rejected by the Division Bench of NCLT Chennai Bench in *Emerson Process Management Chennai Ltd Vs. Shriram EPC Ltd TCP/135/(IB)/2017* wherein it was held that a pending suit, irrespective of whether the same has been instituted by the creditor or debtor is by itself a bar to maintaining a petition filed u/s 9 of the IB Code 2016 and the instant petition ought to be dismissed in view of the precedent set down by the Adjudicating Authority.

11. Further, it is submitted that when the statutory notice under section 433(1)(e) was sent on 15.09.2016, the Respondent herein vide reply dated 17.10.2016, raised several issues disputing the amount claimed in the statutory notice. The notice is a matter of record and as such, the disputing of debt in the reply notice itself constitutes a dispute for the purpose of the IBC. In this regard, the learned counsel placed his reliance on a judgement passed by the Hon’ble NCLAT in *MCL*

***Global Steel Pvt. Ltd Vs. Essar Projects India Ltd  
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It is submitted that the mere raising a dispute in reply to the statutory notice sent under section 433 of the Companies Act, 1956 amounts to be “dispute” under the IB Code 2016 and for this reason alone, the instant petition ought to be dismissed.

12. Further, it is submitted that a number of disputes as defined by the Hon’ble Supreme Court in ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited CIVIL APPEAL No. 9405 of 2017*** held that

*40. 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 proceedings relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is*

*whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of 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 need to be satisfied that the defence is likely to succeed. 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.*

**13.** It is submitted that in light of the aforesaid dicta of the Hon’ble Supreme Court, the Court held that earlier judgments given under Section 433(1)(e) of the Companies Act, 1956 are irrelevant for the purpose of deciding matters under the IB Code, 2016, for which reason alone, all the decisions relied upon by the Petitioners herein ought to be rejected.

**14.** It is submitted that on a meeting held on 02.03.2015, Mr. John Winstell SVP (Finance) & Admin; Global Controller, General Cable and Mr. Kangwas Bwalya, Regional CFO APAC, General Cable, Mr. G.D.Thaker had visited the office of the Respondent

Company. During the meeting and subsequently it is clearly stated that the India Plant of General Cables has been closed and it would not be possible to give warranty from the Indian Company. It was suggested that they can give warranty from the Holding Company. Since the holding Company is also a shell Company the same was unacceptable as it was clearly discussed that any warranty will be from a Company with sufficient experience acceptable to the end customer. The Respondent Company has also clearly indicated that in case giving of warranty was not possible, they are free to take away the cables within six months from the date of the meeting. But till date suitable manufacturer's warranty from an approved manufacturing firm has not been given and the cables for which manufacturer's warranty has not been given have also not been lifted and accordingly the supplies made by GC India has been treated as rejected and as such the Respondent Company is not liable to pay any amount to M/s. General Cable Energy (India) Pvt. Ltd. This aspect has been made clear in the Reply Notice dated 28.04.2016 given by the respondent.

**15.** The learned senior counsel for respondent further submitted that due to closure of manufacturing activity of the Petitioner Company in India, Respondent Company under an apprehension

as how to fulfil its contractual obligations with the state electricity board, failed to meet its commitment to the state electricity board and the electricity board has already invoked indemnity clauses against the Respondent Company and the petitioner company alone is liable. It is further submitted that the item supplied by the petitioner company, is still under warranty and during the subsistence of warranty, closing down of manufacturing activity rendered the contractual obligations as null and void and unenforceable.

16. He further submitted that once the suit is filed for the recovery of money, then all other proceedings for the very same subject matter ought to be stopped. The learned senior counsel referred to Section 5(6) of IB Code 2016 which is reproduced below:-

*“dispute” includes 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 a representation or warranty;*

He submitted that the term dispute cover all disputes on debt; default etc. and the definition of “dispute” is inclusive and not “exhaustive”. Further, the aforesaid section does not mention anywhere that the suit is to be filed by the debtor and not by the creditor. Therefore, the learned senior counsel finally submitted that the suit can be filed

either by the Creditor or Debtor and thus, dispute means a dispute pending in Arbitration or a suit filed either by the creditor or debtor.

17. The learned senior counsel for the petitioner vehemently opposed the contentions put forth by the counsel for the respondent and submitted that from the bare perusal of the aforesaid provisions, it is clear that the *suit* referred in Sec. 5(6)(a) to (c) of the IB Code stipulates about the initiation of suit by the corporate debtor against the operational creditor prior to the Demand Notice u/s 8 of the IB Code 2016 and the filing of suit by the petitioner/OC against the corporate debtor cannot be termed as existence of a dispute under Section 8(2)(a) of the IB Code 2016. Moreover, a creditor cannot self-incriminate himself by filing a suit against a corporate debtor.

18. Further, On the question of warranty and quality of goods or the amount payable to the operational creditor, he submitted that the corporate debtor has not filed any suit or initiated arbitration proceedings within the meaning of Sec. 5(6)(a)(ii) to (c) of the IBC Code in the instant case. From the reading of the Sec. 8(2)(a) of the IB Code 2016 also, one can understand that on receipt of the notice from the operational creditor, the corporate debtor must bring it to the notice of the operational creditor existence of a dispute, if any and record the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices in relation to such dispute, which

would only mean that the corporate debtor should have initiated suit or arbitration proceedings against the operational creditor and it cannot be vice versa. Therefore, from the perusal of the said section, it can be inferred that the suit or arbitration proceedings initiated by the petitioner/operational creditor cannot be termed as dispute.

19. The learned senior counsel for the petitioner further submitted that the winding up petition or initiation of corporate insolvency resolution process is not only for the benefit of the Petitioner/Operational Creditor but also for the general body of the creditors, contributors etc., therefore, the present petition is in the nature of *Right in Rem* and cannot be termed as *Right in Personam*. Moreover, the instant petition filed before this Adjudicating Authority pertains to insolvency proceedings whereas the civil suit filed by the petitioner before Hon'ble Delhi High Court is related to recovery of money and not connected to subject matter in instant petition.

20. After hearing submissions of both the senior counsel and having perused the record, I am of the opinion that there does not exist any dispute between the parties under the meaning and definition of section 5 (3) of the IB Code 2016 as the aforesaid civil suit is nowhere connected to instant petition. The instant petition pertains to insolvency proceedings whereas the civil suit filed before High Court belongs to recovery of money. Moreover, this

Adjudicating Authority is of the opinion that there would have been a different situation, had the respondent initiate a case related to breach of warranty or defective goods against the petitioner. However, the respondent neither raised any demand of express warranty prior to the said reply notice nor sought for replacement of goods supplied to the respondent.

21. In this case, the petitioner has filed a civil suit against the respondent and that too, after filing a winding up petition before the High Court. Otherwise also, the petitioner must have been aware of the well-established procedure of the winding up/insolvency process and would not have filed the civil suit before the Hon'ble High Court to self-incriminate. Further, the learned senior counsel for the petitioner has stated that the Said civil suit has been filed just to save the limitation period for recovering monies from the respondent. This also reflects the bonafide on part of the petitioner. Thus, this Adjudicating authority is satisfied that the petitioner has made out his case by establishing that this Corporate Debtor has defaulted the payment dues on various occasions to this petitioner/OC and there is no dispute between the parties. In the circumstances, I am inclined to admit the instant petition.

22. Therefore, the instant petition is admitted and I order the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed within 180 days, reckoning from the day of this order is passed.

23. I declare the moratorium which shall have effect from the date of this Order till the completion of corporate insolvency resolution process for the purposes referred to in Section 14 of the I&B Code, 2016. I order to prohibit all of the following, namely :

- (a) *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;*
- (b) *Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
- (c) *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);*
- (d) *The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

24. The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The provisions of Sub-section (1) of Section 14 shall not apply to such transactions, as notified by the Central Government.
25. The IRP shall comply with the provisions of Sections 13 (2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I&B Code, 2016. Accordingly, the application is admitted.
26. Before concluding with the matter, it is pertinent to mention herein that the Operational Creditor has not proposed the name of an Interim Resolution Professional, therefore the Registry is directed to make a reference to IBBI, who, in turn, shall recommend the name of an IRP.
27. The Registry is also directed to communicate this Order to the Operational Creditor and the Corporate Debtor.

  
**K. ANANTHA PADMANABHA SWAMY**  
**Member (J)**

**RLS**