

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

TCP No. 308/IBC/NCLT/MB/MAH/2018

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

In the matter of

Mars Petrochem Private Limited

..... Operational Creditor  
(Petitioner/Applicant)

v.

Valecha Piletech Infra Private Limited

..... Corporate Debtor  
(Respondent)

Heard on : 04.02.2019

Order delivered on : 25.02.2019

**Coram :**

Hon'ble M. K. Shrawat, Member (J)

**For the Petitioner :**

Advocate Tanmay Kelkar

**For the Respondent :**

Advocate Disha Ponda.

*Per: M.K. Shrawat, Member (Judicial)*

**ORDER**

1. This is a Petition filed under section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter as **Code**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) on 27.02.2018 by the Petitioner 'Mars Petrochem Private Limited' in the capacity of **"Operational Creditor"**, against Valecha Piletech Infra Private Limited (hereinafter as **'Corporate Debtor'**) having registered address at C-212, Mittal Commercial, Off. MV Road, Bhd Ruby Couch, Andheri East, Mumbai.
2. The Petitioner has submitted Form-5 as prescribed under the rules. In the requisite Form, under the Head "Particulars of Operational Debt" the total amount in default is

stated as ₹5,92,206/- (₹5,30,000/- being the balance amount of invoices and ₹62,206/- being the interest amount @ 24% p.a.).

**A) Background of the Case :**

3. The Operational Creditor has supplied certain goods to the Corporate Debtor which were received undisputedly. Accordingly, an invoice dated 03.06.2017 bearing No. IND/0348/17-18 for an amount of ₹5,30,000/- was issued to the Corporate Debtor. The Corporate debtor has failed to pay the same. hence, this petition.

**B) Submissions by the Operational Creditor :**

4. The Operational Creditor states that an amount of ₹5,92,206/- being the amount of invoice and interest @24% thereon is due and payable by the Corporate Debtor as per the books of Operational Creditor as on 27.01.2018.
5. In order to discharge the aforesaid liability, the Corporate Debtor issued the following cheques as payment for the balance outstanding amount of ₹5,30,000/- in the year 2017. The details are given herein below:

Sr. No.	Cheque Date	Cheque No.	Bank	Amount ₹
1	15.11.2017	0079566	Axis Bank Ltd.	2,65,000/-
2	20.11.2017	0079567	Axis Bank Ltd.	2,65,000/-
			<b>Total</b>	<b>5,30,000/-</b>

6. The Operational creditor deposited the above said cheques for encashment/clearance with HDFC Bank Ltd. However, the cheques were dishonoured vide a return memo dated 22.11.2017 with an endorsement "Payment Stopped by Drawer". Consequently, the Operational Creditor sent a legal notice dated 27.01.2018 U/s 138 r/w 141 of the Negotiable Instruments Act. The Corporate debtor neither replied to the said notice nor paid the cheques' amount to the petitioner.
7. Thereafter, the Operational Creditor sent a Demand Notice dated 29.01.2018 U/s 8 of the Code calling upon the Corporate debtor to pay the outstanding amount. In spite of the repeated requests of the Operational Creditor, the Corporate debtor has failed to reply to the said notice and has failed to repay the outstanding dues.
8. It is finally argued that since the Debtor is not making the payment and all the procedural formalities have been complied with, this Petition/Application may be Admitted for the initiation of the CIRP.

**C) Contentions of the Corporate Debtor:**

9. The Ld. Counsel for the Respondent has raised a technical objection to the maintainability of this petition itself. It is submitted that the Demand Notice sent by the Operational creditor is not as per the provisions of Section 8 of the Code. Section 8(1) of the Code prescribes a proper format for sending a Demand Notice. It says '*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*". The Operational Creditor has to comply with the requirements of Rule 5, Form 3 & Form 4 given in the Adjudicating Authority Rules, 2016. However, in the present case, the same has not been followed. Hence, for the above said non-compliance, this petition be rejected at the threshold itself.

**Findings:**

10. I have gone through the pleadings on record and perused the submissions made by learned counsels for both the sides. On careful perusal of the documents it is noticed that the invoice for an amount of ₹5,30,000/- has not been paid by the Corporate Debtor till date. The cheques were issued for the said repayment, however, dishonoured. The Corporate Debtor has acknowledged its liability by issuing the cheques. Thereafter, despite the continuous follow up by the Operational Creditor for the payment, the Corporate Debtor failed to reply to the notices of the Operational Creditor as well as to repay the amount.
11. As far as the contention of the Corporate Debtor regarding non-compliance of Section 8 of IBC is concerned, the language of Section 8 does not mandatorily require the issuance of notice in the prescribed format because the section says that "*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*". It is worth to give emphasis on the term 'may'. The Performa annexed to Application to Adjudicating authority Rules, 2016- Rule 5 is a guideline to issue a notice which shall contain all the information as prescribed in the said Performa in the shape of Form 3 & Form 4. The purpose should be to communicate the correct amount of default and other connected details. In this case, it is noticed that barring the format prescribed, otherwise the columns of the said format has duly been incorporated so as to communicate precisely the quantum of debt and the claimed default of non-payment. Therefore, this Bench is of the opinion that merely because of this technical defect, the petition should not be thrown out of court without adjudicating on merits.
12. I am of the view that merely a technical objection and the defect being a curable defect should not come in the way of admission of a petition, otherwise a genuine claim. Moreover, the notice sent by the Operational Creditor along with the unpaid invoice has been duly served on the corporate Debtor and affidavit of service has been produced on record. The impugned notice along with invoice contains all the relevant information which may be required by the Corporate Debtor to reply to the same. However, the Corporate Debtor failed to reply to the said notice and this raises an obvious presumption that there is no defence on merits to the claim of the Operational Creditor. No dispute has been raised by the Corporate Debtor to the said claim.

13. Keeping presumably admitted facts in mind that, the Operational Creditor has not received the outstanding Debt from the Debtor and that the formalities as prescribed under the Code have been completed by the Operational Creditor. It is my conscientious view that this Petition deserves '**Admission**' specially wherein the Debtor is accepting its default.
14. The Operational Creditor has not proposed the name of Interim Resolution Professional. Consequentially, this Bench hereby appoints **Mr. Rajmal L Mogra**, having registration no. as IBBI/IPA-001/IP-P00511/2017-18/10912, as Interim Resolution Professional for initiation of CIRP.
15. Having admitted the Petition/Application, the provisions of **Moratorium** as prescribed under **Section 14 of the Code** shall be operative henceforth with effect from the date of appointment of IRP shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.
16. That as prescribed under **Section 13 of the Code** on declaration of Moratorium the next step of **Public Announcement** of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
17. The appointed IRP shall also comply the other provisions of the Code including **Section 15** and **Section 18** of The Code. Further the IRP is hereby directed to inform the progress of the Resolution Plan to this Bench and submit a compliance report within 30 days of the appointment. A liberty is granted to intimate even at an early date, if need be.
18. The Petition is hereby "**Admitted**". The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of order.

SD/-

Date:25.02.2019

**M. K. SHRAWAT**  
**MEMBER (JUDICIAL)**