

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

C.P. No. 342/I&BP/2018

Under section 9 of the IBC, 2016

In the matter of

Smart Serve Houseware Private

Limited, Unit No.24, Sumitinath Industrial

Premises Co-operative Housing Society

Ltd. Chincholi Bunder Road, Mindscape,

Link Road, Malad West, Mumbai-400064

....Petitioner

V/s.

Virgo Home Deziner Private Limited,

Regd. Office at Godown No.1, Building No.183,

Jumboshed, Village-Gundavali, Taluka-Bhiwandi,

District-Thane-421302

....Respondent

Order delivered on: 19.02.2019

Coram: Hon'ble Bhaskara Pantula Mohan, Member (Judicial)

Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. Priyank Kapadia, Advocate, i/b Mr. Vikrant Shetty, Advocate.

For the Respondent: None Present.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. This Company Petition is filed by Smart Serve Houseware Private Limited (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Virgo Home Deziner Private Limited (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default on 19.01.2014 in making payment to the extent of Rs. 8,54,576.25/- along with interest by invoking the provisions of Sections 8 and 9 of I & B Code (hereinafter called "Code") read with Rule 5 and 6 of Insolvency & Bankruptcy (AAA) Rules, 2016.
2. The facts of the case are that the Petitioner has supplied various Houseware products to the Corporate Debtor from 11th May 2011 to 16.01.2014 and raised invoices on the Corporate Debtor. The Petitioner submits that a sum of Rs. 8,54,576.25/- is due from the Corporate

Debtor. The Petitioner issued a Demand Notice dated 27.12.2017 demanding the payment of aforesaid amount along with interest thereon. The Corporate Debtor has replied to the Demand Notice sent by the Petitioner vide its reply dated 20.01.2018 whereby the Corporate Debtor has disputed the debt claimed by the petitioner.

3. Previously the Petitioner has sent a Demand Notice through an Advocate on 06.01.2017 to the Corporate Debtor and the Corporate Debtor has given a reply on 04.02.2017 wherein the Corporate Debtor denied the liability and in fact demanded a sum of Rs.11,78,222/- from the Petitioner. This has been mentioned in the reply dated 20.01.2018 sent by the Corporate Debtor to the Petitioner for their second demand notice dated 27.12.2017.
4. The Counsel for the Petitioner during the hearing submitted that their attempts to serve the Corporate Debtor failed and requested for substituted service by way of publication in newspapers, and the same was allowed. Accordingly, the Petitioner issued publication in two daily newspapers and filed proof of service. However, the Corporate Debtor is absent.
5. The Petitioner enclosed an email communication dated 10.02.2015 sent by the Corporate Debtor to the Petitioner which reads as below:-

"Sir,

Refer to our earlier discussion, As told u we don't want to talk to u on phone, we send mail only, as an businessman I don't like to inform u and repeat the same thing again and again,

We are clear from day one and sending u finally,

1. Before packing I personally called u and send mail. Please send Y person for checking, u haven't send.

2. After packing also Mr. Ajay send mail after your mail, we are not responsible for any transit damages,

3. All products packed in front of our operation-Head Mr. Vinod Gupta ji, Life style back ground-7 years,

4. So it is very clear whatever we send is perfect, we are not at all responsible for any transit damages and whatever we send is perfect,

5. So RTV amount is perfect and debited to u,

6. Balance Stock u will pick up in front of u on coming Monday from our Pune-Ishanya Store.

7. Balance amount we will clear before February or max before March, 2015."

I hope it's clear from our end again and again, we can't do anything in this.

6. The Petitioner filed an additional affidavit stating that the Corporate Debtor, by the above referred email, stated that the Balance Payment shall be paid to the Petitioner before February, 2015 or maximum before March, 2015. The Petitioner claims that the three year period would expire by February or March 2018, this Petition is filed on 01.03.2018 (but this Petition is actually filed on 06.03.2018) and hence the Petition is filed within the period of limitation and maintainable.

7. The Petitioner relied on the judgments of Hon'ble Supreme Court in the case of *Aries & Aries Vs. Tamil Nadu Electricity Board (2018) 12 SCC 393* to say that since the Petitioner have committed that balance payment will be made before February or maximum before march 2015 and since this Petition is filed on 06.03.2018, the Petition is filed within the period of limitation.

8. Since the Petitioner by the above referred email confirmed that payment will be made by March 2015, the right to file Petition accrues on 31.03.2015 and the limitation ends on 01.04.2018, as provided under Article 137 of the Limitation Act, 1963. This Petition was filed on 06.03.2018 and hence the same is well within the period of limitation.

9. This Bench has given serious consideration to the reply dated 04.02.2017 for the first demand notice dated 06.01.2017 and the second reply dated 20.01.2018 for the subsequent demand notice dated 27.12.2017. The followings are the disputes raised by the Corporate Debtor;

- a. Tax invoices are not given by the Petitioner.
- b. The Corporate Debtor made the payment on advance basis and it is quite possible that the Corporate Debtor might have given some cheques for advance amount without admitting the liability.
- c. VAT was not paid by the Petitioner to the concerned Authority and hence the Corporate Debtor will become liable to pay the VAT.
- d. The Corporate Debtor has sent several debit note for Rs. 8,46,181/- along with interest @18% p.a. on Rs. 1,52,312/-, as on 31.07.2016. Further they are entitled for interest from August, 2016 till January, 2017 to the extent of Rs. 1,79,729/- and hence the Petitioner is liable to pay a sum of Rs. 11,78,222/-, etc.

10. All the above disputes were raised only after the email dated 10.02.2015 where there is a categorical statement that the Corporate Debtor will make the payment by February or maximum by March of

2015. The disputes were raised only after the issue of Demand Notice under the Code, that too after committing that the payments will be made. The Corporate Debtor has not produced any communication or document which shows that there is a pre-existing dispute except the reply to the demand notice.

11. The Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. v/s. Kirusa Software (P) Limited- 2017 (SCC Online SC 1154) held as below :-

"40..... 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 defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense 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".

12. In the case on hand the contentions raised by the Corporate Debtor are hypothetical in view of the fact that on 10.02.2015 itself the Corporate Debtor had given an assurance that the payment will be made by February or maximum March of 2015. If the amount is actually due from the Petitioner to the extent of Rs. 11,78,222/- as claimed in the reply to the demand notice, there is no occasion for the Corporate Debtor to give such assurance on 10.02.2015. Hence, this Bench is of the considered view that the dispute does not really exist.

13. This Bench having been satisfied with the Application filed by the Operational Creditor which is in compliance of provisions of section 8 & 9 of the Insolvency and Bankruptcy Code admits this Application declaring moratorium with the directions as mentioned below:

- (a) That this 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.

- (b) 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.
- (c) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (d) That the order of moratorium shall have effect from 31.01.2019 till the 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.
- (e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- (f) That this Bench hereby appoints Mr. Hirachand Nemichand Bafna, 1502, Garner Towers, Sheth Motisha Lane, Mazgaon, Mumbai - 400010, Registration No.: IBBI/IPA-001/IP-P01207/2018-19/11922 as an Interim Resolution Professional (IRP) to carry the functions as mentioned under the Insolvency & Bankruptcy Code.

14. Accordingly, this Petition is admitted.

15. The Registry is hereby directed to communicate this order to both the parties and also to the IRP immediately.

sd/-

V. Nallasenapathy
Member (Technical)

sd/-

Bhaskara Pantula Mohan
Member (Judicial)