IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-123/(ND)/2021

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

M/s Omax Autos Limited.
Plot No. B-26, Institutional Area,
Sector-32, Gurugram,
Haryana- 122001

...Applicant/Operational Creditor

Versus

M/s Hema Automotive Private Limited.
Registered Office at:
Sachidanand Farmhouse, KishanGarh Village,
OP Swimming Pool (Near DDA Sports Complex)
Lane, Green Avenue, Vasant Kunj,
New Delhi-110070 (India)

...Respondent/Corporate Debtor

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Coram:

SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)
SHRI.RAHUL BHATNAGAR, Hon'ble Member (Technical)

Counsel for Applicant: Mr. Swapnil Gupta
Counsel for Respondent: Mr. Kapil Kher

ORDER

PER RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date:18.08.2022

1. This is an application filed by the Applicant M/s Omax Autos Limited seeking to initiate corporate insolvency resolution process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code') against the Respondent M/s Hema Automotive Private Limited for the alleged default of INR 91,65,494.59 along with interest at 24% p.a., as alleged by the Applicant. The date the application has been filed by the Operational Creditor is 29.12.2020.

2. The details of transactions leading to the filing of this application as averred by the Applicant/Operational Creditor are as follows:

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i. That the Corporate Debtor is having business relations with the Operational Creditor for the past many years.

ii. That the Operational Creditor has been supplying different components to the Corporate Debtor from time to time against different purchase orders and the Corporate Debtor, instead of making invoice to invoice payment, has been making payments on account against pending invoices.

iii. That the Corporate Debtor placed order vide purchase order PO17180000768 dated 02.07.17 amounting to Rs. 2,82,09,167.55/- inclusive of GST for the supply of components by the Operational Creditor.

iv. The said order was duly delivered against different invoices. The payment for each invoice was to be made in an average of 52 days. That the Corporate Debtor failed to pay the amount of the said invoices/debit notes and the Corporate Debtor on one pretext or the other sought time from the Operational Creditor to clear the outstanding amount of Rs. 91,65,494.59 of the said invoices.

v. That the Operational Creditor requested the Corporate Debtor to make payment of the outstanding amount of Rs. 91,65,494.59 along with interest, through Garg & Garg Chartered Accountants.

vi. That the Operational Creditor issued a statutory Demand Notice under S. 8(1) of the Insolvency and Bankruptcy Code, 2016 read with clause (a) of sub-rule (1) of Rule 5 of the IBC (Application to Adjudicating Authority Rules) 2016 on 29.12.2020 by speed post as per tracking report of India Post. The said notice had duly been served to the Corporate Debtor on 31/12/1/2020. Also, the Operational Creditor had served a copy of the notice to the Corporate Debtor through e-mail (dkverma@hemaautomative.in) on 29.12.2020 at 6:51 PM. Moreover, the said demand notice was also sent to the Corporate Debtor and its Director Sh. Chandresh Jajoo through mail at (cj@hemaengineering.com) dated 29.12.2020 at 6:51 PM.

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vii. That the Corporate Debtor did not furnish any reply to the said notice.

viii. That it has come to the knowledge of the Operational Creditor that the Corporate Debtor, instead of making the payment to the Operational Creditor, started diluting/transferring its moveable and immovable assets to defeat the valuable claim right of the Operational Creditor.

ix. That the total claim of the Operational Creditor is Rs 1,47,12,285/- including interest @24% p.a. as calculated and the amount fell due from 14.08.2018

In compliance with Section 9 (3)(b) of the Insolvency and Bankruptcy Code, 2016, the Operational Creditor has filed an affidavit dated 18.01.2021.

3. The Corporate Debtor has specifically denied all the averments made by the Applicant.

3.1. The Corporate Debtor has argued that the amount claimed by the Petitioner (Operational Creditor) is

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not an Operational Debt under S. 5(21) as there is no occurrence of default in terms of S. 3(12) of the Insolvency and Bankruptcy Code 2016 read with other relevant provisions and hence the petition is not maintainable. It is contended that the Corporate Debtor has duly made payments towards the undisputed supplies by the Petitioner, and the bill/invoices, copies of which haven't been filed, though relied upon by the petitioner, are disputed. It has been submitted that the quality of the goods was far from satisfactory owing to which disputes are pending between the parties, and hence, by virtue of pre-existing disputes the petitioner should be dismissed. It is submitted that various issues have persisted since 2016 and because of them, the petition cannot be admitted. For instance, the respondent had informed the petitioner about the non-supply of frames by the petitioner vide emails dated 01.04.2016 and 07.10.2017 and intimated that the paint shop hanger was running empty.

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Details of the empty hangers were given to the petitioner by the respondent again vide emails dated 23.07.2018, 24.07.2018, and 14.11.2018. The respondent intimated the petitioner about the loss of Rs. 61,24,694/- suffered by it due to non-supply and delay in supply of material and delay in supply of material by the petitioner. The petitioner had not disputed the contents of the aforementioned emails and acknowledged that they had caused loss to the respondent. The loss is valued at Rs. 72,90,923/-.It is submitted that the Petitioner is accordingly liable to indemnify the losses incurred by the Respondent to the tune of Rs. 72,90,923. The Corporate Debtor has cited the case of *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, 2018 1 SCC 353,* wherein it was held that in case of pendency of dispute between the parties, the Insolvency Petition filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 is not maintainable. Hence, it is argued that the operational creditor hasn't reached the adjudicating authority with clean hands and bona fide intention. The Corporate Debtor also places reliance on the judgment of the Hon'ble NCLAT in case of *Ramco Systems Ltd. V. Spicejet Ltd.*, 2019 SCC OnLine NCLAT 354, which held that: *"There is nothing on the record to suggest that the invoices dated 23rd July, 2014 were forwarded or received by the Respondent- 'Spicejet Limited'. Therefore, the Demand Notice issued on 24th April, 2017 as relates to invoice dated 23rd July, 2014, though it cannot be held to be barred by limitation, but in absence of specific evidence relating to invoices actually forwarded by the Appellant and there being a doubt, we hold that the Adjudicating Authority has rightly refused to entertain application under Section 9 which requires strict proof of debt and default."* It is contented that the present petition is an attempt to recover money and that the Petitioner has failed to give the calculation of any undisputed amount

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which may be due and payable by the Respondent. On the contrary, the Petitioner has allegedly concealed the payments made by the Respondent.

3.2. The Corporate Debtor further contends that the petition says that the principal amount due is Rs. 91 Lakhs and has objected by saying that the invoices didn't provide for any interest for payments alleged to be due.

3.3. The Corporate Debtor thus points out that the insolvency petition has been filed against the Respondent Company and the initiation of the Corporate Insolvency Resolution Process has been sought by the Petitioner, fraudulently and with malicious intent for reasons, other than for the resolution of insolvency. The captioned insolvency petition suffers from the vice of concealment/suppression of material facts and documents and misrepresentation of facts, and there is no amount payable.

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3.4. Lastly, it is argued that the provisions of the Insolvency and Bankruptcy Code,2016 cannot be used as a recovery mechanism to extract undue amounts and the filing of the captioned insolvency petition is nothing but an abuse of the process of law.

4. The Operational Creditor has tried to rebut the arguments of the Corporate Debtor by stating that the inclusion of interest rates at 24% is according to the relevant market practices and it relies on *Rajasthan v. Ferro Concrete Construction Pvt. Ltd.* Moreover, it also states that interest under section 3 of the Interest Act, 1978 is to be included whenever any specific rate of interest hasn't been mentioned, which ultimately enables passing the minimum threshold of initiating the CIRP.

5. In the light of the above said facts and after giving careful consideration to the entire matter, hearing the arguments of the learned counsels for the Operational Creditor and the Corporate Debtor; and upon appreciation of the documents placed on

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record to substantiate the claims, this Adjudicating Authority does not find merit in the instant application. The present application for CIRP has been filed after the implementation of the IBC notification dated 24.03.2020 by which the threshold limit of default under Section 4 had been raised to INR 1 crore. In the present case, this threshold limit for the amount of default of debt has not been met as the default is alleged to be of the amount of INR 91,65,494.59 (Rupees Ninety-one lakhs sixty-five thousand four hundred ninety-four and fifty-nine paisas). The claim of interest, the addition of which is sought by the Operational Creditor and which would raise the default amount above the threshold limit is not supported by any agreement or commercial understanding between the parties. Besides, a bare reading of Section 5(8) and Section 5(21) of the IBC by which Financial Debt and Operational Debt have been defined, adequately indicates the intention of the legislature. The definition of Financial Debt clearly states that it is a 'debt along with interest if any' whereas there is no mention of interest in the definition of Operational Debt, Hence, there is neither any provision nor any scope to include interest along with the claim against provision of goods or services to constitute Operational Debt. The Corporate Debtor has also revealed the existence of disputes prior to the issue of Section 8(1) notice under IB Code, 2016.

6. Hence, this application is not maintainable since it does not meet the minimum threshold of Rs. 1 crore required in terms of notification dated 24.03.2020 and for the reason of pre-existence of disputes.

7. This application is therefore **dismissed** without costs. Let a copy of the order be served to the parties.

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(SH.RAHUL BHATNAGAR)

MEMBER (TECHNICAL)

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(SH. P.S.N. PRASAD)

MEMBER (JUDICIAL)