

IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENCH-III  
NEW DELHI

IB-1265/(ND)/2018

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:

Magnum Steels Limited,  
Essel House, A10 Asaf Ali Road,  
New Delhi-110002

Also at:  
312-313, PP Tower-II-B,  
Netaji Subhash Palace,  
Pitampura, Delhi-110034

.....Operational Creditor

VERSUS

SVS Buildcon Private Limited,  
56-58, Community Centre,  
East of Kailash,  
New Delhi-110065.

..... Corporate Debtor

**Coram:**

**R.VARADHARAJAN,  
Hon'ble Member (Judicial)**

Counsel for the Petitioners:

Mr. Manoj Kumar Garg, Mr. Santosh  
Kumar, Mr. Siddhartha Patra, Mr.  
Achint Gupta, Mr. Kundan Kumar Roy,  
Advocates

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Magnum Steels Limited vs. SVS Buildcon Pvt. Ltd.

Counsel for the Respondent:

Mr. D.P.Singh, Mr. Abhishek Malhotra,  
Ms. Sonam Gupta, Mr. Kaushik Moitra,  
Mr. Aditya Singh, Mr. Jadunath Behera,  
Mr. Ashwini Sharma, Mr. Bagmisikha  
Puhan, Mr. Devansh Arya, Mr.  
Abhinandan Banerjee, Ms. Ishita Jain,  
Mr. Manu Mishra, Mr. Anurag Tandon,  
Ms. Shilpa Gamnani, Ms. Niyati  
Asthana, Mr. Suamay Kapoor, Mr.  
Atmaja Tripathy, Ms. Gauri Tyagi,  
Advocates

**Delivered on: 13.09.2019**

### **ORDER**

The Applicant has filed this Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC,2016) seeking for initiation of the Corporate Insolvency Resolution Process (CIRP) under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Applicant, it is seen is a Company having identification No.U27109DL1991PLC042681. The Corporate Debtor (CD) is stated to be incorporated on 12.12. 2007 with authorized share capital and paid up share capital being Rs.28500000/- and Rs.11971340/- respectively. The address of the registered office of the CD is stated to be 312-313, PP Tower-II-B, Netaji Subhash Palace, Pitampura, Delhi-110034 and the same is also reflected in the Master Data as filed by the Operational Creditor (OC) annexed with Petition and placed at page 244 of the typed set of the Petition. No Interim Resolution Professional (IRP) has been proposed by the OC. Part IV of the Petition details the amount of debt and

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default of Rs.5,05,84,229/- and interest of Rs.3,15,98,282/- at the rate of 24% per annum, aggregating to Rs.8,21,82,511/-.

2. It is stated that an Agreement /Understanding was entered into between the parties dated 10.02.2015 for supply of material to the project situated at Bhopal, pursuant to which TMT bar (steel material) was supplied and delivered to the CD from time to time for a total value of Rs.8,21,82,511/-. It is further stated in the Petition that the sale of material namely, TMT bar was in consideration of the purchase of the built up unit in the proposed commercial complex namely, 'Great India Place', at village Bairagarh Chichli, Tehsil Huzoor, Kolar Road, Bhopal, Madhya Pradesh proposed by the CD and that the value of the material supplied by the CD to the OC was to be adjusted with the consideration of the built up unit in the proposed commercial complex in barter. Seven debit notes were raised as against the consideration for seven built up units in the project namely, 'Great India Place' by the CD in relation to the materials supplied by the OC and the details of the debit notes raised for appropriating the value of the material supplied in relation to each of the units has been tabulated in the Petition, which is extracted herein.

Sl.No	Particulars of Debit Note	Amount of the Debit Note (Rs.)	Unit Details
01	No.GIP/1 dated 31.03.2015	23097987	GF 58
02	No.GIP/2 dated 31.03.2015	5058370	LGF 20
03	No.GIP/3 dated 31.03.2015	5195941	LGF 21
04	No.GIP/4 dated 31.03.2015	3556857	FF 41A
05	No.GIP/5 dated 31.03.2015	3254146	FF 41B
06	No.GIP/6 dated 31.03.2015	572365	LGF 25

07	No.GIP/7 dated 31.03.2015	9181446	FF 9B
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3. In furtherance of the same, 7 agreements to sell were executed as between the OC and the CD with one Khaneja Properties Pvt. Ltd. as a confirming party and correlating with the debit notes raised for individual unit which stood raised, have been entered into on 16.09.2015, 08.01.2016 and in relation to one agreement it was entered into on 28.01.2016. In relation to the unit which was agreed to be provided on barter basis and as per agreement for which debit notes have been raised by the CD, upon inspection by the representative of the OC, it was seen that the CD had not executed the construction work and in the circumstances due to failure on the part of the CD who had violated the terms and conditions of the agreements, OC demanded the payment of the consideration of steel supplied against the proposed sale and purchase of the built up units from the CD. The date of default is claimed to be on several dates i.e. 10.02.2015 when an agreement of understanding was signed between the parties, on 30.01.2017 when the last part of the supply of steel was made and when seven debit notes were issued by the CD in acknowledgement of the receipt of consideration in relation to all the aforesaid seven built up units as well as the dates when seven agreements to sell were executed as between the CD and the OC. The amount which has been claimed by the OC as against the CD is in a sum of Rs.8,21,82,511/-, break-up of which has already been given in the earlier portion of the order.

4. Part-V of the Petition discloses documents listed in support of the claim which includes invoices raised against the supplies which have been made as well as debit notes which have been raised by the CD as against the OC, seven agreements to sell and demand notices as raised by the CD have also been annexed, which is evident from the reply as given by the CD that the same had been duly served upon the OC. This Petition has been filed in view of the non-payment of the amount due to the OC from the CD.

5. Upon perusal of the Petition and the documents annexed thereunder since the basic question arises as to whether the Petitioner can be classified as an 'Operational Creditor' and the debt can be categorized as an 'Operational Debt', notice was issued in relation to the maintainability of the Petition to the CD. Upon an opportunity being afforded to the CD, a reply/counter has been filed in relation to the maintainability of the Petition per se. Perusal of the said reply shows that the amount which is claimed as due by the OC and the existence of 'Operational Debt' is prima facie objected to on two counts on the basis that there has been pre-existence of dispute even prior to the issue of notice under Section 8 as notice has been served by the CD upon the OC. In relation to the same, it is contended that a legal notice was sent by the OC to the CD dated 2.1.2018 wherein the OC had called upon the CD to make payment in a sum of Rs.6,95,64,314/- and that on receipt of the said notice, the CD had responded vide communication dated 19.1.2018 that in view of delay in the supply of steel, as the consideration, there has been delay in the

construction of the project and hence with the subsequent issue of demand notice and the proceedings before this Tribunal as initiated by the OC in relation to the CD is nothing but an attempt of shirking of liability of the OC arising out of delayed supply of steel. It is also brought to the notice of this Tribunal in the reply that in relation to the demand notice a detailed reply has also been given and taking into consideration of the Judgement passed by Hon'ble Supreme Court in the matter of Mobilox Innovations Private Limited vs. Kirusa Software Private Limited that in view of the pre-existence of a dispute, this Petition is required to be dismissed.

6. The next ground which has been raised by the CD is that there was no existence of Operational Debt, per se, as alleged by the OC as it cannot be considered as an Operational Debt in view of the OC and the CD having entered into an agreement in relation to the purchase of 12 units in the commercial project being developed by the CD and which fact has also been recorded in the understanding dated 10.2.2015 as annexed with the Application by the OC itself under which a onus has been placed as per the understanding as agreed to by the OC, to credit it by a sum of Rs.1,40,000,00/- and thereafter pay the remaining consideration in a sum of Rs.12,85,22,300/- by way of supply of steel which has not been fulfilled by the OC and hence the alleged default is not arising from the supply goods or services by the CD and the Petitioner



cannot be termed as an 'Operational Creditor' and the Petition is liable to be dismissed as being ill-conceived and untenable in law. Even though a plea has also been made in the reply that the CD is a Joint-Venture Company with Unitech Holding Ltd. and that all coercive steps for executing any order passed in any proceedings have been prohibited by virtue of the order passed by Hon'ble Supreme Court rendered on 30.10.2017 and further reaffirmed by order dated 20.11.2017. However, Ld. Counsel for the Petitioner in relation to the same brings to the notice of this Tribunal that only specified entities as reflected in the Hon'ble Supreme Court's website can be considered as an entities can which avail the order of embargo as passed by the Hon'ble Supreme Court and in its absence, the CD cannot claim any relief. During the course of oral submissions the above said plea was not pressed by the CD as it was not in a position to demonstrate that it falls within the specified entities covered by the order of the Hon'ble Supreme Court.

7. The fundamental question arises as to whether the Petitioner can be considered as an Operational Creditor. From the Petition as filed, it is seen that an understanding has been arrived at as between the Petitioner and the CD dated 10.2.2015 and it is also mentioned therein that the Petitioner being defined itself as a 'purchaser' and the CD being defined as the 'developer' has agreed, wherein the Petitioner as the purchaser has agreed to book 12 units with the developer which are to be developed by



the developer at 'Great India Place' to be situated at Village – Bairagarh Chichli, Tehsil Huzoor, Kolar Road, Bhopal, Madhya Pradesh and the details of the individual units in relation to which the consideration is required to be paid is given by way of tabulation in the said understanding itself. It is also further seen that at the time of booking of the 12 units, a sum of Rs.1,40,00,000/- has been agreed to be paid by the OC and for the balance amount payable of Rs.12,85,22,300/-, the Petitioner in the capacity as a purchaser has agreed to supply 450 TMT bar in various dias for the project to be developed within a period of 1 year at the site of the developer and that the value of the steel so supplied by the Petitioner as a purchaser shall it is provided in the understanding to be adjusted against barter, for one unit at a time and the sale consideration which is required to be adjusted as per the said understanding by the developer/CD against the units booked. Individual agreements were required to be signed in relation to each of the units by the Petitioner. From the above understanding, it is seen that instead of money terms the Petitioner has agreed to pay the consideration for the unit proposed to be purchased in 12 Nos. by way of supply of materials. Thus, effectively if at all, the Petitioner can be classified as to that of a 'Home Buyer' falling under the relevant definition under the provisions of IBC,2016. This is reinforced from the documents of the Petitioner itself as subsequent to the above understanding, upon supply of material, debit notes have been raised by the CD and that 7 agreements have been entered into as between the Petitioner and the CD. Each of the agreements, upon perusal discloses that they relate to the description of

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the unit proposed to be purchased clearly giving out the details of the units in the Annexure. Also, the individual agreement specifies the basic price and as to how the appropriation is to be done by way of supply of steel for which the debit note is to be raised by the CD has also been provided. In the circumstances, whether the Petitioner can be considered as an 'Operational Creditor' is a moot point and in relation to the same, it will be worthwhile to refer to the decision of the Hon'ble Supreme Court rendered recently in the matter of Pioneer Urban Land and Infrastructure Ltd. & Anr. vs. Union of India & Ors. in Writ Petition (Civil) No.43 of 2019 dated 9.8.2019 wherein the Hon'ble Supreme Court has categorically held that the Home Buyers are financing the project in which they have undertaken to purchase units can be classified as 'Financial Creditors'. However, the Petitioner herein has chosen to invoke the provision of Section 9 of IBC,2016 in relation to an 'Operational Creditor' and debt as an 'Operational Debt' which is claimed to be defaulted whereas it can at best be considered as one falling under the category of a financial debt under the provisions of IBC,2016. As rightly pointed out by Ld. Counsel for the CD relying on the reply as filed by the CD from the transaction between the parties, it is evident that there is no incidence of an 'Operational Debt' between the Petitioner and the Respondent as the Petitioner instead of money terms has agreed to supply goods in lieu of payment of money in relation to the project being developed by the CD and for the purchase of unit therein. The underlying sales cannot be considered as a transaction in relation to the one contemplated under the provisions of Section 9 of IBC,2016 read with the definition under

Sections 5(20) as well as 5(21) in relation to 'Operational Creditor' and 'Operational Debt' respectively and in the circumstances this Tribunal is constrained to dismiss the Petition as not maintainable under Section 9 of IBC,2016 as an 'Operational Debt'. It is not necessary for this Tribunal to go into the aspect of dispute as claimed by the CD, as the debt giving rise to the claim is held to be not an 'Operational Debt'.

This Petition stands dismissed accordingly.

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U.D.Mehta  
13.09.2019

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13/09/2019  
(R.VARADHARAJAN)  
MEMBER(Judicial)