IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH

COURT-V

C.P. No. 903/IBC/MB/2021

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Kinetix Engineering Solution Limited

Having registered office at:No. 940, 20th Main Road, Banashankari 2nd Stage, Bangalore 560 070

……*Operational Creditor*

Vs

Walchandnagar Industries Limited

Having registered office at: 3 Walchand Terraces, oppsite Air Conditioned Market, Tardeo, Mumbai 400 034

…….*Corporate Debtor*

Order pronounced on: **12.04.2023**

Coram:

Hon'ble Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Anuradha Sanjay Bhatia, Member (Technical)

For the Applicant: Mr. Shyam Kapadia a/w. Mr. Bhargav Kosuru a/w. Ms. Nidhi Chauhan i/b. Indus Law, (Advocates)

For the Respondent: Mr. Amir Arsiwalla (Advocate)

Per: Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The above Company Petition is filed by Kinetix Engineering Solution Limited, (hereinafter called as "**Operational Creditor"**), seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against Walchandnagar Industries Limited (hereinafter called as "**Corporate Debtor"**) by invoking the provisions of Section 9 Insolvency and Bankruptcy code (hereinafter called "**Code**" read with rule 6 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of Operational Debt of Rs. 3,20,33,542/-.

Facts of the case

2. The Petitioner submits that the Respondent Corporate Debtor had issued the following Purchase Orders for delivery of Road Mobile Launchers ('**RML**'):
   a. Purchase Order No. 4500035342 dated 24.11.2013 (revised on 25.02.2019)
   b. Purchase Order No. 4500036232 dated 07.01.2014 (revised on 22.01.2019)
   c. Purchase Order No. 4500060969 dated 13.07.2018 (revised on 22.01.2019)

   The Petitioner had duly delivered and completed its Scope of Work, as envisaged in the Purchase Orders, by 12.03.2021

3. The Sub Systems of RML under the scope of supply were commissioned by the Petitioner and have also been subjected to Site Acceptance Trials ("**SATS**"). The SATS for RML Mk III were completed by 28.02.2021. The Petitioner submits that no observations/defects in the purview of scope of work of the Petitioner have been made either by the Respondent or the

designated Inspection Agency [i.e. Strategic System Quality Assurance Group ("**SSQAG**")] or the End Customer [i.e. Research & Development Establishment (Engineers) ("**R&DE(E**)")] to the Petitioner. The Respondent has also not shared any written document released by SSQAG and/or R&DE(E) raising any observations in the purview of the Petitioner for liquidation. However, the Respondent has failed to take necessary steps to process the payment in favour of the Applicant i.e., by not processing the Bill of Exchange and other documents as mandated in the Letter of Credits("**LC**"), for LC Negotiation and Bill Discounting.

4. The Respondent has, therefore, defaulted on payment of debt, which has been due and payable from the date of completion of the last SATS completed i.e. 28.02.2021.

5. Thereafter, certain email correspondences ensued between the parties, wherein the Petitioner had reminded the Respondent about the outstanding dues.

6. As the payment was not made, the Petitioner had issued the Demand Notice dated 20.05.2021, under Section 8 of the Insolvency and Bankruptcy Code, 2016. The Corporate Debtor issued a reply to the said Demand Notice on 30.05.2021. The Petitioner issued a response to the contents of the said Reply of the Corporate Debtor vide rejoinder dated 21.06.2021.

7. As the Respondent has failed to repay the outstanding amounts despite demand notice, this necessitated the filing of the present Petition.

Reply by the Respondent

8. The Respondent has filed an affidavit in reply controverting the allegations sought in the Petition.

9. The Respondent submits that the present Petition is not maintainable as the same is barred by section 10A of the Code. Since, it is the case of the

Petitioner that the default occurred either on 28.02.2021 or on 12.03.2021and both dates of default mentioned by the Petitioner falls within the Section 10A period. For this reason alone, the Petition is liable to be dismissed. Apart from that, the amounts claimed by the Petitioner were to become payable only after the completion of the SATs (i.e. Site Acceptance Trials) which is not the case as observed from the factual matrix of the case since, the SATs were never completed. Thus, the cause of action does not arise. Even otherwise, the present Petition is not maintainable as there exists several pre-existing disputes between the parties. As the goods and services rendered by the Petitioner were substandard and defective, the same caused loss to the Respondent. Furthermore, the Demand Notice issued by the Petitioner is defective as it lacks the requisite supporting documents which are required to be annexed by the Petitioner.

10. It is further submitted that the Respondent had informed the Petitioner as to how the delays have been resulting in inability of the Respondent to submit invoices for stage payments through their emails dated 09th January, 2020, 16th January, 2020, 7th January, 2020. Thereafter, in March 2020, on account of defect at the Petitioner's end and malfunctioning in the Software, the delivery schedule was inordinately delayed which was brought to the notice of the Petitioner by emails dated 21st March, 2020 and 22nd March, 2020. The malfunctioning of software resulted in the Respondent not being able to recover payments from the end customer. It is also pertinent to note that, the Petitioner has delayed the completion of project which has led to end customer levying very heavy Liquidated Damages and also delayed submission of essential documentation and designs, which is an essential part of the contract to be completed before any payment for the work done can be considered as due and payable. This has been communicated by the end customer to Petitioner vide Letter dated 15th December 2020. Thus, there has been an inordinate delay in completing documentation by the Petitioner which is also highlighted in an email dated 26th April 2021. Furthermore, It is

submitted that the end customer has also sent Fax message dated 15th December 2020 to Petitioner and Respondent regarding submission of pending items and drawings/documents of RML and various observations mentioned therein. This has been intimated by the Respondent to Petitioner by email dated 18th December 2020. The Respondent has also sent an email dated 26th April 2021 to Petitioner pointing out certain deficiencies. It is further submitted that the end customer had by its letter dated 09th September, 2021 categorically requested the Petitioner to bring Hydraulic and Controller team for conducting technical trial. Thereafter, the Respondent had issued an email dated 11th September, 2021 requesting the Petitioner to depute representatives for technical trials, this establishes that the SAT's were not concluded and with a view of the same the Petitioner cannot demand the debt.

Rejoinder by the Petitioner

11. The Petitioner has filed an affidavit in rejoinder addressing the contentions raised by the Respondent.

12. The Petitioner has denied that there is any pre-existing disputes between the parties. the Petitioner further submits that the Demand Notice issued by the Petitioner is duly in accordance with the provisions of the Code.

13. The Petitioner submits that the Respondent has sought to take a defence that the present debt falls within Section 10A period. However, as per the terms of the Purchase Orders, the Respondent was required to make payments through letters of credit. As per the terms of the Purchase Orders, the Respondent was required to make payments on or before 26.04.2021. Furthermore, the Petitioner had issued an email dated 09.04.2021 seeking concurrence of Bills of Exchange for payment from the Respondent after 14 days from the receipt of the email. The Respondent had replied to the same raising issues falling outside the scope of services of the Petitioner and further that the Respondent was resolving same with the end-customer. In the said email, the Respondent

had not raised any issued with regard to the quality of the services tendered by the Petitioner. Therefore, the Respondent had no issues as regards to the quality of services and goods tendered by the Petitioner. Furthermore, it is an indisputable position that the Petitioner had called upon the Respondent to concur on the bills of exchange vide its email dated 09.04.2021, and the said date falls outside the Section 10A period. Thus, the date of default falls outside the scope of Section 10A period.

14. The Petitioner submits that it has duly completed its scope of work as envisaged in the completion certificate. Pertinently, the Strategic System Quality Assurance Group (herein after referred to as "**SSQAG**") an inspection agency appointed by the end customer of the Respondent has even issued a clearance certificate for the work undertaken by the Petitioner. In view of successful completion of the Site Acceptance Trial ("**SAT**"), the Respondent had cleared payments for 01. No. RML under all three purchase orders. However, the remaining payments were withheld by the Respondent on account of unresolved issues with its other sub-contractors and, therefore, the Petitioner submits that there were no pre-existing disputes between the parties.

Findings

15. We have heard the Counsel for the Parties and have gone through the records.

16. During the course of arguments, the Counsel for the Operational Creditor has pointed out that on the basis of three purchase orders issued by the Corporate Debtor, the Petitioner supplied road mobile launchers for a total value of Rs. 3,20,33,542/-. The sub systems of all the four RMLs were commissioned and were also subjected to site acceptance trials on 28.02.2021. Therefore, the Corporate Debtor was liable to pay the outstanding amount claimed in the Petition to the Operational Creditor. In addition to this, no defects were ever raised in the purview of the scope of the work delivered by the Operational Creditor. Therefore, there is no

pre-existing between the parties with regard to the quality of the RMLs supplied by the Operational Creditors.

17. The Counsel for the Operational Creditor has further argued that the Petition is not hit by Section 10A of the Code. In this regard, the Counsel for the Operational Creditor has pointed out that the Operational Creditor sought concurrence of the Corporate Debtor on the bills of exchange and letter of credit through its email dated 09.04.2021 and, therefore, for all intents and purposes, the due date for payment was subsequent to 09.04.2021 and, therefore, the Petition cannot be said to be barred under Section 10A of the Code.

18. On the other hand, the Counsel for the Corporate Debtor has argued that in the Petition itself the date of default is mentioned as 28.02.2021 which falls within the period excluded by Section 10A of the Code. The counsel for the Corporate Debtor has further argued that there is a pre-existing dispute between the parties with regard to the quality of goods supplied by the Operational Creditor. In this regard, it has been pointed out of the four RMLs supplied, Site Acceptance Trial (SAT) was successfully conducted in respect of only one RML while there were certain issues with the working of the remaining three RMLs and trials in respect of those have still not been concluded. According to the Counsel for the Corporate Debtor, the issues and defects in the RMLs supplied by the Operational Creditor have not been addressed till date and until and unless the same are resolved, the payment cannot be claimed.

19. We have thoughtfully considered the above contentions raised by the Counsel for the Parties.

20. As per the purchase order dated 24.11.2013 (revised on 25.01.2019), there is a clear-cut condition that acceptance will be considered complete after successful completion of Site Acceptance Trial (SAT) and successful liquidation of all observations under the purview of the Operational Creditor which will be duly certified by R & DE(E) and/or SSQAG (Strategic System and Quality Assurance Group). As per the record, out of

the four RMLs, the SAT is said to have been conducted only in respect of just one RML whereas no such tests are shown to have been successfully conducted in respect of the remaining three RMLs. Since it was clear from the purchase order itself that the supplied would be treated as complete only on completion of Site Acceptance Trials and as the same are not shown to have been successfully carried out till date, therefore, it cannot be said that the RMLs have been accepted by the Corporate Debtor. As certain issues of the RMLs are yet to be resolved and till such time, the trials are successfully completed, as stipulated in the purchase orders, it cannot be said by any stretch of imagination that there is no pre-existing dispute between the parties.

21. As regards the second objection pertaining to the Petition being barred under Section 10A of the Code, it is pertinent to mention that in Part IV of the Petition, the Petitioner itself has mentioned that the delivery of goods was completed by 12.03.2021 and the debt fell due from the date of the completion of all SATs last of which was completed on 28.02.2021. It is well settled that the date of default has to be considered from the time when it became due and was not paid after having become due. As per the pleadings made in Part IV of the Petition, it is unequivocal case of the Petitioner that the default took place either on 28.02.2021 or on 12.03.2021 and both the dates fall within 10A period. The Operational Creditor has tried to explain in the rejoinder that the Petition is not hit by Section 10A of the Code stating that the Operational Creditor addressed an email on 09.04.2021 seeking concurrence or acceptance of the Corporate Debtor of bills of exchange for payment within 14 days, i.e. on or before 26.04.2021 as per the terms of the purchase orders. However, in our considered view, whatever has been subsequently stated in the rejoinder cannot come to the rescue of the Operational Creditor considering the fact that in Part IV of the Petition, it has been candidly stated that the date of default is either on 28.02.2021 or on 12.03.2021. The Operational Creditor has not chosen to amend Part IV of the Petition.

Therefore, it cannot be heard harping that the date of default is some other date than those mentioned in part IV of the Petition.

22. As a result of the above discussion, we are of the considered view, the Petition is not only barred under Section 10A of the Code but there is a pre-existing dispute as well due to which the Petition under Section 9 of the Code cannot be admitted and deserves '**dismissal**'. It is ordered accordingly.

Sd/-	**Sd/-**
Anuradha Sanjay Bhatia	**Kuldeep Kumar Kareer**
Member (Technical)	**Member (Judicial)**