

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
HYDERABAD**

CP (IB) No.177/9/HDB/2017

U/s 9 of the IBC, 2016 and Rule 6 of I&B
(Application to Adjudicating Authority) Rules, 2016

In the matter of

Crompton Greaves Consumer Electricals Ltd.
Regd. Office at Equinox Business Park,
Tower 3, 1st Floor, Kurla (West),
Mumbai -- 400 070.

.... Petitioner/Operational Creditor

Versus

KPR Industries (India) Ltd,
Regd. Office at Survey No. 1 to 4,
Near Kanedu Metta Road,
Balabhadrapuram, Biccavolu Mandal,
East Godavari District – 533 343,
Andhra Pradesh.

.... Respondent/Corporate Debtor

**CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL**

Date of pronouncement of Order: 15.11.2017

CORAM:

Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)

Hon'ble Shri Ravikumar Duraisamy, Member (Technical)



Present for parties:

For the Petitioner : Shri Hemant Daswani, Advocate along with Shri Bharadwaj and Ms. U. Neeraja, Advocates

For the Respondent : Shri N.V. Shravan Kumar, Advocate along with Shri Challa Gunaranajan, Shri M. Sridhar and Shri E. Venkateswara Reddy, Advocates

Per: Ravikumar Duraisamy, Member (Technical)

ORDER

1. The Petitioner/Operational Creditor i.e. Crompton Greaves Consumer Electricals Limited has filed the present application under Section 9 of the Insolvency and Bankruptcy Code, 2016 R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 as the Corporate Debtor is indebted to Operational Creditor for the amount of Rs.34,42,005.57.
2. The Applicant is a Demerged Company of Crompton Greaves Limited pursuant to the Order dated 20.11.2015 passed by the Hon'ble Bombay High Court in Company Scheme Petition No.744 of 2015 connected with the Company Summons for direction No.524 of 2015.
3. Crompton Greaves Consumer Electricals Limited is incorporated on 25.02.2015 under the Companies Act, 2013 and the company is limited by shares and CIN of the Company is U31900MH2015PLC262254. The main objects of the Company/Operational Creditor is inter alia to carry on the business of manufacturing assembling, altering, exchanging, buying, selling, importing, exporting, servicing or otherwise dealing in all types of consumer electrical goods, home & electrical appliances, electronic equipment and instrument including all types of fans, water heaters, coffee makers, induction cooktops, air coolers, LED lighting luminaires, bulbs, domestic, agricultural & industrial pumps, plugs & sockets, cable reels and its accessories including chokes undertake turnkey projects, combine two or more of its products, provide after sales services, provide consultancy and other services and solutions in relation to its products, etc.
4. Brief facts of the case are as follows:-
 - i) Corporate Debtor vide its Purchase Order dated 25.07.2014 bearing No.KPR/3167/173/2014-15, had placed an order for Designing, Engineering, Manufacturing, Testing, Supply, erection and Commissioning Spares of Industrial Light Fixtures with all required



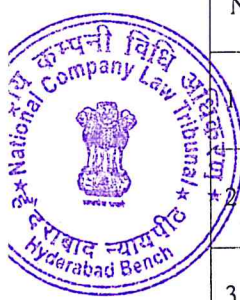
accessories upon Operational Creditor for the quantity and for the basic value of Rs.42,88,826/-.

- ii) Pursuant to the said Purchase Order placed by Corporate Debtor from time to time Applicants have sold, supplied and delivered upon Corporate Debtor the material as ordered as per Corporate Debtors Purchase Order placed, a delivery whereof had been accepted from Corporate Debtors end without raising any dispute as to its quality and or quantity thereof.
- iii) The Operational Creditor have time to time raised, issued and delivered upon Corporate Debtor, Applicants various Invoices for the sale and supply of the said materials as ordered amongst which some of the invoices were partly settled from Corporate Debtor end. Corporate Debtor are reasonably regular in making the payment of the invoices raised, issued and delivered upon them towards the supply of the said materials and other accessories.
- iv) Corporate Debtor are reasonably regular in making the payment of the invoices raised, issued and delivered upon them towards the supply of the said materials and other accessories. However, subsequently the Applicant noticed that the Corporate Debtor had started committing defaults in payment of the invoices as per the agreed terms and a number of invoices have remained unpaid for considerable period of time. The Applicant vide various emails constrained to bring to Corporate Debtors notice that there was no response from them for release of the outstanding dues and had time and again called upon the Corporate Debtor to take immediate steps to release forthwith the outstanding dues.
- v) Despite the repeated reminders provided to Corporate Debtors through various means neither they have replied to the said emails with any constructive repayment plan nor was any response provided



to the subsequent reminders sent to them on the said issue. Further, Applicant states that, having received no response, Applicant had thereafter vigorously followed up the matter with Corporate Debtor and Applicant have been time and again called upon to liquidate Corporate Debtors entire outstanding due and payable to Applicant which amounts to Rs.34,42,005.57.

- vi) The Operational Creditor has raised the following Invoices on the Corporate Debtor as mentioned below:-



S. No	Purchase Order No.	Date	Invoice No.	Outstanding Amount	Tax Liability	Total Claim(Rs.)
	KPR/3167/173/2014-15	31.12.14	306940931	9,32,079.06	Nil	9,32,079.06
2	KPR/3167/173/2014-15	31.12.14	306940969	6,81,968.57	Nil	6,81,968.57
3	KPR/3167/173/2014-15	31.12.14	306940976	16,06,952.46	Nil	16,06,952.46
4	KPR/3167/173/2014-15	31.12.14	306940977	34,721.45	Nil	34,721.45
5	KPR/3167/173/2014-15	31.12.14	306941003	1,51,903.50	15,637.13	1,67,540.63
6	KPR/3167/173/2014-15	31.12.14	306941004	16,994.02	1,749.38	18,743.40
	TOTAL			34,24,619.06	17,386.51	34,42,005.57

- vii. The Operational Creditor noticed that the Corporate Debtor had started committing defaults in payment of the invoices as per the agreed terms and a number of invoices have remained unpaid for considerable period of time.

- viii. The Operational Creditor state that though Corporate Debtor have received various reminder emails from Operational Creditor calling upon Corporate Debtor to liquidate their aforesaid outstanding dues, however, for reasons best known and attributable to them for having

failed and neglected and or intentionally avoided either to reply with positive repayment schedule and or to comply with the demand made in the said correspondences. Thus, the said amount of Rs.34,42,005.57 still remains due and payable by Corporate Debtor, which Operational Creditor is now entitled to recover the same with interest at the contractual rate till payment and or realisation.

- ix. Legal Notice was sent through RPAD on 07-07-2016 by Shri V.Deshpande & Co., Advocate for the Operational Creditor to the Corporate Debtor for non-payment of outstanding amount of Rs.34,42,005.57 along with interest at the contractual rate within 21 days from the date of receipt of the Legal Notice, duly treating the said notice as a Statutory Notice under Section 433 and 434 of Companies Act, 1956.
- x. Shri E. Venkateswar Reddy, Advocate for the Corporate Debtor replied to the notice dated 07-07-2016, vide reply dated 05-08-2016 denying all the contentions of the dues outstanding.
- xi. Another Legal Notice was sent on 17-08-2016 by the Operational Creditor through RPAD to the Corporate Debtor for non-payment of outstanding amount and directing to repay the entire outstanding amount of Rs.34,42,005.57 otherwise, Operational Creditor is ready to file a case/suit before appropriate Court against you.
- xii. On 25-04-2017, Notice/Invoice for demanding payment of Rs.34,42,005.57 in respect of unpaid operational debt due from Corporate Debtor (Form No.4 under IBC, 2016).
- xiii. The Operational Creditor is having their Bank Account with ICICI Bank. On 11-09-2017, ICICI Bank has confirmed that no amounts have been received in the account of Operational Creditor namely



Crompton Greaves Consumer Electricals Limited from any account bearing the name of KPR Industries Limited.

5. Shri K. Rajsekhar Reddy, Advocate has filed a Counter Affidavit on behalf of the Respondent/Corporate Debtor on 06-09-2017 stating that the CP is neither maintainable in law nor on facts and the same is liable to be dismissed on the following grounds:-

a) The notice issued on which the Applicant relies is issued under Section 433 of the Companies Act, 1956 and as such this petition is defective.

b) The Applicant has not attached any certificate from a financial institution confirming that there is no payment of an unpaid operational debt as is mandatory as specified by Section 9(c) of the IBC, 2016.



c) The Applicant had in fact issued a defective notice under Section 8 of the IBC, 2016 dated 07.04.2017 which was received and replied to by the Corporate Debtor vide Reply Notice dated 25.05.2017 and same is suppressed wherein the Corporate Debtor is deprived to agitate their defence. The reply to the Demand Notice dated 07.04.2017 may be prays to the Hon'ble Tribunal pleased to dismiss the Company Petition.

d) The Applicant Company failed to make out a prima facie case. The Respondent is a new Company and has not even started production and that the existing and probable assets would be sufficient to meet the creditor's liability.

e) The Power of Attorney as attached by the Applicant is not in accordance with law. The Applicant has not paid the requisite stamp duty on the General Affidavit that has been filed by the Applicant and is such inadmissible in law.

f) The Corporate Debtor had placed orders on equipment suppliers and had already paid advances and awaiting the supply of machinery. The

Corporate Debtor has Import-Export licence and their products have export potential which contributes to the foreign exchange of the nation. The above Company Petition is premature and impedes the commencement of the project. The Corporate Debtor may be allowed to start its production in the interest of public. As such the present petition is liable to be dismissed at threshold. Further the equipment which is the subject matter of the claim is intact and not yet opened and in case of any variation of any of performance parameters exceeding the acceptable limits, the Corporate Debtor as per terms of purchase order, may reject the equipment and in such case the Applicant is obligated to pay liquidated damages or to replace the equipment.

- g) The Corporate Debtor has not yet commenced its production and there is a delay in implementation of the project due to reasons beyond the control of Corporate Debtor. The Corporate Debtor enjoys the credit extended by 7 National Banks and some of funds are yet to be disbursed.



The case was listed before the Adjudicating Authority for the first time for admission on 01-09-2017 and subsequently listed on 04-09-2017, 06-09-2017, 11-09-2017, 13-09-2017, 18-09-2017, 22-09-2017 and 25-09-2017. During the hearings the respondent proposed settlement of the issue in question and sought time. Accordingly, the case was listed on various dates with the consent of both the parties in to explore the possibility of settlement of issue. During the hearing held on 25-09-2017, the Bench recorded that “the Learned Counsel for Corporate Debtor refuted the demand notice as it is not in order as per IBC and the Operational Creditor would recommend the name of the IRP by 27.09.2017 and Orders Reserved”.

7. On 27-09-2017, the Operational Creditor/Learned Counsel for the Petitioner has filed Memo proposing the name of Smt. Padmasri Appana, Company Secretary as Insolvency Professional to initiate the process of Resolution.
8. We have heard the Learned Counsels for the parties and carefully perused the material papers filed by them. It is seen from the material papers submitted by

the Operational Creditor that a Legal Notice was sent through RPAD on 07.07.2016 by Shri V. Deshpande & Co., Advocate for the Operational Creditor to the Corporate Debtor for non-payment of outstanding amount of Rs.34,42,005.57 along with interest at the contractual rate within 21 days from the date of receipt of the Legal Notice, duly treating the said notice as a Statutory Notice under Section 433 and 434 of Companies Act, 1956.

9. Upon perusal of the records, notice issued by Operational Creditor, counter of the Corporate Debtor, the Adjudicating Authority made the following observations:-

a) With regard to the submission of the Corporate Debtor that the applicant had not attached any certificate from Financial Institution confirming that no payment of an unpaid Operational Debt as per Section 9(c) of IBC, 2016 is factually incorrect, since the Operational Creditor has submitted a letter dated 11.09.2017 from ICICI Bank confirming that “as on 11th September, 2017, no amount(s) have been received in the aforesaid account from any account bearing the name of KPR Industries (India) Limited, since 7th July, 2016, against whom said petition is being filed.”

b) With regard to another submission i.e. the Corporate Debtor is yet to commence production is immaterial under IBC. The existence of a debt and default is the primary criteria for admission of the application.

c) Proper demand notice delivered to the Corporate Debtor is an important pre requisite under Section 9(3)(a) of the IBC, 2016. The Corporate Debtor also submitted that the notice issued under Section 8 of the IBC, 2016 dated 07.04.2017 is defective.

10. At this juncture, we like to rely upon the judgment of Hon'ble NCLAT vide its Judgment dated 28.07.2017 passed in Uttam Galve Steels Limited Vs. DF Deutsche Forfait AG & another in Company Appeal (AT) (Insolvency) 39/2017 observed and held the following:-



“27. From a plain reading of sub-section (1) of Section 8, it is clear that an occurrence of default, the Operational Creditor is required to deliver the demand notice of unpaid Operational Debt and copy of the invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as is prescribed.

28. Sub-rule (1) of Rule 5 of the ‘Adjudicating Authority Rules’ mandates the ‘Operational Creditor’ to deliver to the ‘Corporate Debtor’ the demand notice in Form-3 or invoice attached with the notice in Form-4, as quoted below:

“Rule 5. (1) An operational creditor shall deliver to the corporate debtor the following documents namely:-

- (a) a demand notice in Form 3; or
- (b) a copy of an invoice attached with a notice in Form 4.”

29. Clause (a) and (b) of sub-rule (1) of Rule 5 of the ‘Adjudicating Authority Rules’ provides the format in which the demand notice/invoice demanding payment I respect of unpaid ‘Operational Debt’ is to be issued by ‘Operational Creditor’. As per Rule 5(1)(a) & (b), the following person(s) are authorised to act on behalf of Operational Creditor, as apparent from the last portion of Form-3 which reads as follows:-



“6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor].

Yours sincerely,

Signature of person authorized to act on behalf of the operational creditor

Name in block letters

Position with or in relation to the operational creditor
--

Address of person signing

30. From base perusal of Form-3 and Form-4, read with sub-rule (1) of Rule 5 and Section 8 of the I & B, it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. The person who is authorised to act on behalf of Operational Creditor is also required to state “his position with or in relation to the Operational Creditor”, meaning thereby by the person authorized by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.

31. The demand notice/invoice Demanding Payment under the I&B Code is required to be issued in From-3 or From-4. Through the said formats, the ‘Corporate Debtor’ is to be informed of particulars of ‘Operational Debt’, with a demand of payment, with clear understanding that the ‘Operational Debt’ (in default) required to pay

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केस संख्या
CASE NUMBER... CP(IB)No.177/9/HDB/2017
निर्णय का तारीख
DATE OF JUDGEMENT... 15-11-2017
प्रति तैयार किया गया तारीख
COPY MADE READY ON... 21-11-2017

the debt, as claimed, unconditionally within ten days from the date of receipt of letter failing which the 'Operational Creditor' will initiate a Corporate Insolvency Process in respect of 'Corporate Debtor', as apparent from last paragraph no.6 of notice contained in Form-3, and quoted above.

Only if such notice in Form-3 is served, the 'Corporate Debtor' will understand the serious consequences of non-payment of 'Operational Debt', otherwise like any normal pleader notice/Advocate notice, like notice under Section 80 C.P.C. or for proceeding under Section 433 of the Companies Act, 1956, the 'Corporate Debtor' may decide to contest the suit/case if filed, distinct Corporate Resolution Process, where such claim otherwise cannot be contested, except where there is an existence of dispute, prior to issue of notice under Section 8.



In view of provisions of I&B Code, read with Rules, as referred to above, we hold that an 'Advocate/Lawyer' or 'Chartered Accountant' or 'Company Secretary' in absence of any authority of the Board of Directors, and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the I&B Code, which otherwise is a 'lawyer's notice' as distinct from notice to be given by operational creditor in terms of section 8 of the I&B Code."

11. In the instant case the Advocate of the Operational Creditor has issued a notice under Section 8(1) of the IBC, 2016 and the same is not in the format as prescribed. Further, no authority of the Board of Directors for issue of the aforesaid notice was also submitted, in the absence of the same we are of the considered view that the present case of the Operational Creditor is covered by the decision in **Uttam Galva Steels Limited** (supra) and we have no other option but to reject the petition of the Operational Creditor.
12. In the result, the Company Petition bearing CP(IB)No.177/9/HDB/2017 is rejected by exercising the powers conferred under section 9 of IBC, 2016 as the same is incomplete.

Sd/-

RAVIKUMAR DURASAMY
MEMBER (TECHNICAL)

Sd/-

RAJESWARA RAO VITTANALA
MEMBER (JUDICIAL)

Dy. Regr./Asst. Regr./Court Officer/
National Company Law Tribunal, Hyderabad Bench