S.No.105

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON **15-02-2022** AT 10:30 A.M. THROUGH VIDEO CONFERENCE.

CP(IB) No.441/9/HDB/2020
U/s 9 of IBC, 2016

IN THE MATTER OF:

Global Monarch FZC **…Operational Creditor**

Vs

Raasi Refractories Ltd **…Corporate Debtor**

C O R A M:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)

O R D E R

Orders in CP IB No.441/9/HDB/2020, are pronounced vide separate orders.

In the result petition is allowed and the respondent is admitted into CIRP as per the conditions mentioned in the order.

Sd/- Sd/-

MEMBER (T) **MEMBER (J)**

Pavani

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - I

CP(IB) No. 441/9/HDB/2020

(U/s. 9 of I&B Code, 2016 r/w Rule 6 of I & B (AAA) Rules, 2016)

In the matter of:
M/s. Global Monarch FZC
Rep. by its Authorised Signatory, Mr. Kamal Kishore Arora
Having its Registered Office at A1-518
Ajman Free Zone Main Office
Ajman, UAE P.O.Box: 6263

Also having its Branch Office at:
G-3, Second Floor, Naraina Vihar
New Delhi – 110 028

…. Operational Creditor

Vs.

M/s. Raasi Refractories Ltd.
Represented by its Executive Director, Konda Venkanna
Having its Registered Office at 15-145/9
Kodandaram Nagar, Saroor Nagar
Near Sarada Talkies
Hyderabad – 500 060

… Corporate Debtor

Date of Order: 15.02.2022

Coram:
HON'BLE DR. VENKATA RAMA KRISHNA BADARINATH NANDULA, MEMBER (JUDICIAL)

and

HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI, MEMBER (TECHNICAL)

Parties / Counsels Present:

For the Petitioner : Mr.Elison Arikatla, Advocate

For the Respondent : Mr. Arunn Marripeddi

PER : BENCH

ORDER

I. This is an application filed by the Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016, r/w Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the application, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon against the Corporate Debtor, alleging that the Corporate Debtor had failed in discharging the debt amount of Rs.1,17,08,250/- (USD 156,110 @ Rs.75/-) (Rupees One Crore Seventeen Lakhs Eight Thousand Two Hundred and Fifty only) which includes Principal amount of Rs.87,37,500/- (USD 116,500 @ Rs.75/-) and interest of Rs.29,70,750/- (USD 39,610 @ Rs.75/- calculated upto 01.05.2019). The break-up details are filed at page 13 of the application.

II. *The gist of the Operational Creditor's brief is -*

i. *M/s. Global Monarch FZC, hereinafter referred to as 'Petitioner/Operational Creditor' is a Company registered under the Laws of the UAE and is engaged in the trading of refractory raw materials like magnesia, aluminium etc. M/s. Raasi Refractories Ltd., hereinafter referred to as 'Respondent/Corporate Debtor', is a Non-*

Governmental Company limited by shares, inter alia, is involved in the manufacture of refractory bricks and allied products.

ii. The Corporate Debtor, vide email dated 19.11.2018 placed a Purchase Order for supply of 200 MTs of fused magnesia 97 brown (2:1) at a cost of 1165 USD per MT. In turn, the Operational Creditor issued a Proforma Invoice No.GMON/RAASI/2018/001, inter alia, containing all the terms and conditions and shipment schedule, which is accepted by the Corporate Debtor. Accordingly, the Operational Creditor entered into a Contract and supplied the material in two lots and raised two invoices, i.e. Invoice No.GMON/RAASI/2018/004, Dated 08.12.2018 and Invoice No.GMON/RAASI/2018/005, Dated 15.12.2018, each Rs.87,37,500/- (USD 116,500), which were accepted by the Corporate Debtor to its satisfaction and there was no complaint / dispute with respect to its quality or otherwise. In terms of the Contract, the Corporate Debtor has to make the payment on or before 23.02.2019 and 02.03.2019 respectively.

iii. It is stated that the dispatch details were duly communicated to the Corporate Debtor through E-mail dated 26.11.2018 and all the relevant documents were handed over to the Operational Creditor's Bank i.e. Habib Bank for sending the same to the Corporate Debtor's Bank i.e. Allahabad Bank. As a normal practice, the bankers of the Corporate Debtor inform the Corporate Debtor to collect the original documents, which were received by them after accepting the bill of exchange. In fact that is a promissory note for making the payment, as such, the original documents were handed over to the Corporate Debtor.

iv. According to the Operational Creditor, it has sent several reminders and made repeated requests *to release the due amount*. However, the Corporate Debtor repeatedly sought further dates for repayment, which are filed at page nos.39 to 41 of the application. *When the due amount was not paid by the Corporate Debtor after continuous follow up, got issued a Demand Notice dated 29.05.2019 in Form-3, demanding payment of the outstanding debt amount of* USD 233,000 (USD Two Lakhs Thirty Three Thousand only) alongwith 18% interest. However, even on service of demand notice, the Respondent failed to send any reply within the statutory time period of 10 days to indicate either payment of debt or existence of dispute.

v. It is filed an e-mail dated 13.06.2019 sent by the Corporate Debtor at page 73 of the application, wherein it was mentioned as follows –

> "We have two bills pending from our side regds FM shipments. One bill of 100 ton FM shipments will be paid before 25th June 2019 and second bill of 100 ton FM shipments will be paid before 1st July 2019. Thanks for your support. Sorry for the inconvenience caused by us".

vi. It is also filed an email dated 26.06.2019 sent by the Corporate Debtor stating that "we have made payment for one bill", at page 48 of the application.

vii. It is averred that after receiving the Demand Notice, the Corporate Debtor paid an amount of USD 116,500 towards Invoice No.GMON/RAASI/2018/005, dated 15.12.2018. It is also averred that the same is evident from the fact that after collection of the Invoice

No.GMON/RAASI/2018/004 and Bill of Lading No.GOSUDAL855118 by the Corporate Debtor, the said documents were returned to Allahabad Bank (which were eventually returned to Habib Bank) with a malafide intention of avoiding the payment.

viii. On 19.08.2019, the Corporate Debtor issued a letter to Operational Creditor requesting that due to some unavoidable circumstances and financial crunch they could not make the payment and requesting to extend the credit period to 120 days as they are planned to pay the total amount in two instalments, taking the schedule with effecting date as 19.08.2019, first instalment as 50% on or before 90 days; second instalment as balance 50% on or before 120 days. Copies of the correspondence between the parties are filed at pages 49 to 63 of the application. The payment is still continued to remain due. Various email correspondence took place between the parties which are filed at page nos.64 to 74 of the application.

ix. It is filed a Criminal Complaint against the Corporate Debtor, which is pending investigation. Copies of FIR No.CR No.714/CR-L2/RCK/2019 dated 22.10.2019 filed at P.S. Saroornagar, Hyderabad, Telangana and Complaint are filed at pages 75 to 83 of the application.

x. It is averred that the outstanding amount due to the Operational Creditor has never been disputed by the Corporate Debtor in any manner whatsoever.

xi. *It is averred that as the* demand notice dated 29.05.2019 and letter dated 19.08.2019 since not complied with by the Corporate Debtor, the *Operational Creditor was left with no option except to file the instant petition.*

III. The gist of the Corporate Debtor's brief is -

i. It is true that the Corporate Debtor ordered for 200 MTs but the first lot of 100 MTs delivered to the Corporate Debtor and made the payment, but it is not delivered as per the schedule time.

ii. It is averred that the Proforma Invoice of the Petitioner dated 19.11.2018 narrates the shipment within 15 days but delivered on 23.12.2018.

iii. It is also averred that the Petitioner is seeking recovery of amount for already paid bill of first lot and even for undelivered sale of next lot of 100 MTs and the Applicant is misleading the Hon'ble Tribunal by making false claims for wrongful gains.

iv. The applicant cannot have both civil and criminal remedies at once.

v. The Applicant has not filed any documents showing the proof of delivery of two Invoice Bills, showing 200 MTs delivery in the custody of Corporate Debtor.

vi. It is averred that Section 32 of Sale of Goods Act, 1930 says that payment and delivery are concurrent conditions. The applicant not delivered the second lot to the Corporate Debtor, the question of payment / debt does not arise in the current application.

vii. Damages as per Section 56 of Sale of Goods Act, here there is no sale, no case of damages arises, and the second lot never reached the debtor place, office or warehouse. The buyer examination to be must for acceptance or rejection for delivery of goods. Examination of the goods is considered necessary before delivery of goods can amount to acceptance.

IV. In the back drop of the contentions put forth by both sides, the Tribunal has framed the following Points for consideration.

1. *Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable by the corporate debtor and has not yet been paid?*

2. *Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?*

V. *We have heard the Learned Counsels for both parties, perused the documents and Case Law.*

VI. *POINT 1:*

Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable by the corporate debtor and has not yet been paid?

1. At the outset, it is pertinent to refer therein to the following illuminating rulings rendered by the Hon'ble Supreme Court of India, on the law relating to the petitions filed under Section 7 or 9 of the I&B Code, 2016:

1. M/s Innoventive Industries, supra, *Hon'ble Supreme Court of India*, held that;

> *"The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under 71 Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e., before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."*

> *"On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*

2. *Mobilox Innovations Private Limited(supra), Hon'ble Supreme Court of India, has held that;*

"It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational

creditor the existence of a dispute, if any. We 72 have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise."

"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)(2)(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 defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence 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"

In the same ruling, it has been also that,

"Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: (i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act) (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?"

*“**If any one of the aforesaid conditions is lacking, the application would have to be rejected.”** (Emphasis is ours).*

1. We, therefore, intend to proceed without our discussion on the points framed, in line with the law laid down in the above rulings.
2. At the outset, it may be stated herein that in terms of Section 8(2) of the I&B Code, 2016, it is incumbent upon the Corporate Debtor, on receipt of Demand Notice in terms of Section 8 of the I&B Code, from the Operational Creditor, to bring to the notice of the Operational Creditor as follows:

“8. *Insolvency resolution by operational creditor. –*

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –

(a) ***existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute** in respect of which the default has occurred.*”

5. Thus, sub-section (2) of Section 8 of the I&B Code, 2016 postulates two grounds which can be raised by the Corporate Debtor in response to the Demand Notice issued by the Operational Creditor, namely,

(I) That a pre-existing dispute as to unpaid operational debt, and

(II). That a suit or arbitration proceeding filed before receipt of Demand Notice.

6. In so far as the case on hand is concerned, the Corporate Debtor despite receipt of Demand Notice dated 29.04.2019 (Form-3), failed to send reply. On the other hand on 26.06.2019 the corporate debtor made a part payment of a sum of USD 116,500 to the Operational Creditor and prayed time for paying the

balance amount. Thereafter, vide another letter dated 19.08.2019, the Corporate Debtor sought for extension of time for payment. Therefore, these undisputed letters clinchingly and clearly establishes an operational debt which is due and payable by the Corporate Debtor to the Operational Creditor truly exists.

7. In so far discharge of the said operational debt is concerned, the above referred correspondence made by the Corporate Debtor with the Operational Creditor only discloses that the corporate debtor has sought time for payment by the but not payment. Curiously in the counter filed by the Corporate Debtor, it has been stated that the entire amount has been paid and nothing is due and again in subsequent para it is stated that the goods under the first consignment are not delivered therefore, payment was not effected. Thus, there is glaring contradictions in the counter filed by the Corporate Debtor.

8. Be that as it may, as stated in sub-section (2) of Section 8 of the I&B Code, 2016, a dispute as to existence or otherwise of an Operational Debt must exist before receipt of the Demand Notice by the Corporate Debtor. In the case on hand since no such plea has been raised before receipt of the Demand Notice, the plea as to the existence of the operational debt taken in the Counter shall be considered only as an after-thought and therefore, liable to be rejected. Accordingly, the same is hereby rejected.

   The point is answered accordingly.

(VII) ***POINT 2:***

Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

1. In the discussion under Point No.1, we have clearly held that the dispute, if any as to unpaid operational debt shall be pre-existing and shall be raised before the receipt of the Demand Notice by the Operational Creditor. As already stated, admittedly, no reply has been sent to the Demand Notice issued by the Corporate Debtor, and no dispute as the operational debt has been raised. Therefore, the subsequent plea of the so-called dispute as to the sum due is nothing but an after-thought, frivolous. Hence cannot be entertained. Therefore, we hold that there is *no pre-existing dispute* as to the operational debt payable by the Corporate Debtor to the Operational Creditor exists in this case. The point is answered accordingly.

2. Therefore, in the light of our discussion and considering the submissions made by learned counsel and on perusal of the case law, we hold that there exists an operational debt between the petitioner and the respondent/ Corporate Debtor, which the respondent/ Corporate Debtor failed to discharge. Therefore, it is a fit case to put the Corporate Debtor under CIRP.

3. The petition is, therefore, allowed and the respondent/ Corporate Debtor is put under Corporate Insolvency Resolution Process.

(VIII) The Operational Creditor has not named anyone as Interim Resolution Professional (IRP) and has requested this Adjudicating Authority to appoint one for the Insolvency Resolution Professionals as IRP. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of Insolvency Professionals for appointment as Insolvency

Resolution Professional for the period from January 1, 2022 to June 30, 2022 in compliance with Section 16(3)(a) of the Code in order to avoid delay. Accordingly, this Tribunal appoints Mr. Sivaram Reddy Rajula, having Registration No. IBBI/IPA-002/IP-N00477/2017-2018/11407, e-mail: sivaram@sgpassociates.com as Interim Resolution Professional. As per the IBBI website, his AFA is valid upto 21.11.2022. The aforesaid IRP has no disciplinary proceedings pending against him. He shall file his written communication and all relevant papers immediately before the Registrar of this Adjudicating Authority but not later than three days.

(IX) Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with the following directions: -

The 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.

(x) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

xi) 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.

x) 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.

xi. That the order of moratorium shall have effect from the date of this Order 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, whichever is earlier.

Xii The Petitioner is directed to deposit a sum of Rs.2,00,000/- (Rupees Two Lakhs Only) with the Interim Resolution Professional within three days from the date of this Order to meet out the expenses and his fee to perform the functions assigned to him in accordance with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The initial expenditure incurred by IRP shall, however, be subject to the approval by the Committee of Creditors, in its first meeting.

xiii That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.

xiv. Accordingly, this Petition is admitted.

xv Registry to send a copy of this order to the Registrar of Companies, Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.

VEERA BRAHMA RAO AREKAPUDI **MEMBER (TECHNICAL)**	**Dr.N.V.RAMA KRISHNA BADARINATH** **MEMBER (JUDICIAL)**

Syamala