

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

CP (IB) -3249/I&BP/MB/2018  
Under Section 9 of the I&B Code, 2016

**In the matter of**

Siddhi Vinayak Logistics Limited  
Plot No.14, 15, Bhatpore, GIDC ONGC,  
ONGC Plant Hazira, Surat, Gujarat -  
394510

.... Petitioner

Vs.

Arkay Logistics Limited  
Essar House 11, KK Marg,  
Mahalaxmi, Mumbai - 400034

.... Corporate Debtor

**Order delivered on: 29.08.2019**

**Coram:**

Hon'ble Shri Bhaskara Pantula Mohan, Member (J)  
Hon'ble Shri Shyam Babu Gautam, Member (T)

For the Petitioner: Mr. Vishal Kamade, Advocate.

For the Corporate Debtor: Mr. Shyam Kapadia, Advocate, Mr.  
Vikrant Zunzarao, Mr. Abhishek Adke, i/b Zunzarao & Co.

***Per: Shyam Babu Gautam, Member (T)***

**ORDER**

1. Siddhi Vinayak Logistic Limited, being represented by Mr. Dushyant Dave the Liquidator (earlier Resolution Professional), (hereinafter called the 'Petitioner') has sought the Corporate Insolvency Resolution Process against Arkay Logistics Limited (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default on 15.05.2016 in repayment of services provided to the Corporate Debtor to the

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extent of Rs. 26,70,55,042.96/-, under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

**Facts of the case:**

2. The Petitioner is a company undergoing Corporate Insolvency Resolution Process as per the order passed by the National Company Law Tribunal dated 12.07.2017 in pursuance of the above order, the Tribunal had appointed Mr. Dushyant Dave as the Interim Resolution Professional. Thereafter, he was also confirmed as the Resolution Professional by the CoC on 12.10.2017.

3. The Petitioner Company had entered into two agreements for supply of vehicles dated 09.07.2011 and 01.07.2013. The Petitioner enclosed the following documents in support of the above said operational debts:

- a. Copy of details of transactions on account of which debt fell due and payment along with the date from which such debt fell due.
- b. Copy of Notice of repayment dated 13.11.2017.
- c. Copy of Agreement for supply of vehicles dated 09.09.2011.
- d. Copy of Agreement for supply of vehicles dated 01.07.2013.
- e. Copy of Rejoinder Notice dated 06.07.2018 for repayment of outstanding amounts to the Corporate Debtor.

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- f. Copy of statement of accounts of the Operational Creditor with Oriental Bank of Commerce and ICICI Bank.
  - g. Copy of Summary of invoices.
  - h. Copy of computation of amount of debt in default and unpaid by the Corporate Debtor.
4. It is the case of the Petitioner that the Corporate Debtor had availed services from the Petitioner and various invoices against which were issued by them, as per the accounts maintained by the Petitioner a total outstanding sum of Rs. 26,70,55,042.96 is due and payable. As per the Agreements the Petitioner was to supply the vehicles to the Corporate Debtor as per their requirements. The Corporate Debtor issued various work orders from time to time for supply of vehicles and it was agreed between the parties that the payment shall be made by the Corporate Debtor to the Petitioner on the basis of the full operating charges to be incurred in transporting of the said steel products.
5. The Petitioner issued various invoices on various dates in the name of the Corporate Debtor. However, the Corporate Debtor failed to repay outstanding amount to the Petitioner therefore, a legal notice under the same pretext was also sent by the Petitioner on 13.11.2017 seeking payment of the total outstanding due. A reply to the said notice was also sent by the Corporate Debtor on 31.12.2018. The Corporate Debtor in their reply denied all the claims of the Petitioner and informed that the Petitioner owed them huge damages on account of damage caused to steel products and delay in delivery. Further, it was

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also apprised by the Corporate Debtor in their reply that the Petitioner could not seek interest since the Agreement had no such clause.

6. Thereafter a Rejoinder dated 06.07.2018 was again sent by the Petitioner, to which a reply dated 17.07.2018 was sent by the Corporate Debtor. Since, even after these communications the Corporate Debtor failed to make any payments towards the outstanding due and therefore the Petitioner was constrained to Issue a notice of demand for an amount of Rs. 26,70,55,042.96/-. However, till date the Corporate Debtor has failed to pay in terms of the demand, instead a reply to the said demand notice was sent by the Corporate Debtor. Hence, on 27.08.2019, the Petitioner filed a petitioner under section 9 of the Code.
7. The Corporate Debtor has denied all the averments, allegations and statements made by the Petitioner. In response to this Petitioner, the Corporate Debtor has raised various objections which are as follows:
  - a) The Petition is not maintainable under Section 11 of the Code since the Petitioner company itself under undergoing CIRP pursuant to the order passed by the NCLT, Ahmedabad bench dated 12.09.2017. It is argued that the petitioner is not eligible to file an application under section 9 of the Code. Reliance for the same has been placed on M/s Mandhana Industries Limited Vs M/s Instyle Exports Private Limited (CP 301/2018 passed by NCLT, New Delhi)

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- b) It is also brought to our notice by the Corporate Debtor that since the Resolution period has already lapsed, therefore neither the CoC nor the Resolution Professional who is representing the Petitioner exist.
- c) According to the Corporate Debtor there lies a pre-existing dispute between the parties since the Corporate Debtor has sent various letters dated 31.01.2018, 17.07.2018 and 23.08.2018 disputing the claim of the Petitioner. Reliance herein has been placed on *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* Judgement of the Hon'ble Supreme Court.
8. Thereafter, the Petitioner has filed his Rejoinder, wherein he has argued that the present Petition is not barred by Section 11 of the Code. Reliance has been placed on "*Notes on Clauses*" annexed with the Insolvency and Bankruptcy Bill, 2015. Also, it is argued that the Petition has been filed in the capacity of the 'Operational Creditor' and not in the capacity of 'Corporate Debtor'. Furthermore, it is argued that there is no 'existence of dispute' in compliance with the terms of provisions of the code. It is argued that all the communication by the Corporate Debtor such as reply, and sur-rejoinder as mentioned above is a patently feeble argument and therefore should not be considered.

**ORDER**

9. We have heard the arguments of both the sides and have patently gone through the pleadings of the parties. We will

therefore be dealing with all the objections raised on by one as follows:

i. **Whether the Petition is barred under Section 11 of the Code?**

The language of Section 11 is as follows:

*"The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely: —*

*(a) a corporate debtor undergoing a corporate insolvency resolution process; or*

*(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or*

*(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or*

*(d) a corporate debtor in respect of whom a liquidation order has been made*

*Explanation—For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor."*

A plain reading of the aforesaid provision makes it clear that the Code prohibits certain persons from making an Application under this code. It is the argument of the Corporate Debtor that since the Petitioner Company is undergoing CIRP the same is barred under Section 11

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from making any application before this tribunal through its Resolution Professional.

We are not inclined to accept this argument of the Corporate Debtor, since the Hon'ble Supreme Court in its judgement of '*Forech India Ltd. Vs. Edelweiss Assets Reconstructions Co. Ltd.*' has already made it clear that Section 11 has a very limited scope and the intent of the code is only to bar applicants from filing an application before this Tribunal under section 10 against whom insolvency proceedings have been initiated. Relevant portion of the judgement is as follows:

**"22. This Section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made.** *From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code."*

Further, in order to understand the legislative intent of the code reliance has to be placed on '*Notes on Clauses*' of the Insolvency and Bankruptcy Bill, 2016, which goes as follows:

*"Clause 11 lists out the persons who are not eligible to make an application to initiate the corporate insolvency resolution process. A corporate debtor which is undergoing a corporate insolvency resolution process (at the time of such application) or has completed a corporate insolvency resolution process in the preceding twelve months is not entitled to file an application for initiating the corporate insolvency resolution process. **This ensures that corporate debtors cannot have repeated recourse to the corporate insolvency resolution process in order to delay repayment of debts due or to keep assets out of the reach of creditors.***

*A corporate debtor or a financial creditor who has violated any of the terms of the resolution plan that was approved twelve months before making an application for initiating the process is also not entitled to make an application for initiating the corporate insolvency resolution process again. In addition to ensuring compliance with the terms of the resolution plan, this would also ensure that corporate debtors or financial creditors do not abuse the corporate insolvency resolution process for extraneous considerations.*

*Lastly, a corporate debtor in respect of which a liquidation order has been passed is not allowed to initiate the insolvency resolution process again. This is to ensure finality of the liquidation order."*

A bare reading of the above note makes it crystal clear that, the intent of the legislature was to stop re-filing of Insolvency proceedings against the same corporate Debtor again and again. This is clearly now the case here. Therefore, this argument of the Corporate Debtor is rejected forthwith.

- ii. **Since the resolution process has already elapsed and neither the CoC or the Resolution professional exist any longer, is this petition anymore maintainable?**

It is brought to our attention by the Petitioner that the Hon'ble National Company Law Tribunal, Ahmedabad vide an order dated 19.11.2018 passed a liquidation order of the Petitioner Company appointing the Resolution Professional as the Liquidator in terms of Section 33 and 34 of the Code.

Therefore, we are of the opinion that as per section 35 (1) (d) r/w section 35 (1) (k) of the Code the Liquidator herein is completely authorised to represent the Petitioner company before this Tribunal. So, the second argument of the Corporate Debtor doesn't have any merit and is rejected.

- iii. **Whether there is any 'existence of dispute' between the parties?**

The Hon'ble Supreme Court in its landmark judgement of the *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* has said:

*"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 defence which is mere bluster.**"*

Therefore, when we look into the Genuity of the dispute we notice that the Corporate Debtor had never even once raised a single shred of objection or dispute against the Petitioner in the past seven years about either quality of good or anything else. It was for the first time that the Corporate Debtor only after receiving a notice from the Petitioner started raising disputes.

Therefore, from *prima facie* it is clear that the 'dispute' raised by the Corporate Debtor is patently feeble and is an assertion which is not supported by any evidence. This defence of the Corporate Debtor also has no merit and is therefore rejected.

10. The above facts show that the Corporate Debtor defaulted in making the payment towards the liability to the Petitioner and the petition deserves to be admitted.

11. This Bench having been satisfied with the Petition filed by the Operational Creditor which is in compliance of provisions of section 9 of the Insolvency and Bankruptcy Code admits this Petition 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

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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 29.08.2019 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, Mahesh Kumar Gupta, having office at Add-28, Jai Bharat Ind Estate, Near Western Exp. Highway, Opp. Virwani

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Ind, Estate, Goregaon – E, Mumbai - 400101;  
having Registration No. IBBI/IPA-001/IP-  
P00478/2017-18/10866 as Interim Resolution  
Professional to carry the functions as mentioned  
under Insolvency & Bankruptcy Code.

12. Accordingly, this Petition is admitted.
  
13. The Registry is hereby directed to communicate this order to both the parties and the Interim Resolution Professional immediately.

Sd/-  
Bhaskara Pantula Mohan  
Member (Judicial)

Sd/-  
Shyam Babu Gautam  
Member (Technical)

/Prakhar Tandon/