

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

C.P. No. 4528/IBC/MB/2018

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

M/s. P Manickam & Co.

Having registered office at: Branch
Office: 18/1, Janakiraman Colony
Extn, Arumbakkam, Chennai-
600106, Tamil Nadu

.....**Operational Creditor**

Vs

**M/s K.H. Foges India Private
Limited**

(CIN: U45400MH2013FTC242824)
Registered office at: 203, Joshi
chambers, Ahmedabad Street,
Carnac Bunder, Masjid (East)
Mumbai City MH 400009

.....Corporate Debtor

Order delivered on: 16.07.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Shyam Babu Gautam, Member (Technical)

For the Applicant: Mr. Vikrant Shetty, Advocate

For the Respondent: Mr. Suraj Kumar Ruia, Advocate

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. This Company petition is filed by *M/s P. Manickam & Co.* (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *M/s K.H. Foges India Private Limited* (hereinafter called “Corporate Debtor”) alleging that the Corporate debtor committed default in making payment to the Operational Creditor. This petition has been filed by invoking the provisions of Section 8 and 9 Insolvency and bankruptcy code (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 53,95,744/- (Rupees Fifty Three Lakhs Ninety Five Thousand and Seven Hundred and Forty Four Only).
3. The brief facts of the case are as follows:-
 - a. The petitioner is a partnership firm registered under the Partnership Act, 1932 and is engaged in the construction business of inter alia executing pile foundation work, earthwork, bridges, multistoried building etc. The Corporate Debtor is a private limited company engaged in the building and construction industry wherein it carries on foundation engineering works.
 - b. On 5th May, 2015, the Corporate Debtor placed a purchase order upon the Financial Creditor and engaged the Financial Creditor for providing the

service of pile foundation work to the Corporate Debtor. The total value of work amounted to Rs. 93,19,550/-. Subsequently, the Financial Creditor in lawful compliance of the said purchase order, execute the pile foundation works and upon completion of the works raised timely invoices upon the Corporate Debtor.

- c. The Corporate Debtor has defaulted in remitting a principal amount of 31, 70,710 along with interest amount of 22,25,027 under the said invoices which till this date remains due and payable by the Corporate Debtor to the Financial Creditor. Therefore, the Corporate Debtor has failed to remit an aggregate amount of Rs. 53,95,744/- to the Financial Creditor.
- d. The Financial Creditor also lodged proceedings before the Micro Small Enterprises Facilitation Council wherein the Financial Creditor preferred a claim for the outstanding principal amount of Rs.31,70,710/- along with interest due from the Corporate Debtor. The Micro Small Enterprises Facilitation Council by its order dated 13.06.2018 was pleased to rule in favour of the Operational Creditor and imposed the liability on the Corporate Debtor to make the payment of the outstanding principal amount to the Financial Creditor along with interest due.
- e. However, despite this ruling against the Corporate Debtor, the Corporate Debtor failed to comply with the order in discharging it's liability in respect of outstanding principal amount and interest due. In

view of the same, the Financial Creditor was constrained to issue a demand notice under the Insolvency and Bankruptcy Code, 2016 dated 03.10.2018 to the Corporate Debtor wherein it claimed/demanded a sum of Rs. 53,94,744/- from the Corporate Debtor. Pursuant to the receipt of the demand notice, the Corporate Debtor has failed to reply/remit the Financial Creditor's said outstanding claim within a period of 10 days from the receipt of the said notice.

Findings

1. The Corporate Debtor filed reply in the form of affidavit in rejoinder opposing the above company petition stating that the above operational debt due from the Corporate Debtor has not been recorded with Information Utility in accordance with section 215(3) r/w Regulation 18 and 20 of IBBI. The Corporate Debtor further contends that there is a pre-existing dispute between the Operational Creditor and the Corporate Debtor and the matter is pending before the Hon'ble High Court of Bombay and the Corporate Debtor also obtained an arbitral award dated 15.10.2018 against the Operational Creditor. The Corporate Debtor denied the default and brought for dismissal of the above Company Petition.
2. Basing on the above pleadings, the following questions that falls for consideration in the above matter:
 - i. Whether the above company petition in pursuance of the order dated 13.06.2018 passed by the Micro Small Enterprises Facilitation Council is maintainable?

- ii. Whether there is a pre-existing dispute between the parties?
3. It is evident from the record that the Operational Creditor has obtained the above referred order for a principal amount of Rs. 13,70,717/- against Corporate Debtor from the Micro Small Enterprises Facilitation Council and filed the present company petition for an amount of Rs. 53,95,744/- after adding interest. It is also evident that the Corporate Debtor has obtained Arbitration Award dated 15.10.2018 against the Operational Creditor passed by the Sole Arbitrator, Shri Sharad Govind Marathi directing the Operational Creditor to refund an amount of 15,49,073/- in respect of the same work order which was subsequently challenged by way of an appeal by the Operational Creditor herein before the Hon'ble High Court of Bombay and the said appeal is subjudice before the Hon'ble High Court of Bombay.
 4. In order to examine the issue no. 1, it is important to look at the definition of Operational Creditor which was defined under Section 5(20) of the Code that reads as hereinunder:

Operational Creditor:-

“Any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred”

5. Even though a decree holder is included under the Definition of creditor in clause 10 of Section 3, is specifically omitted under the definition of Operation Creditor in clause 20 of Section 5 of the Code and therefore, the present petitioner does not fall under the

definition of Operational Creditor under Clause 20 of Section 5. To add, the recovery order passed by the Micro Small Enterprises Facilitation Council is not a decree within the meaning of Section 2 of the Code of Civil Procedure nor the Micro Small Enterprises Facilitation Council is a civil court within the meaning of Civil Courts Act and therefore the issue no. 1 goes against the Operational Creditor herein.

6. The second issue with regard to the pre-existing dispute. It is an admitted case that the Corporate Debtor did not send any reply nor paid the amount claimed by the Operational Creditor in response to the demand notice issued to him under Section 8 of the Code by the Operational Creditor. The Corporate Debtor for the first time raised the plea of pre-existing dispute in the reply filed before this Tribunal.
7. In this connection, it is not out of place to mention here that the Corporate Debtor has obtained an award against the Operational Creditor from the sole Arbitrator on 15.10.2018 even before filing the above company petition by Operational Creditor in December, 2018 and the said award is subjudice before the Hon'ble High Court of Bombay. The said Arbitration Award is also relating to certain disputes between the Operational Creditor and Corporate Debtor relating to the same work order. Under these circumstances, this tribunal has no hesitation to hold that there is a pre-existing dispute between the parties and therefore, the second issue also goes against the Operational Creditor.
8. In view of the above adverse findings against the Operational Creditor on both the above issues, this

tribunal is left with no option except to dismiss the above company petition.

9. Hence, the above Company Petition is dismissed. However, in the circumstances without costs.

10. It is hereby clarified that this order of this Bench does not preclude the Operational Creditor from recovering the amount from the Corporate Debtor before appropriate legal forum.

Sd/-

**SHYAM BABU GAUTAM
MEMBER (TECHNICAL)**

Sd/-

**H.V. SUBBA RAO
MEMBER (JUDICIAL)**