

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH, KERALA**

**IBA/26/KOB/2020**

(Under Section 9 of Insolvency and Bankruptcy Code 2016)

**Order delivered on 9<sup>th</sup> day of March, 2021**

**Coram:**

***Hon'ble Shri Ashok Kumar Borah, Member (Judicial)***

**In the matter of**

**M/s Kollinal Steels and Alloya Pvt. Ltd.  
30/984, Gokulam Arcade, Vytilla,  
Ernakulam-682019, Kerala represented by  
its Managing Director Bindu Cherian**

..... **Applicant/Operational Creditor**

Vs.

**M/s Manhaar Constructions India Pvt. Ltd.  
Regd.Office at Room No.XVII/111K2, Kambakkudy  
Building, Near Mar Athanasius College Jn  
Kothamangalamj, Kerala-686691.**

. ....**Respondent/Corporate Debtor**

**Parties/Counsel present (through video conferencing)**

For the Operational Creditor : Shri Reji George, Advocate  
For the Corporate Debtor : Shri P.V.Elias, Advocate

This Insolvency and Bankruptcy Application has been filed by **M/s. Kollinal Steels and Alloys Pvt. Ltd.** (hereinafter called 'Operational Creditor') against **M/s. Manhaar Constructions India Private Limited** (hereinafter called the 'Corporate Debtor'), a Company incorporated under the Companies Act, seeking to initiate Corporate Insolvency Resolution Process (CIRP for short), against the Corporate Debtor under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter called "I&B Code") read with Rule 6 of Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules 2016, on the ground that the Corporate Debtor defaulted in making payment to the extent of ₹32,40,594/- as on 17.11.2019 along with interest @ 18 % p.a.

The brief facts of the case are as under: -

2. The Operational Creditor is a dealer of steel and alloys manufactured by various companies. During the course of business, the Operational Creditor supplied various steel items to the Corporate Debtor for a total amount of ₹45,37,944/- on different dates between 13.08.2019 and 17.09.2019. Subsequently, the goods were delivered to the Corporate Debtor and they issued post-dated cheques towards payment of the amounts covered by each invoice at the time of taking delivery of goods. Thereafter, the Corporate Debtor paid a total amount of ₹12,97,350/-. As on 17.11.2019 an amount of ₹32,40,594/- is due from the Corporate Debtor.

3. As no payments were received from the Corporate Debtor towards the dues, applicant issued a Demand Notice dated 29.01.2020 under Section 8 of the Insolvency and Bankruptcy Code, 2016 (under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016).

4. The Corporate Debtor has neither given a reply stating that there exists a dispute which is pre-existing and bonafide nor repaid the entire debt, therefore the Operational Creditor has filed this application to initiate Corporate Insolvency Resolution Process against the Corporate Debtor under IBC, a copy of which has been duly served on the Corporate Debtor.

5. The Corporate Debtor filed their counter affidavit and contented that there is neither any default nor any wilful default from the part of them with regard to any amount.

6. It is further stated that due to Covid 19 pandemic, the construction works have come to a standstill and they were not in a position to procure fund to pay

off the admitted debt. It is also stated that ‘Annexure E- confirmation from the part of the alleged Corporate Debtor’ is neither issued nor executed by the alleged Corporate Debtor, as it does not bear the seal of the Corporate Debtor which is a Private Limited Company.

7. It is also stated that in the affidavit filed in support of the Application, the applicant has no case that the contents of the Application, except part I and part V of the Form 5 under Sub Rule 1 of Rule 6 are true.

8. It is again stated that the Operational Creditor has filed a Civil Suit as O.S No. 12/2020 before the Principal Sub Court, Ernakulam against the Corporate Debtor for realising the very same amount. It is also stated that the Operational Creditor has filed complaint under Section 138 of the Negotiable Instruments Act,1881 [NI Act 1881] as S.T. No. 48/2020 and S.T No. 49/2020 before the judicial Magistrate Court, Thripunithura.

9. In the rejoinder the Operational Creditor stated that on 18.12.2019 they issued a Lawyer’s notice to the Corporate Debtor demanding payment of the amount due. Thereafter as directed by the Corporate Debtor the Operational Creditor placed 4 cheques for clearance. However, all 4 cheques were dishonoured for the reason “funds insufficient”. Since the cheques issued by the Corporate Debtor were dishonoured, the Applicant filed O.S No. 12/2020. It is also stated that the Operational Creditor filed S.T. Nos. 48/2020 and 49/2020 against the Corporate Debtor and its Directors under Section 138 of the NI Act, 1881.

10. The Operational Creditor in the counter stated that in the affidavit of the Application due to an inadvertent error it was typed as ‘Part I and Part V’ instead of ‘Part I to Part V’. This was allowed to be corrected.

11. The fact that the Original Suit and the Criminal complaint were filed by the Applicant prior to the filing of this Application and the fact that those case are

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still pending, would not in any way make the present Application filed by the Applicant under the I& B Code not maintainable. The Applicant stated that in *International Asset Reconstruction Company Pvt. Ltd. V. Paramount Mills Private Limited [ Company appeal (AT) No. 777 of 2018]* it was clarified that pendency of Civil Suit cannot be a ground to reject an application filed under I&B Code, 2016. Further in *Shah Brothers Ispat Pvt. Ltd. V. P. Mohanraj &Ors [Company Appeal (AT) No. 306 of 2018]* a complaint under Section 138 of NI Act 1881 filed even after moratorium was declared under Section 14 of the I& B Code is maintainable and the same can be prosecuted parallel with the proceedings initiated under the I&B Code,2016.

12. The Applicant further stated that it is clear from the documents annexed with the Application that huge amount is due from the Corporate Debtor. Therefore, it is highly necessary in the facts and circumstances of the case to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

## **FINDINGS**

13. I have heard the arguments advanced by the Learned Counsel for the Applicant and the Respondent and had gone through all the materials placed on record. It appears from the records that the claim of Operational Creditor has never been disputed by the Corporate Debtor within the timelines as mentioned in the Code nor the Corporate Debtor could show a pre-existing dispute in this matter.

14. This Tribunal examined the relevant provisions of the Code insofar as “Operational creditors”, “Operational Debt”, “Default” and “Dispute”, to determine the eligibility for admission of this application.

### ***Section 5, Sub-Section 20:***

*“operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*

**Section 5 Sub-Section 21:**

*“operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;*

**Section 3 Sub-Section 12:**

*“default” means 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, as the case may be;*

**Section 5 Sub-section 6:**

*“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.*

15. On a careful reading of the above definitions, the applicant has qualified to become an Operational Creditor as the Corporate Debtor owed them debt which is considered as an “Operational Debt”. As the applicant has undoubtedly provided services to the Corporate Debtor, their dues are qualified to classify as “Operational Debt”.

16. As regards the “Default”, the Corporate Debtor admits their debt and states that due to Covid 19 pandemic the construction works have come to a standstill, therefore the Corporate Debtor was not in a position to procure funds.

As regards the “Dispute”, the Corporate Debtor could not establish any of the three points mentioned under the definition in the Code, i.e., *the existence of the amount of debt, the quality of goods or service, or the breach of a representation or warranty.*

17. In ***“Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited – CIVIL APPEAL NO. 9405 OF 2017 dated September 21, 2017***, the Hon’ble Supreme Court held that the ‘existence of the dispute’ and/or the suit or arbitration proceeding

must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be and observed:

*“24. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be....”*

In the aforesaid case, the Hon’ble Supreme Court clearly laid down as to what are the facts to be examined by the Adjudicating Authority while examining an application under Section 9, which is as follows:

*“(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act)*

*(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? And*

*(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed*

*before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

*If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”*

18. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the ‘operational debt’ is exceeding ₹ 1 lakh [prior to the notification of 24<sup>th</sup> March 2020] and that the aforesaid debt is due and payable and has not been paid, in such a case, in the absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of the demand notice of the unpaid ‘operational debt’, the application under Section 9 cannot be rejected and is required to be admitted.

19. On a perusal of the case records in the instant application, it is established that:

- i. The operational debt due to pay exceeds ₹1 Lakh
- ii. The documentary evidence furnished with appropriate source that the aforesaid debt is due and not paid till date.
- iii. There is no proof of existence of any earlier dispute between parties or arbitration proceedings filed before the Competent Authority.

20. The aforesaid conditions are not lacking in the present Application to reject the same. The apparent philosophy underlying the IBC is that Companies which

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are not able to function on commercial basis must be liquidated. In other words, Corporate Darwinism ensure survival of the fittest.

21. Since all the aforesaid conditions are fulfilled in the instant case, this Tribunal is of the opinion that the application submitted by Operational Creditor is complete in all respects.

22. The Operational Creditor filed IA(IBC)/17/2021 and suggested the name of **Mr. P.D Vincent**, having Registration No. **IBBI/IPA-002/IP-N00521/2017-2018/11638**, having office at 65/2364A, Ponoth Road, Kaloore, Kochi-682017, for appointment as Interim Resolution Professional (IRP) if an order admitting the present application is passed. Shri. Vincent has filed a declaration in Form 2 affirming that he is a Registered Insolvency Professional and no disciplinary proceedings are pending against him.

### **ORDER**

23. For the aforesaid discussions, the Application on behalf of Operational Creditor filed under Section 9 of the I&B Code 2016 for initiation of Corporate Insolvency Resolution Process is **admitted** against the Corporate Debtor, **M/s. Manhaar Constructions India Private Limited** prohibiting the following:

a) having admitted the application, the provisions of moratorium as prescribed under Section 14 of the Code should be operative hereafter with effect from the date of order shall be applicable by prohibiting institution of any suit before a court of law transferring, encumbering, any of the assets of the debtor etc...

b) 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;

d) 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;

e) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

**II. It is further made clear that:**

a. The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.

b. That the provisions of Sub-Section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

c. That the order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 of IBC or passes an order for liquidation of corporate debtor under section 33 of IBC, as the case may be.

d. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of IBC.

24. That this Bench hereby appoints **Mr. P.D Vincent**, Registration No. **IBBI/IPA-002/IP-N00521/2017-2018/11638**, having office at 65/2364A, Ponoth Road, Kaloor, Kochi-682017, as Interim Resolution Professional to carry out the functions as mentioned under the Code. The fee payable to IRP, or, as the case may be the RP, shall comply with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP/

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RP shall carry out his functions as contemplated by Sections 15, 17, 18, 19, 20 and 21 of the IBC.

25. The Applicant Operational Creditor shall deposit an amount of Rs. 2,00,000/- [Rupees Two Lakhs] with the Interim Resolution Professional for initiation of the proceedings as directed by this Tribunal forthwith. This amount is subject to ratification by the CoC.

26,. The Registry is directed to communicate this order to Operational Creditor, Corporate Debtor and IRP through email and speed post.

27. A copy of this Order be sent to the RoC for modifications, if any in the master data of the Company.

28. With the above Orders, IBA/26/KOB/2020 is admitted

29. In view of the fact that the name of the proposed IRP has been considered by this Tribunal, no further orders in the IA(IBC)17 KOB/ 2021 is necessary. Hence IA(IBC)17/ KOB/ 2021 stands disposed of.

Dated this the 9<sup>th</sup> day of March 2021

Sd/-  
**(Ashok Kumar Borah)**  
**Member (Judicial)**