

NATIONAL COMPANY LAW TRIBUNAL, COURT-V, NEW DELHI
IB-3173/ND/2019

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Item 506 of 02.09.21

In the matter of:

Swastik Pipe Limited

Through its Authorized Representative
Mr. Sanjay Mishra, 4, Punjabi Bagh West,
Central Market, Near Syndicate bank
New Delhi-110026

....Operational Creditor

Vs

Emkay Automobiles Industries Limited

W-10/14, Western Avenue, Sainik Farms,
New Delhi- 110062

.....Corporate Debtor

Under Section 9 of the Insolvency and Bankruptcy Code, 2016.

Order delivered on: 2.10.2021

Coram:

ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)
K.K. VOHRA, MEMBER (TECHNICAL)

Present:

For the OC : Adv Sanjay Jain
For the CD : Adv Kapil Kher

ORDER

Per: K.K. Vohra, Member (T)

1. This is a petition filed by Swastik Pipe Limited, Operational Creditor (OC) seeking initiation of Corporate Insolvency Regulation Process (CIRP) against the Corporate Debtor (CD) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) for the alleged default on the part of the CD in settling the amount of Rs 1,20,04,712 (Pg 14 of Petition) as on 17.07.19 including interest @18% PA towards supply of Precision Tubes. The details of transactions leading to the filing of this application as averred by the OC are as follow:



● CD approached OC for supply of Precision Tubes to the factories of CD situated at Pant Nagar and Gurugram. OC has been supplying to CD on running account basis since 2017 & 2018. OC supplied the required goods and raised invoices and the unit wise outstanding is as under:

Sl No	Date of the Statement of Account	Unit Name	Principal	Interest	Total Amount (Rs)
1	07.08.19	Pant Nagar	1,07,45,645.96	33,61,836	1,41,07,481.96
2	19.06.19	Gurugram	2,93,255.60	32,384	3,25,639.60
	Total		1,10,38,901.56	33,94,220	1,44,33,121.56

● CD issued eleven (11) cheques all drawn on State Bank Of India (SBI) SME Branch for a total amount of Rs 1,25,59,446 towards the part payment of dues and out of these seven cheques for an amount of Rs 79,74,158 towards discharge of liability got dishonored on 28.6.19, and were returned with remarks 'Cheque is stopped'. Other two cheques both drawn on SBI SME Branch were dishonored on 17.7.19 and returned with remarks 'funds insufficient'

● OC received an email from CD on 18.07.19 stating that one cheque was deposited without informing them and that balance payment would be made through RTGS, hence, OC to not deposit any cheque without CD's written consent (Pg 78 of Petition).

2. OC issued the Demand Notice u/s 8 of IBC (Form 3) as per Rule 5(1) (a) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to the CD on 29.07.19 (pg 79-88 of Petition). CD paid to OC an amount of Rs 24,28,408 through cheques 954406 and 954407 both dated 07.08.19 upon receipt of demand notice dated 29.07.19 which has been adjusted against the part payment of interest on the delayed payment by CD and after adjusting the details of outstanding unit wise are as under:

Sl No.	Date of the Statement of Account	Unit Name	Principal	Interest	Total Amount (Rs)
1	07.08.19	Pant Nagar	1,07,45,645.96	9,33,427.11	1,16,79,073.07
2	19.06.19	Gurugram	293255.60	32,384	3,25,639.60
	Total		1,10,38,901.56	9,65,811.11	1,20,04,712.67

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3. In terms of Section 9 (3) (b) of the IBC, OC has affirmed vide affidavit dated 25.11.2019 that no notice of dispute and no amount has been received from CD in reply to demand notice dated 29.07.2019 (pg 90).
4. It is noted that as per Order dated 2.12.19 OC has filed affidavit in terms of Section 9 (3) (c) of IBC and also annexed Bank Statements (Pg 3-154 of affidavit 2.1.20)
5. It is noted that in compliance to the Order dated 23.7.21 OC has filed copies of invoices and certificate of registration issued to it under MSME Act. As seen in the statement of Outstanding amount claimed in the petition that OC receive payments vide Cheque on 07.08.19 and the total principal amount is Rs 1,10,62,311 and interest is Rs 9,65,811.
6. CD has filed reply to the petition on 7.2.20 and denied that there is any amount due and payable as claimed by OC. CD further stated that OC is trying to mislead as the supplies were not made as per the agreed terms and has caused several losses to CD (Pg 5, para 7 of reply). Further, it is stated that the material was rejected due to which CD has suffered loss and this fact was communicated to OC on few occasions including emails sent by CD to OC on 22.4.19 and 23.4.19 (Pg 14-18 of reply). It is further submitted that few cheques in question were given as security before supply on the assurance that OC shall supply material in a timely manner as per requirements of CD (pg 6, para 8). It also stated that OC has failed to disclose the receipt of payments for certain cheques and is seeking to adjust certain amount paid towards the alleged interest amount when there was no such understanding between the parties [Pg 4 Para 3 vi (e)]. CD has further stated that an amount of Rs. 24,28,408 was paid to OC, and OC adjusted that amount against interest, however, no such terms were agreed on these lines [Pg 4, para 3 (vi) (e)]. CD has stated that no demand notice was received by it. CD has relied on judgments among others, as follows:
- (i) In the matter of *Innoventive Industries Vs ICICI Bank & Anr.* Civil Appeal 8337-8338/2017, Hon'ble Supreme court has held that the moment there is existence of such a dispute, OC gets out of the clutches of the court.
- (ii) In the matter of *Mobilox Innovations private limited Vs Kirusa Software private Limited* Civil Appeal 9405/2017, Hon'ble Supreme court has held that one of the objects of the Code is to ensure



that the amount of such operational debt], which is usually smaller than that of financial debts, does not enable operational creditors to put CD into the Insolvency Resolution Process prematurely.

7. Heard the applicant and perused the case records.

8. The provisions pertaining to filing a petition for initiation of CIRP by OC are given under Section 9 of IBC. Before filing of Section 9 petition, the OC shall issue demand notice under Section 8 of the IBC. Section 8 and Section 9 have been reproduced below:

8. Insolvency resolution by operational creditor.

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -

(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the payment of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.

9. Application for initiation of corporate insolvency resolution process by operational creditor.

(1) After the expiry of the period of ten 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 subsection (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.



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(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish-

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen 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 payment 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 proceeding 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, if-

- (a) the application made under sub-section (2) is incomplete;
- (b) there has been payment 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:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

9. While applying aforementioned provisions over the facts of the present case, it is seen that in the email dated 27.12.19 sent by CD (pg 25 of rejoinder filed by OC), it is stated that CD requested OC to return the cheques and further stated that CD will clear dues of OC separately. Thus, it is clear that that CD was bound to pay and has acknowledged the same. CD has also sent an email dated 21.07.21 wherein CD has admitted that there is outstanding of Rs 60, 00,000 including interest (pg 2 of additional documents filed by CD on 26.07.21). OC has also stated that upon receipt of the demand notice by CD, an amount of Rs 24,28,408 was paid by CD to OC through two cheques and OC adjusted the same against the part payment of interest. OC has submitted that invoices raised provide 18% interest after the payment by CD, the latter has acknowledged vide Email dated 21.7.21 that total outstanding is Rs 60,00,000 (Rs 52,52,698 + Rs 7,47,302); CD has also stated that the amount would be paid in six monthly installments of Rs 10,00,000 each. OC has placed sufficient evidence in support of its claim. Going by the above details, the OC has established that material was supplied to CD. Additionally, CD has been able to quantify the loss due to some delay or other reasons and has also acknowledged to pay Rs 52,52,698 plus Interest latest as on 21.7.21. Thus, the existence of debt and default on the part of the CD is established. The petition is within limitation period.

10. In view of the above facts, the present application deserves to be admitted. Hence, the present application is **admitted** to initiate CIRP on the CD, with immediate effect.



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11. The OC has not proposed the name of IRP; therefore, we appoint Hemant Sethi (Registration No. IBBI/IPA-002/IP-N01107/2021-2022/13628; Email: hemantmlsethi60@gmail.com) whose name appears in the list provided by IBBI for 1.07.21 to 31.12.21. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of IBC and file his report within 30 days.

12. In pursuance of Section 13 (2) of IBC, we direct that public announcement shall be made by the IRP within 3 days with regard to admission of this petition under Section 7 of IBC.

13. We also declare a moratorium in terms of Section 14 of IBC. The necessary consequences of imposing the moratorium flow from the provisions of Section 14 (1) (a), (b), (c) & (d) of IBC. Thus, the following prohibitions are imposed:

- a) *the institution of suits or continuation of pending suits or proceedings against the CD 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 CD 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 CD in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
- d) *the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the CD.*

14. The supply of the essential goods or services to CD as specified, are not to be terminated or suspended or interrupted during the moratorium period [Sec 14 (2) of IBC].

15. The IRP shall perform all his functions contemplated, inter-alia, under Sections 17, 18 and 21 of IBC and conduct proceedings with utmost dedication, honesty and strictly in accordance with the provisions of IBC, Rules, Regulations and shall file reports before the Adjudicating Authority. It is further made clear that all the personnel connected with CD, its promoters or any other persons associated with the Management of CD are under legal obligation as per Section 19 of IBC to extend every assistance and cooperation to the IRP as may be required by him in



managing the day-to-day affairs of CD. The IRP shall be under duty to protect and preserve the value of the property of CD as a part of its obligation imposed by Section 20 of IBC and perform all his functions strictly in accordance with the provisions of IBC.

16. OC is directed to deposit a fee of Rs 2 lakh to meet the immediate expenses of the IRP within two weeks of this Order. The same shall be fully accountable by IRP and shall be reimbursed by the Committee of Creditors (CoC) to OC to be recovered as CIRP cost.

17. Registry is directed to communicate a copy of the Order to OC, CD, the IRP and the Registrar of Companies, New Delhi at the earliest possible but not later than seven days from today.

Sd/-

(K. K. VOHRA)
MEMBER (T)

Sd/-

(ABNI RANJAN KUMAR SINHA)
MEMBER (J)

Pronounced today under Rule 151 of the NCLT Rules 2016 as
Hon'ble Member (J), Shri Abni Ranjan Kumar Sinha is not
holding court today i.e. 12.10.2021.


For (Court Officer)