

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

C.P. No. 1365/I&BC/2018

Under section 9 of the IBC, 2016

In the matter of

Haresh Dharmani
....Operational Creditor

v/s.

AP Coated Drums & Barrels Pvt. Ltd.
.... Corporate Debtor

Order Reserved on 08.10.2018
Order Delivered on 16.10.2018

Coram:

Hon'ble Shri V. P. Singh, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Operational Creditor: Mr Rishabh Jaisania /w. Devesh Juvekar
Advocates.

For the Corporate Debtor : Mr. Deepak Bapat a/w. Sonali Bapat,
Disha Karambar, Priya Rita i/b. Disha
Karambar & Associates.

Per V. P. Singh, Member (Judicial)

ORDER

It is a Company Petition filed u/s 9 of Insolvency & Bankruptcy Code by the Operational Creditor against the Corporate Debtor stating that the Corporate Debtor defaulted in making payment of ₹67,29,188/-, given the same, this Company Petition is filed for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. The case of this Operational Creditor is that the Corporate Debtor approached the Operational Creditor for the purchase of C.R. coils. The Operational Creditor supplied various materials and was

dealing with the Corporate Debtor for the past four years. The Operational Creditor has supplied goods to the Corporate Debtor and has timely raised invoices upon the Corporate Debtor. However the payment against the two of the invoices, by way of which the Operational Creditor has supplied 'CR Sheet' to the Corporate Debtor on 30th November 2014, remained partly unpaid. The outstanding amount against the invoices aggregates to ₹38,82,916/-. Out of which the Corporate Debtor has paid an aggregate amount of only ₹1,10,486/-, leaving a balance principal of ₹37,72,430/. According to Operational Creditor the last payment of ₹10,00,000/- was paid on 15 & 18 September, 2017. The invoice provides for an interest provision of 24% per annum. The invoices were accepted by the Corporate Debtor and Goods were utilised in the usual course of business by the Corporate Debtor, and the Corporate Debtor has accepted the goods supplied by the Operational Creditor without any protest or demur about quality or quantity. The Goods supplied by the Operational Creditor to the Corporate Debtor never returned to the Operational Creditor.

3. The Operational Creditor has also issued the VAT Confirmation Certificate for the period FY 2013-2014, 2014-2015, 2015-2016 to the Corporate Debtor in respect to the Goods supplied to the Corporate Debtor. In respect of the invoices/ goods which are subject matter of this Company Petition, the Corporate Debtor already claimed CENVAT credit of ₹28,13,569/- and VAT Set-off of ₹18,01,726/-. By the VAT confirmation Certificate on entire amount/ value of the Goods supplied by Operational Creditor for FY 2013-14, 2014-15, 2015-16, the Corporate Debtor has never sought any reversal/ variation of the CENVAT credit of Excise Duty and VAT setoff claimed by the Corporate Debtor. The year wise bifurcation for the amount of MODVAT and VAT Set-off claimed by the Corporate Debtor in respect of goods supplied by the Operational Creditor is as under:

| Year | Excise (₹) | VAT (₹) |
|-----------|------------|-----------|
| 2013-2014 | 10,07,386 | 6,03,914 |
| 2014-2015 | 16,79,290 | 11,40,710 |
| 2015-2016 | 1,26,893 | 57,102 |
| Total | 28,13,569 | 18,01,726 |

4. The Operational Creditor issued a demand notice dated 6th March 2018 under Section 8 of Insolvency & Bankruptcy Code, 2016. After that, the Corporate Debtor replied to the Demand notice by a letter undated which was received by the Operational Creditor on 17th March 2018. In the said reply, the Corporate Debtor has not denied the amount claimed in the Demand Notice and also has not raised any dispute.

5. Furthermore, the Ld. Counsel for the Operational Creditor also states that the Corporate Debtor has already claimed MOD-VAT credit of Central Excise Duty amounting to ₹28,13,569/- and set-off of VAT of ₹18,01,726/- for the period beginning from 2013-2014 to 2015-2016. The Corporate Debtor does not dispute the modvat credit of central excise duty availed by them. In regards to the VAT Set-off, the documents produced by the Operational Creditor is evidence that it has already availed VAT Set-off of ₹18,01,726/-.

6. The Ld. counsel for Corporate Debtor, relied upon Mobilox Innovation Pvt. Ltd. v. Kirusa Software Pvt.Ltd., Under I&B Code, it need not be seen whether the company is unable to make payment or that the relief sought has bonafide or not. The only criterion to be looked into is as to whether debt and default are in existence as on the date of filing case. Under Section 9 of the Code, if corporate debtor brings it to the notice of operational creditor that debt is in dispute, then such claim cannot lie under section 9 of the Code. To see how this clause "existence of dispute" plays out, we have to read

the judgment of Hon'ble Supreme Court delivered in *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* (September 21st 2017) as to this; the para relevant is as below:

"54. 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)(ii)(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 proceeding 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 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."

7. The Ld. Counsel for the Operational Creditor states that, they had filed copies of monthly VAT returns filed with the sales tax department for the period from Financial Years 2013-14 to 2015-16 along with copies of VAT paid challans, which are evidence of the fact that the Operational Creditor had deposited the sales tax amount with the Government treasury which includes the amount of VAT collected from the Corporate Debtor. Therefore, the allegation made by the Corporate Debtor that the Operational Creditor has not paid the sales

tax collected from the Corporate Debtor into the Government treasury is false, however, dispute of VAT do not come under the definition of "Dispute" under the Insolvency and Bankruptcy Code which defines as under:

*"(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;"*

8. As per the mandate of the Code, this Adjudication Authority is only required to ascertain whether there is a default of the operational debt of ₹1,00,000/- or more to be paid. It is evident from the fact that the default of the operational debt is more than ₹1,00,000/-. Therefore, the plea taken by the Corporate Debtor in respect of VAT is not sustainable. The dispute about non depositing of the VAT amount after its collection is a different issue, but this issue is not covered in the definition of existing dispute. However the issue of VAT has been raised only after receiving the demand notice, which shows that issue of VAT has been raised for creating the defence.

9. Given the above facts, that the Demand notice demanding payment was served upon the Corporate Debtor, after that, the Corporate Debtor had filed reply to the Demand Notice wherein it had admitted that that it has to pay the Principal amount to the Operational Creditor.

10. It appears from the record that the Corporate Debtor having defaulted in making payment to the operational creditor. As discussed above there being no dispute in respect of the quality of goods or service, the dispute which has been raised after receiving the demand notice is not covered under the meaning of existence of dispute given in the case law of Mobilox supra. Thus saying that dispute is in

existence in respect to the services provided by the Operational Creditor is not sustainable.

11. The petitioner has recommended the name of Mr Hemanshu Kapadia for being appointed as IRP and has filed the declaration in Form 2 of Interim Resolution Professional Mr Hemanshu Kapadia, Registration No. IBBI/IPA-002/IP-N00318/2017-18/10923, Office No. 12, 14th Floor, Building No. 3, Navjivan Commercial Premises Soc. Ltd. Lamington Road, Mumbai – 400 008.

12. In the circumstances petition filed by the operational creditor for initiation of Corporate Insolvency Resolution Process is admitted. The moratorium order u/S. 14 of the I & B Code is being passed, and we issue following directions.

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

- (iii) 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.
- iv) That the order of moratorium shall have effect from the date of admission of the petition 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.
- v) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- vi) That this Bench hereby appoints Mr. Hemanshu Kapadia, Registration No. IBBI/IPA-002/IP-N00318/2017-18/10923, Contact No. 66310888, Office No. 12, 14th Floor, Building No. 3, Navjivan Commercial Premises Soc. Ltd. Lamington Road, Mumbai – 400 008, as Interim Resolution Professional to carry out the functions as mentioned under Insolvency & Bankruptcy Code.

13. The Registry is hereby directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional even by way of email and by speed post. List on 30th Oct 2018 for filing progress report.

Sd/-

RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

Sd/-

V. P. SINGH
MEMBER (JUDICIAL)