

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P. (IB) No. 1325/KB/2018

In the matter of:

An application by Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

And

In the matter of:

Super Smelters Limited, CIN: U27109WB1995PLC072223 with its Registered Office at 39, Shakespeare Sarani, 3rd Floor, Kolkata-700017

...Petitioner/Operational Creditor

Versus

Electro Poles Products Private Limited, CIN: U27101WB2007PTC114288 with its Registered Office at 1B, Ramlochan Mullick Street, Kolkata- 700073

...Respondent/Corporate Debtor

Coram: Shri Jinan K.R., Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

For the Operational Creditor:

1. Mr. Om Narayan Rai, Advocate
2. Mr. Proshant Agarwal, Advocate

For the Corporate Debtor in Person:

Mr. Ajay Kumar Gupta

Date of pronouncement of the Order : 13-12-2019

ORDER

Per Shri Jinan K.R., Member (Judicial):

1. This is an application filed by Super Smelters Limited/Operational Creditor, for initiating Corporate Insolvency Resolution Process as against the Electro Poles Products Private Limited /Corporate Debtor, under Section 9 of the Insolvency and Bankruptcy Code, 2016(in short, Code) on the allegation that Corporate Debtor committed default in making payment of Rs.9,79,752/- (Rupees Nine Lakh Seventy Nine Thousand Seven

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Hundred Fifty Two only) exclusive of interest despite repeated demand.

2. Brief facts, for the determination of the points, are the following:-

a. The Corporate Debtor used to purchase raw materials. i.e., M S Black Pipe from the Operational Creditor by issuing various purchase orders. The Operational Creditor delivered goods after generating various invoices. The Operational Creditor supplied goods as per invoices dated 09.04.2016, 23.04.2016, 09.05.2016 and 17.05.2016. The Corporate Debtor has paid part payment of **Rs. 3,92,540/-** and the total outstanding amount due is Rs. 14,12,200/-(Rupees Fourteen Lakh Twelve Thousand Two Hundred only). Since Corporate Debtor could not make payment within the agreed time frame of 30 days from the date of invoices, the Operational Creditor is entitled to claim interest. The Operational Creditor had lifted some goods allegedly being defective and upon mutual discussions, worth Rs. 6,32,448.63 (Rupees Six Lakh Thirty Two Thousand Four Hundred Forty Eight and paise Sixty Three only) and after adjusting and/or deducting price of the goods so lifted from the total

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outstanding amount, a sum of Rs. 9,79,752/- (Rupees. Nine Lakh Seventy Nine Thousand Seven Hundred Fifty Two only) still remained outstanding and payable to the Operational Creditor.

b. The Corporate Debtor thereafter made part payment of Rs. 2,00,000/- on 29.03.2017 thereby the balance outstanding as on the date of filing of this application came to be Rs. 7,79,752/- (Rupees Seven Lakh Seventy Nine Thousand Seven Hundred Fifty Two only). The Corporate Debtor has thereafter failed and neglected to clear the outstanding amount of Rs. 7,79,752/- (Rupees seven Lakh Seventy Nine Thousand Seven Hundred Fifty Two only) despite repeated demands. Hence, Section 8 demand notice was served to the Corporate Debtor.

c. The Operational Creditor is also entitled to claim interest @ 18% per annum since the Corporate Debtor failed in making payment within 30 days of delivery of goods to the Corporate Debtor. The account in between the parties are running and continuing. The Operational Creditor is, therefore, entitled to realize the total amount of Rs. 7,79,752/- (Rupees. Seven Lakh Seventy Nine Thousand Seven Hundred Fifty Two only) along with interest @ 18% per annum calculated on and from the due date on the invoices. The applicant prays for passing an

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Order of Admission in the aforesaid facts and circumstances.

3. The Corporate Debtor entered appearance and filed reply affidavit contending that the application is not maintainable in terms of provisions of the Insolvency and Bankruptcy Code, 2016 and that the application is not in proper form. There is no debt outstanding, due or payable by the Corporate Debtor, that there are serious disputes raised pertaining to the contract. There are series of correspondence regarding defective materials supplied by the Operational Creditor to the Corporate Debtor. The Corporate Debtor has a counter claim against the Operational Creditor. The Corporate Debtor purchased goods for the purpose of end user M/s. T & T Projects Limited, having its office at Guwahati.

4. The claim of the applicant is also barred by limitation. The Corporate Debtor is entitled to claim the loss sustained against supply of defective materials and to support the aforesaid contentions the Corporate Debtor has produced copies of letters marked as R1, R2, R3, R4, R5 and R6 and a copy of Cheque for an amount of Rs. 7,00,000/- (Rupees Seven Lakh only) dated 29.03.2018 drawn in the name of Electro Poles Products Private Limited/Corporate Debtor. Upon the said contentions the Corporate Debtor prays for the dismissal of the application.

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5. Heard the Ld. Counsel for the Operational Creditor. One of the representatives of the Corporate Debtor appears and prays for adjournment for want of arguing Counsel. However, no satisfactory explanation is offered from his side for the absence of his Counsel. Accordingly, we declined the prayer for adjournment and heard the Ld. Counsel for the Operational Creditor. Perused the record.

6. This is an application filed under Section 9 of IBC Code, alleging that the Corporate Debtor has committed default in payment of Rs.7,79,752/-((Rupees Seven Lakh Seventy Nine Thousand Seven Hundred Fifty Two only) despite repeated demands. The transaction between the Operational Creditor and the Corporate Debtor is an admitted fact. It has come out in evidence reflected from the documents on record that goods were delivered to the Corporate Debtor as per the invoices and some of the goods were returned to the Operational Creditor due to defects and value of the goods was adjusted by the Operational Creditor from the amount found due to the Operational Creditor.

7. The Corporate Debtor objected to the claim mainly on two grounds. Firstly, it is contended that there is no debt due or payable to the Operational Creditor. Secondly, the materials supplied to the Corporate Debtor for the end use of one another user situated in

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Guwahati, namely, M/s. T/T Projects could not be utilized being defective goods supplied by the Operational Creditor. Admittedly, there were some dispute in regard to defective supply of a materials to the end user M/s. T/T Projects Limited at Guwahati. Some of the materials which were found defective upon joint inspection by the representative of the Operational Creditor and Corporate Debtor, at the work site, were lifted by the Operational Creditor and its costs adjusted/deducted from the amount due. These disputes appeared to have been settled between the Operational Creditor and Corporate Debtor and the copy of reply of the demand notice sent to the Operational Creditor on 17th February, 2018 referred to the settlement in between the parties and balance outstanding after the settlement is the amount claimed by the Operational Creditor in the application. The relevant extract in the reply notice dated 17.02.2018 of the Corporate Debtor is good to read. It reads as follows:

“Secondly regarding the balance amount we have already informed you that we have done the settlement with our client M/s T& T Project with whom we had due of Rs. 32 lacs and due to your material issue they have withheld our payment since September 16 but now we have given them 11 lacs Rs discount only to close the issue and don’t go for any further dispute. Hence it is our final request to your end to inform us how much discount you can offer us so that we can also settle the balance payment issue form your end keeping in mind that all the above thing has been created due to your inferior quality material and we have already suffered the

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loss of 11 Lacs and fund blockage of 32 lacs from almost 20 months. We have settled with our client on good faith basis and we expect the same from you."

8. The copies of letters evidencing correspondence between M/s. T&T Projects are not helpful to prove existence of the alleged disputes between the Operational Creditor and the Corporate Debtor. Those letters are not at all an evidence to prove that it related to a claim demanded by the Operational Creditor in the case in hand. **Letter R1** is dated 08.08.2016 sent by the Operational Creditor to the Corporate Debtor extending its apology regarding supply of defective materials. **Letter R2** is the very same copy of reply notice sent by the Corporate Debtor in response to first demand notice dated 22nd December, 2017. On an overall screening of the documents available in this case, we are satisfied that Rs. 7,79,752/- (Rupees. Seven Lakh Seventy Nine Thousand Seven Hundred Fifty Two only) is due and payable by the Corporate Debtor as the balance outstanding as on the date of issuance of the demand notice under section 8 of the Code. To the demand notice dated 10th July, 2018, the Corporate Debtor has not sent any reply. It is an indication that the amount demanded by the operational creditor is due and payable by the Corporate Debtor.

9. Although, we are satisfied that the claim for Rs. 7,79,752/- (Rupees Seven Lakh seventy nine thousand seven hundred fifty two

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only) as the outstanding amount is due and payable by the Corporate Debtor to the Operational Creditor, the claim for interest at the rate of 18 @ per annum has not been established on the side of the Operational Creditor. Nowhere in the purchase orders or in the invoices, there is any default clause compelling the Corporate Debtor to pay interest as demanded by the Operational Creditor.

10. Being satisfied that the Operational Creditor succeeds in proving that the application filed under section 9 of the Code is complete, that the Operational Creditor has filed affidavit in conformity with Section 9(3)(b) of the Code to the effect that there is no notice given by the Corporate Debtor, that copies of statement of bank account produced to prove that the outstanding amount found due and payable by the Corporate Debtor, has not been paid to Operational Creditor in conformity with Section 9(3) (c) of the Code this application is liable to be allowed. The Operational Creditor has not proposed the name of any Insolvency Resolution Professional. Accordingly, this application is admitted upon the following orders.

ORDER

- i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating

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Corporate Insolvency Resolution Process against the Corporate Debtor, Electro Poles Products Private Limited, is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgement, 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 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.
- v) The services rendered to the Corporate Debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

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- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x) Ms. Jayshree Bhandari, Sunrise Tower, Flat 5L, 134B, Beliaghata Road, Kolkata – 700015, Reg. No. IBBI/IPA-001/IP-P01174/2018-19/11838, E-Mail id. bhandarijayshree@gmail.com, Mobile Number – 9831270975, is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.
- xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.



xii) The Operational Creditor/Applicant is directed to deposit 2,00,000/ in the ESCROW Account in SBI to be operated through the Registrar NCLT, Kolkata Bench for the purpose of meeting the preliminary expenses for initiating the CIRP by the Interim Resolution Professional within one week of the date of this order.

xiii) Registry is hereby directed under Section 9(5) of the I & B Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through email.

11. List the matter on 21st January, 2020 for the filing of the progress report.

12. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.



(Harish Chander Suri)

Member (Technical)



(Jinan K.R)

Member (Judicial)

Signed on this, the 13th day of December, 2019