

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III**

C.P. No. 1261/IBC/MB/2019

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016 read with
Rule 6 of the Insolvency and
Bankruptcy (Application to
Adjudication Authority) Rule 2016)

In the matter of

Inmac Computers Private Limited

219, Udyog Bhavan, Sonawala Lane,
Goregaon (East) Mumbai 400063

.....**Operational Creditor**

Vs

Windsor Realty Private Limited

Windsor 1st floor, CST Road Kalina
Santacruz (East), Mumbai MH
400098

.....Corporate Debtor

Order delivered on: 20.09.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Chandra Bhan Singh, Member (Technical)

Counsel for the Applicant: Mr. Sunny Shah i/b Hemant Sethi & Co,
Advocate

Counsel for the Respondent: Mr. Gaurav Joshi, a/w Ms. Prachi
Dhanani and Ms. Rohini Jaisawal, Advocate

Per: *Shri Chandra Bhan Singh, Member (Technical)*

ORDER

1. This Company petition is filed by *Inmac Computers Private Limited* (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Windsor Realty Private Limited (hereinafter called “Corporate Debtor”) by invoking the provisions of Section 9 Insolvency and bankruptcy code (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and sought resolution of an Operational Debt of Rs. 52,40,999/- to Operational Creditor.

Brief submissions of the Operational Creditor:

- i. The Operational Creditor submits that pursuant to purchase order dated 01.10.2018 bearing No. (PO/WRPL/201819) issued by Corporate Debtor for supply of DELL Laptops and Ms. Office H&B 2016 FPP-FA-SOFTWARE Operational Creditor sold, supplied and delivered DELL Laptops, Latitude 3490-Ci3 & i5, MS office Home & Business (as detailed in Invoice) laptops under Invoice No. 1492/18-19 dated 01.10.2018 for aggregate value of Rs. 52,40,999/-. The Laptops were delivered on 01.10.2018 under delivery note No. 431 which is duly signed by affixing rubber stamp of the Corporate Debtor. The goods were delivered under e way Bill No. 261046271656 b vehicle No. MH04FJ3923.
- ii. The Operational Creditor mentions that the total being the outstanding amount due and payable is Rs. 52,40,999/-. The Operational Creditor further mentions that By letter dated 19.11.2018 the Corporate Debtor has confirmed its liability to pay Rs. 52,40,999/- under the aforesaid invoice.

Various e mails have been exchanged between the Operational Creditor on one hand and Corporate Debtor through Mr. Gopal Narang, Advail Narang and Satish Kala, where the Corporate Debtor promised to pay the amounts due under various invoices.

- iii. The Corporate Debtor did not make payment for the invoice raised. The Operational Creditor has been consistently following up with the Corporate Debtor for the pending bill amount.
- iv. The Operational Creditor as a first step towards initiating Corporate Insolvency Resolution Process under the Code sent a demand notice dated 28.12.2018 in Form 3 and Form 4 of Insolvency and Bankruptcy Code under Section 8 to the Corporate Debtor demanding payment of a net amount of Rs. 52,40,999. The demand notice was received on 10.01.2019 by Speed Post for which response has been received from the side of the Corporate Debtor on 10.01.2019 by Speed Post.

Brief Submissions of the Corporate Debtor:

- i. The Corporate Debtor mentions that the Application ought to be dismissed on the following grounds:
 - a. The Corporate Debtor has neither entered into any arrangement nor has it ordered/received any goods or products from the Applicant therefore the question of the Applicant being entitled to receive any money from the Respondent Company cannot and does not arise.
 - b. The entire claim of the Applicant is based on the alleged Purchase Order issued by one Mr. Satish Kale (“the Accused”) in relation to the goods allegedly supplied by the Applicant on 1st October, 2018 to the Respondent Company. It is emphasized that, said the purchase order,

alleged to have been issued by respondent company, was never in fact issued by the Respondent Company. The purchase order in fact appears to have been issued by the accused, which fact is admitted by the Operational Creditor. It is pertinent to note that the accused, was an employee of Windsor condominium (Condominium). The respondent and the Condominium are distinct and separate entities, engaged in unrelated industries and are independent of each other. We say that at no point of time was the Accused employed or in any manner authorized by the Respondent Company and therefore the Purchase Order placed by the Accused could not have been placed for and / or on behalf of Respondent Company. Consequently, the respondent company reviving any goods pursuant to the said purchase order does not arise.

- c.** The Corporate Debtor in his reply mentions that the Operational Creditor has admittedly neither corresponded with and / or met any other representative including the Directors or any other key managerial personnel of the Respondent Company and have only been communicating with accused with respect to the alleged transactions. It may be pertinent to note that the said purchase order and all other documents relating thereto, including the E-way bill, tax invoice and delivery note have been signed and / or acknowledged solely by the accused. As already stated hereinabove, the accused was not even an employee of the respondent and therefore had no power to authorize any transaction on behalf of respondent company.
- d.** The Corporate Debtor mentions that it had absolutely no knowledge of the alleged transactions and came to know

about them only when the accused confessed to the same i.e. at the end of December 2018. Additionally, as soon as the respondent discovered the fraud being perpetrated by the accused using the name of the Respondent, representatives of the Company, immediately informed applicant by way of the letter dated 27.12.2018 and even before that on 25.12.2018 over a telephone call.

- e. The Corporate Debtor mentions that it has not placed an order nor received any goods alleged to have been delivered by the petitioner on 01.10.2018 nor has the respondent received any income and/or benefit out of the said transactions. All the dealings and correspondence with the petitioner was carried out solely by the accused in his individual capacity, and therefore the respondent is not liable for payment pertaining to the alleged purchase order to the petitioner.
- f. The respondent submitted that there is no debt, operational or otherwise, payable to the petitioner by the respondent under Section 3(11) of the Code. Consequently, the respondent cannot be termed as a “corporate debtor”, nor can the petitioner be termed as an ‘operational creditor’ in relation to the respondent within the meaning of Section 5(20) of the Code and therefore on this ground alone the present petition ought to be dismissed.

ii. **Pre-existing dispute in relation to the said claim:**

- a. The respondent states that, the said purchase order on which the applicant has based his entire claim, had been issued by the accused on the basis of false and fabricated documents and the entire transaction is fraud perpetrated by the accused. Upon discovering the fraud

perpetrated by the accused, Mr. Gopal Narang has in his capacity as the director of respondent company, already lodged an FIR against the accused and investigations with respect to the alleged transactions are being carried out by the concerned authority.

- b.** In relation to the FIR lodged by Mr. Narang, on 25.12.2019, the accused has also given a Confession to the police authorities admitting to the deceitful and false acts committed by him inter alia purchasing and selling laptops, computers and software licenses. The Corporate Debtor mentions that Mr. Satish Kale created the fake email-ids of the directors of Respondent Company in order to purchase the 100 laptops and licenses from the Applicant, carrying out the said transaction, by misrepresenting himself as the authorized signatory of the respondent purchasing products approximately worth Rs. 1,10,00,000/- from the applicant including the 100 laptops and the said software products and licenses. Further the Corporate Debtor mentioned that Mr. Satish Kale using a cheque from the cheque book belonging to “Windsor Grande Residences Condominium” printed the applicant’s name on the same along with an amount of Rs. 1,07,00,000/- for the purpose of sending a scan of it to the Operational Creditor to create a false impression that the said cheque is pending for signatures.
- c.** The Respondent states and submits that all of the aforesaid had been categorically informed in detail to the Operational Creditor in a personal meeting held with the director of the Operational Creditor on 26.12.2018 and also through various correspondences including the letter dated 27.12.2018 and the reply dated 10.01.2019

to the Demand Notice dated 28th December amongst several others. The Corporate Debtor further mentioned that it is therefore clear that the Operational Creditor had specific knowledge pertaining to the aforesaid complaint and proceedings with respect to the fraud committed by the accused and despite being aware of the same, has filed the present application against respondent, who is itself a victim of the fraud perpetrated.

- d.** The Corporate Debtor reiterated that the entire claim of the applicant is based on false, fabricated and forged documents and the alleged transactions were carried out without the knowledge and/or authority of the respondent company and until and unless the genuineness of the documents and transactions are validated, the same cannot be relied on and therefore the entire claim of the applicant is unsubstantiated and uncorroborated and ought to be dismissed.

FINDINGS

1. This Petition has been filed by M/s. Enmac Computers Pvt Ltd Operational Creditor/ Applicant against M/s. Winsor Realty Pvt Ltd, Corporate Debtor/Respondent in the matter u/s 9 for the supply of 100 no. of Dell laptops and MS Office software under an Invoice 1492/18-19 dated 01.10.2018. The Operational Creditor mentions that these laptops along with the software were delivered on 01.10.2018 and goods were delivered under an e-way bill. The aggregate value of these goods was Rs.52,40,999/, which is also the principal amount claimed as a default in the Petition. The default fell due as per the Petition, on 01.11.2018 after giving credit of 30 days. Further, the demand notice was issued by the Petitioner to the Respondent on 28.12.2018. Similarly, reply to the demand

notice was given by the Corporate Debtor on 10.01.2019. This Petition was filed on 28.03.2019.

2. The Bench notes that the claim of the Petitioner is based on Purchase Order dated 01.10.2018. The Respondent submits that the Purchase Order was never issued by the Respondent Company but was admittedly issued by Mr. Satish Kale who was not an employee of the Respondent Company but an employee of a separate and distinct legal entity viz. Winsor Condominium. The Petitioner has clearly mentioned that except for Mr. Satish Kale, he has never met or corresponded with any other representative including Directors/ any key managerial person of the Respondent Company. The Bench also notes that the Purchase Order, e-way bill, delivery note, and other documents have been signed only by Mr. Satish Kale. The Respondent reply have categorically stated they have neither issued any purchase order nor have received any goods.
3. The Bench notes that by December, 2018 the Respondent Company discovered this illegal act of Mr. Satish Kale and therefore its Director Mr. Gopal Narang filed FIR on 24.12.2018 before the local Police authorities in relation to the fraud perpetrated by Mr. Satish Kale. The Respondent side mentions that a trial is ongoing in this matter. The Bench notes that in their reply the Respondents have attached a confession statement by Mr. Satish Kale made before the local Police authorities dated 25.12.2018, admitting to the deceitful and fraud acts committed by him which included, *inter alia*, purchasing and selling laptops and creating fake email ids of the Respondent Company in order to purchase these laptops. The Bench also notes that the lodging of the said FIR against Mr. Satish Kale has been intimated to the Petitioner Company

in a meeting held on 26.12.2018 which was subsequently also conveyed to the Petitioner's side by a letter dated 27.12.2018.

4. It is worthwhile to note that, the Petitioner Company was well aware of this fraud prior to issue of this demand notice by them. From the above, It is also clear to this Bench that there is a pre-existing dispute which is demonstrated by the filing of the FIR dated 24.12.2018, confession statement by Mr. Satish Kale dated 25.12.2018 and the letter dated 27.12.2018 addressed by Mr. Gopal Narang, Director in the Corporate Debtor Company to the Petitioner whereby the existence of dispute has been specifically brought to the notice of the Petitioners. All this has happened prior to the issuance of the demand notice on 28.12.2018.
5. In this regard the Bench would like to refer to Hon'ble Supreme Court of India Judgment of *Mobilox Innovations Private Limited. v/s Kirusa Software Private Limited*:

"...34. 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?*
- (ii) Whether the documentary evidence furnished with the application shown 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?*

(iv) If any one of the aforesaid conditions is lacking, the application would have to be rejected...

6. It is a settled law that Application u/s 9 of the Code by Operational Creditor is not maintainable in the event there is pre-existing dispute between the parties in relation to a debt and in the event of Operational Creditor has received a notice of dispute before the issuing the demand notice.
7. In view of the pre-existing dispute between the parties in relation to the amounts claimed by the Petitioner and the chain of events associated with it, the Bench is of the view that this Petition u/s 9 is not maintainable and deserves to be dismissed.
8. Accordingly, CP 1261/MB/2019 is “**dismissed**”

Sd/-

CHANDRA BHAN SINGH
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)