

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 939 (ND)/2020

In the matter of:

**HONEST MACHINERY PVT LTD P. B. 24,
STATION ROAD, NR. BANK OF BARODA BARDOLI,
SURAT-394601, GUJARAT, INDIA**

Email: hmpl@honestpapermachines.com

Ph: 26226 15194 Fax: 26222 26870

.... APPLICANT/FINANCIAL CREDITOR

VERSUS

**VSM VENTURE CONTROL SYSTEMS PRIVATE LIMITED
OFFICE NO.104,**

BUILDING NO. A-84, STREET NO.15,

MADHU VIHAR, PATPARGANJ,

DELHI EAST, DELHI-110092, INDIA

Email: ranjeet@venturecontrolsystems.com

Ph: 01204881000

.... RESPONDENT/CORPORATE DEBTOR

SECTION: U/S 9 of IBC, 2016

Order delivered on: 24.12.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Applicant/Financial Creditor: Adv. Dhiren R Dave

For the Respondent/Corporate Debtor: Adv. Sanchit Garga

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ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present petition is filed under Section 9 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency Resolution Process of the Respondent/Corporate Debtor on grounds of its inability to liquidate its operational debt.

2. The facts mentioned in the application in brief are as follows:
 - i. That the Applicant Company has made various sale transactions with Respondent Corporate Debtor.
 - ii. That the Applicant Company has rendered services of liaisoning, designing & consultancy against project revamping of paper machine as per Invoices attached with notice.
 - iii. That the Applicant Company has served demand notice to Respondent Corporate Debtor at registered office address and site address vide Speed Post No. EG521616043IN and EG521616026IN. Same was delivered on 01.08.2019 and 05.08.2019 respectively. 16026IN. Same was delivered on 01.08.2019 and 05.08.2019 respectively.
 - iv. That the total amount of Debt is Rs. 1,11,82,688/- (including account of which Debt fell interest amount of Rs. due 11,15,564/- calculated up to And the Date from which Demand Notice.
 - v. That the debt fell due on account of Sale of Goods in ordinary course of business.
 - vi. That the due date of payment is the date of invoice i.e. 12.04.2018.

3. The Respondent/Corporate Debtor has filed its reply and has asserted the following contentions:
 - i. That the Operational Creditor was awarded a tender by Mazandaran Wood and Paper Industries Co (hereinafter referred to



- as "MWPI") in Tehran, Iran, however due to the incapability of the Operational Creditor in securing the said tender, the tender awarded to the Operational Creditor was cancelled and the same was awarded to the Corporate Debtor.
- ii. That it is correct that a MOU dated 28.09.2017 was entered in between the parties to the lis, however, the MOU was never executed. The Operational Creditor has not done an iota of work pursuant to the MOU dated 28.09.2017.
 - iii. That the meetings with the representatives of MWPI were always attended to by the representatives/directors of the Corporate Debtor and Operational Creditor had no role to play in either awarding of the said contract or execution of the contract awarded to the Corporate Debtor by MWPI.
 - iv. That as per the MOU, the transportation of the Paneling and other works done by the Corporate Debtor was to be transported to Iran from India and the shipment charges for the same were to be borne by the Operational Creditor, however, despite the request made in this regard by the Corporate Debtor vide E-mail dated 07.06.2017 and also accepted by the Operational Creditor, the Operational Creditor has also not got the Job done.
 - v. That the entire payment of shipment charges was made by the Corporate Debtor.
 - vi. That the Operational Creditor has suppressed material facts from this Hon'ble Tribunal. The MOU dated 28.09.2017 was terminated by the Corporate Debtor as far back as on 24.07.2018, which was duly communicated to the Operational Creditor vide E-mail dated 26.07.2018.
 - vii. That it is pertinent to mention here that the Operational Creditor as also stated in the Letter has not done any work, whatsoever and

the Invoices raised by the Operational Creditor are bogus, fabricated and false.

- viii. That the Operational Creditor has raised the Invoices for three purposes namely a) Liasoning b) Designing and c) Consultancy, against project revamping of paper machine of equipment MWPI-Iran. However, the Operational Creditor has failed to prove before this Hon'ble Tribunal as to when, how and where these three services were actually rendered by the Operational Creditor. It is re-iterated that the Operational Creditor has not provided any service to the Operational Creditor.
- ix. That the Invoices dated 12.04.2018 & 09.04.2018 have never been delivered to the Corporate Debtor.
- x. That even though assumed but not admitted that the MOU was in existence, even then, as per Clause of "Payment Terms", the payment was contingent upon receipt of payment from MWPI Iran, the entire application and Invoices are silent as to when the payments were actually made by MWPI-Iran to the Corporate Debtor and hence, the amount claimed in the invoice are premature and not legally payable.
- xi. That it is relevant to mention here that the Invoices were Billed to the wrong Company namely "Venture Control Systems Pvt Ltd" whereas the nomenclature of the Corporate Debtor is "SM Venture Control Systems Pvt Ltd".
- xii. That as per laws applicable with regard to Goods and Service Tax (GST) the Operational Creditor was legally bound to submit the Invoices raised with the GST department in order to claim Input Tax benefit and the same should automatically reflect in the GST returns of the Corporate Debtor, however, this exercise has also not been done by the Operational Creditor in the present case, thereby, the only logical conclusion that follows is that the Invoices



were never even raised, leave alone, submitting the Invoices before the GST department.

- xiii. That no Purchase Order of any sort was ever given to the Operational Creditor by the Corporate Debtor and have also not even been placed on record.
 - xiv. That it is also pertinent to mention here that the Operational Creditor was not even aware of the Status of the Project and has requested the status of the project from the Corporate Debtor vide E-mail dated 02.10.2018.
 - xv. That the demand notice U/s 8 IBC was never received by the Corporate Debtor or any responsible officer of the Corporate Debtor and therefore, the Notice U/s 8 IBC could not be replied to by the Corporate Debtor.
4. The Petitioner/Financial Creditor has filed its rejoinder and has asserted the following contentions:
- i. That the Corporate Debtor has not produced any single evidence in support of their contentions and has made bald statements.
 - ii. That it is admitted that MOU dated 28.09.2017 was executed and implemented and as per the MOU, Operational Creditor was to provide services of Design Supply and Consultancy Work only and that takes place at the very initial stage of the order and Operational Creditor has provided to the satisfaction and that's why project has been implemented. There is no iota of evidence that Operational Creditor has not provided any services till the export of goods in 19.01.2018.
 - iii. With regard to Para 6, it refers to email confirmation from Corporate Debtor that there is MOU and he is liable to make payment as per MOU. Page 26 of the Reply refers to the MOU and an amount of Rs. 265 Lacs as referred to in the MOU at page 25 of

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the Petition. Further in the email from Corporate Debtor they have confirmed that amount as per MOU is payable to the Corporate Debtor and some addition / deduction of work and amount in continuation of MOU is there and last but not the least they have stated in their own email that "Also kindly note I will call you for your payment, which can be done". This is confirmation beyond doubt that they have admitted the dues and amount is receivable by the Operational Creditor.

iv. That it is absolutely false and denied that they have ever send any such email or letter on 24, July 2018 to the Operational Creditor. However, without admitting receipt of this email, it is submitted that:

- a) MOU dated 28.09.2017 is admitted,
- b) All acts as per MOU from Sept 17 to Jan 18 are admitted,
- c) Export of goods in Jan 2018 as per MOU is admitted and
- d) Receipt of payment by the Corporate Debtor from the Importer is also admitted.
- e) Even receipt of Bills of April 2018 raised by Operation Creditor are also admitted.
- f) Emails from Corporate Debtor for amount payable to Operational Creditor is also admitted.

Hence MOU gets fully implemented on export of goods and liability as per MOU arises.

This proves beyond doubt that the email and letter of July 2018 is created as an afterthought and never received by the Operational Creditor. It is nothing but a sham defense created subsequently.

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- v. That the Corporate Debtor has confirmed in their own letter at page 34 of the reply they have acknowledged that they have received invoices.
 - vi. That the Demand Notices were delivered to both addresses of the Corporate Debtor and admittedly they have not replied the Demand Notice. That there was no dispute raised by the Corporate Debtor.
5. We have heard Ld. Counsel for the applicant as well as respondent/Corporate Debtor and perused the averments made in the reply, rejoinder as well as written synopsis filed by the respective parties. Ld. Counsel for the applicant in course of his arguments submitted that the demand notice was duly served upon the Corporate Debtor on 01.08.2019 and 05.08.2019 on the address of the Corporate Debtor but no reply has been filed or dispute has been raised by the Corporate Debtor after receiving the demand notice. He further submitted that the Corporate Debtor at page 34 of the reply admit that they have received the invoices. He further submitted that the Corporate Debtor has not produced any document to show that they ever raised the dispute before the issuance of the demand notice. He further submitted that there are only two invoices, one is dated 09.04.2018 and the other is dated 12.04.2018, which are at page nos. 20-21 of the application. He further submitted that the Operational Creditor has raised invoices on the basis of memorandum undertaking, which is at page no. 25 of the application. He further submitted that since no reply of the demand notice has been filed by the corporate debtor, therefore, in view of Section 8(2) of the IBC, the corporate debtor has failed to raise the existence of dispute and so the applicant prayed for admission of the application.
6. On the other hand, Ld. Counsel for the corporate debtor submitted that the corporate debtor has never received the demand notice. He further submitted that the MOU on the basis of which the operational

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creditor has claimed to raise the invoices have already been cancelled and it was communicated by the e-mail dated 26.07.2018 and the said e-mail is at page 33-34 of the reply. He further submitted that therefore, the operational creditor is not entitled to raise any invoice on the basis of that MOU. He further submitted that there is nothing on the record to highlight the fact that the operational creditor ever did any work for the corporate debtor and the shipment charges which has to be borne by the operational creditor were never borne by him, therefore, the entire MOU was never implemented, so, there is no question of payment due and payable. He further submitted that as per Section 37 Read with Section 44 of the GST Act read with Rule 44 & 59 of CGST Rules 2017 with regard to the Goods and Services Tax, the operational creditor was legally bound to submit the invoices raised with the GST Department in order to claim input Tax benefit but that has not been done by the Operational Creditor. He further submitted that the NCLT is not a recovery forum, therefore, the present proceeding is not maintainable here and, in this regard, he placed reliance upon the decision of Hon'ble NCLAT in Company Appeal (AT) (Insolvency) no. 54 of 2020 decided on 04.09.2020. He further submitted that the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) no. 1354 of 2019 in para 42 held that proving of invoice is an essential document to prove the existence of debt and once the invoice is not updated as per the statutory terms invoice in the GST Act read with CGST Rules 2017, the invoice is forged and fabricated and cannot be relied upon and so under such circumstances, the application under Section 9 of IBC is not maintainable. In this regard, he also placed reliance upon the decision of NCLAT reported in 2019 SCC online NCLAT 354. He also placed reliance on Mobilox Innovation Pvt. Ltd. reported in (2018) 1 SCC 53. He further submitted that so far the Section 8 of the IBC is concerned, the notice was never received by the directors of the corporate debtor and the dispute which the corporate debtor has raised

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in its reply are prior to the issuance of the demand notice dated 19 July, 2019. He further submitted that even no reply to the demand notice is given even then corporate debtor can raise the dispute in its reply and on this, he placed reliance upon the decision of Hon'ble NCLAT Company Appeal (AT) (Insolvency) No. 351/2018 dated 09.07.2018 but he further submitted that this decision of Hon'ble NCLAT is stayed by the Hon'ble Supreme Court in Civil Appeal No. 9027 of 2018 vide order dated 17.09.2018. He further submitted that mere stay of the order does not mean the finding given by the Hon'ble NCLT is not binding in nature and in this regard, he placed reliance upon a decision reported in AIR 1992 SC 1439 (2007), 2 CAL LT, 577, SC. He further submitted that since there is pre-existence of dispute, therefore, on this ground alone, the present application is liable to be dismissed.

7. In reply, Ld. Counsel for the operational creditor submitted that after receiving the demand notice, the corporate debtor has not raised any dispute and there is no document to show that any communication was made by which the dispute was raised prior to the issuance of the demand notice. This contention of the corporate debtor that the corporate debtor can raise the dispute even in its reply is not liable to be accepted.
8. In the light of the submissions raised on behalf of the parties, we would like to consider the case in hand. Admittedly, the corporate debtor has not given the reply to the demand notice. The contention of the corporate debtor that the director of the corporate debtor has never received the demand notice, hence, at this juncture we would like to examine this aspect whether the demand notice was duly delivered to the corporate debtor or not?
9. The operational creditor by filing separate affidavit has enclosed the postal receipts by which, they sent the demand notice to the corporate debtor as well as the tracking report and the tracking report



which is at page nos. 6-7 of the affidavit filed by the operational creditor shows that at Pin Code number 110092 and at Pin Code number 201301, the demand notice was duly delivered on 01.08.2019 and 05.08.2019 respectively.

10. At this juncture, we would like to examine the address mentioned in part II of the application, which is registered office of the corporate debtor shown and as per the serial number 5, the registered address of the corporate debtor is "Office number 104, Building number A-84, Street number 15, Madhu Vihar, Parparganj, Delhi-110092 and this is the Pin Code upon which the tracking report shows that the demand notice was duly delivered. At this juncture, we would like to refer Regulation 5 of the IBBI (Application to Adjudicating Authority) Rules, 2016 and the same is quoted below: -

5. Demand notice by operational creditor. —

(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.-

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in subsection (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due;

or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

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(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

11. Mere plain reading of the Regulation shows that the operational creditor is required to deliver the demand notice at registered office by hand, registered post or speed post with acknowledgement due or by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor and here in the case in hand in view of Regulation 5 (2) (c) of IBBI, Application to Adjudicating Authority Rules, 2016, the demand notice was duly delivered to the registered office, therefore, we are unable to accept the contention of the corporate debtor that the demand notice was not duly delivered. Since, the demand notice was duly delivered and it is also admitted by the corporate debtor that no reply has been filed by the corporate debtor to the demand notice, therefore, at this juncture, we would like to refer Section 8 of IBC and the same is quoted below: -

Section 8: Insolvency resolution by operational creditor:

**8. (1) 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.*

(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, ¹[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;

(b) the ²[payment]of unpaid operational debt—



(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding³[payment] of the operational debt in respect of which the default has occurred.

12. Mere plain reading of the provision shows that after receiving the demand notice within a period of 10 days, the corporate debtor is required to bring to the notice of the operational creditor the existence of a dispute or record of the pendency of the suit or arbitration proceeding filed before the receipt of such notice or invoices in relation to such disputes.
13. In the light of that provision, we consider the contention of the corporate debtor. We noticed that it is admitted fact that after receiving the demand notice within a period of 10 days, neither any dispute has been raised nor any record of the pendency of the suit or arbitration proceeding filed before receipt of such notice or invoice in relation to such dispute were bring to the notice of the operational creditor. Even in view of Section 8 Sub-Section 2 Clause (b), the corporate debtor has not produced any document to show that the amount has been paid, rather the contention of the corporate debtor that the MOU on the basis of which the operational creditor has raised the invoices has already been cancelled.
14. In the light of that contention, we consider this aspect and noticed that the invoices were raised on 09.04.2018 and 12.08.2018, whereas as per the contention of the corporate debtor, the MOU was cancelled on 26.07.2018, much after the issuance of the invoices, so under such



circumstances, we are unable to accept the contention of the corporate debtor that since the MOU was cancelled on 26.07.2018, therefore, the invoices raised prior to the cancellation of the MOU are not maintainable. Rather we are of the considered view that these invoices were raised on the basis of the MOU, which was executed in between the operational creditor and corporate debtor, of course, it was subsequently cancelled. Since the invoices are prior to the cancellation, therefore, we are unable to accept the contention of the corporate debtor that these invoices are not legal. So far the contention of the corporate debtor that it is the duty of the operational creditor to establish that the invoices are duly received by the corporate debtor.

15. At this juncture, we would like to refer the e-mail dated 26.07.2018, which is at page no. 34 of the reply filed by the corporate debtor. The said mail shows that this was with reference to the invoice dated 09.04.2018, so under such circumstances, we are unable to accept the contention of the corporate debtor that the invoices, which were duly sent were not received by the corporate debtor. Rather the mail dated 26.07.2018, which is at page no. 34 of the reply shows that the invoices were duly raised and it was received by the corporate debtor, so the decision upon which the corporate debtor has placed reliance is not applicable under the facts and circumstances of the case in hand.

16. So far the contention of the corporate debtor that dispute even if no reply of the demand notice was earlier sent, can be raised after filing the reply is concerned, the decision upon which the corporate debtor has placed reliance, since the corporate debtor themselves admitted this fact that such order has been stayed by the Hon'ble Supreme Court in Civil Appeal No. 9027 of 2018 vide order dated 17.09.2018 and that civil appeal is still pending and not decided as yet, therefore, the same is not binding.



17. So far the contention of the corporate debtor, mere stay of the order would not effect their binding nature and the decisions upon which they placed reliance is concerned, we have gone through that decisions and we find that the facts of that decisions are different from the facts of the case in hand. Of course, that stay does not amount to restoration of the appeal but the findings of this issue since under the challenge and the order has been stayed then we are of the view that this decision would not help the corporate debtor. Therefore, we are of the considered view, the corporate debtor is required to raise the dispute within 10 days from the date of receipt of demand notice.
18. Moreover, during the course of hearing, the Ld. Counsel for the corporate debtor has not placed any document to show that any correspondence has been made raising the disputes in terms of Section 8 read with Section 5 (vi) of the IBC. So under such circumstances, we are unable to accept the contention of the corporate debtor that he has raised the dispute.
19. At this juncture, we would like to refer Section 9 Sub-Section 5 of IBC and the same is quoted below: -
- Section 9: Application for initiation of corporate insolvency resolution process by operational creditor:*
- (5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—*
- (i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—*
 - (a) the application made under sub-section (2) is complete;*
 - (b) there is no ³[payment] of the unpaid operational debt;*
 - (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*

- (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
- (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*
- (ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—*
 - (a) the application made under sub-section (2) is incomplete;*
 - (b) there has been ⁴[payment] of the unpaid operational debt;*
 - (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;*
 - (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or*
 - (e) any disciplinary proceeding is pending against any proposed resolution professional:*

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

20. Mere plain reading of the provision shows that if the application made under Section 9(2) IBC is complete and there is no payment of unpaid operational debt and the invoices or notice for the payment of corporate debt has been delivered by the operational creditor and no dispute has been received by the operational creditor or there is record of dispute in the information, so under such circumstances, the Adjudicating Authority have no option but to admit the application of the operational creditor.



21. In the light of that aspect, we consider the application and notice that the application is complete, the invoices and demand notice were duly delivered upon the corporate debtor and neither payment was made nor dispute as required under law is raised by the corporate debtor, therefore, we have no option but to admit the application.

22. Therefore, in view of Section 9(5)(i) of IBC, we hereby admit this application and since the applicant has not proposed the name of the IRP therefore, we appoint Mr. Deepak Kumar Aggarwal, Registration No.- IBBI/IPA-001/IP-P02076/2020-2021/13225 and email- id ipdeepakaggarwal@gmail.com as IRP and initiate CIRP against the respondent. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

1. **effect forthwith staying:-**

(a) 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;

(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;

(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.

Further:

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(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) 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.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

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 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.

23. Operational Creditor is directed to deposit the fee of Rs. 100000 /- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs and IRP is directed to follow the rules and regulations as per Section 15, 16, 17 & 18 of IBC.

24. Registry is directed to communicate the order with the IRP as well both the parties.

Sd/-
K. K. VOHRÁ
Member (T)

Sd/-
ABNI RANJAN KUMAR SINHA
Member (J)