



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT-III
IB – 522/ND/2021**

IN THE MATTER OF:

M/s. DIAMOND POLYPLAST

Having Its Registered Office at:

C-578, DSIIDC Complex Industrial Park,
Narela, Delhi-110040.

Through Its Sole Proprietor

SHRI ARUN KUMAR

..... Applicant/Operational Creditor

VERSUS

M/s. SHIVPRIYA CABLES PVT. LTD.

Having Its Registered Office at:

29/230, Railway Colony, Mandawali,
Fazalpur, Delhi-110092.

Through Its Director/ Authorised Representative

SHRI AYUSH GUPTA

..... Respondent/Corporate Debtor

Order Pronounced On: 25.05.2023

CORAM:

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER
(JUDICIAL)**

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES

For the Applicant : Mr. Samaksh Goyal, Advocate.

For the Respondent : Ms. Varsha Banerjee, Mr. Karan Grover,
Advocate.

M/s. Diamond Polyplast vs. M/s. Shivpriya Cables Pvt. Ltd.

IB – 522/ND/2021

Date of Order : 25.05.2023



ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. This Application has been filed by M/s. DIAMOND POLYPLAST, the Applicant/Operational Creditor on 20.08.2021, before this Adjudicating Authority, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“IBC” or “Code”) r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (“Adjudicating Authority Rules”), for initiating the Corporate Insolvency Resolution Process (“CIRP”), declaring moratorium and for appointment of Interim Resolution Professional (“IRP”), against M/s. SHIVPRIYA CABLES PVT. LTD., the Respondent/Corporate Debtor on the ground that the Respondent/Corporate Debtor has defaulted to make payment of a sum of Rs.1,37,02,808 (Rupees One Crore Thirty Seven Lakhs Two Thousand Eight Hundred and Eight Only) [being the principal outstanding operational debt] arising on account of materials supplied by the Operational Creditor to the Corporate Debtor, along with Rs. 4,11,084/- (Rupees Four Lakhs Eleven Thousand and Eighty Four Only) being the interest @ 12% on the principal outstanding operational debt calculated from 22.04.2021 (when the operational debt became due and payable to the Operational Creditor) till 27.07.2021 (the date of the Demand Notice), along with further interest @ 12% till the actual date of realization of entire payment.

2. Submissions of the Applicant:

- i.** The Operational Creditor is in the business of manufacturing and warehousing polymers of ethylene in primary forms, more commonly referred to as PE Compound (material). The Corporate Debtor is in the business of manufacturing and supplying a spectrum of durable cables and wires in India and therefore requires material(s) from the Operational Creditor from time to time.



- ii.** The Corporate Debtor used to place various orders for the supply of PE compound/ material(s) upon the Operational Creditor as per its requirements from time to time. Pursuant to the Corporate Debtor's orders, the Operational Creditor used to supply the material(s) to the Corporate Debtor and in this regard used to raise invoices for the material(s) supplied. The details of the invoices raised by the Operational Creditor against the supply of material(s) to the Corporate Debtor and the payments received from the Corporate Debtor against the said invoices are filed along with the application.
- iii.** Evidently, the total value of the material(s) supplied by the Operational Creditor to the Corporate Debtor between the months of December 2020 to March 2021 was Rs. 2,07,93,168/- (Rupees Two Crores Seven Lakhs Ninety Three Thousand One Hundred and Sixty Eight Only). The Operational Creditor used to share the invoices with the Corporate Debtor along with the E-way bills and the Lorry Receipts at the time of dispatch of the material. Though the Corporate Debtor was obligated to clear the invoices within a period of 45 days from the date of the invoice and the Corporate Debtor used to make running account payments to the Operational Creditor against the invoices raised by the Operational Creditor. A copy of the Ledger account of the Corporate Debtor as maintained by the Operational Creditor is filed along with the application.
- iv.** The Operational Creditor made the last supply of material(s) to the Corporate Debtor on 07.03.2021. Even after duly receiving the materials supplied by the Operational Creditor against invoice dated 07.03.2021 and prior thereto, the Corporate Debtor had not communicated any shortcomings/defects regarding either the quality or quantity or chemical composition etc. of the material(s) supplied by the Operational Creditor to the Corporate Debtor either on 07.03.2021 or for any other material(s) supplied prior thereto. The Corporate Debtor had a



reasonable opportunity to examine all the material(s) supplied by the Operational Creditor for any defects or shortcomings, and in the absence of any communication from the Corporate Debtor in this regard, the Corporate Debtor has unconditionally accepted all the materials supplied by the Operational Creditor to the Corporate Debtor. Additionally, the fact that the Corporate Debtor repeatedly placed orders upon the Operational Creditor for the supply of material(s) from time to time is itself a testament to the high standards of quality of the material supplied by the Operational Creditor to the Corporate Debtor.

- v. Despite having received and accepted material(s) worth Rs. 2,07,93,168/- from the Operational Creditor, the Corporate Debtor has only paid the Operational Creditor a sum of Rs. 70,90,360/- (Rupees Seventy Lakhs Ninety Thousand Three Hundred and Sixty Only) against the said material(s), and an operational debt of Rs. 1,37,02,808/- (Rupees One Crores Thirty Seven Lakhs Two Thousand Eight Hundred and Eight Only) (being the Principal amount of debt owed by the Corporate Debtor) is still due and outstanding from the Corporate Debtor.
- vi. Being seriously aggrieved by the Corporate Debtor's default in paying the operational debt of Rs. 1,37,02,808/- (Rupees One Crores Thirty Seven Lakhs Two Thousand Eight Hundred and Eight Only) (being the Principal amount of debt owed by the Corporate Debtor) for the material(s) supplied by the Operational Creditor, the Operational Creditor was forced to serve Demand Notice dated 27.07.2021 under Section 8 of the Insolvency and Bankruptcy Code, 2016 upon the Corporate Debtor by way of email on "rajkumardelhi@shivpriyacables.com" dated 27.07.2021 as well as through registered post on the Corporate Debtor's office in Delhi, Gurgaon as well as its manufacturing unit in Alwar. Copy of the Demand Notice served by the Operational Creditor upon the Corporate Debtor is filed along



with the application. Copy of the email dated 27.07.2021 is filed along with the application.

- vii.** The Operational Creditor has not received any reply to its Section 8 Demand Notice from the Corporate Debtor as per the Code. Though the Corporate Debtor had received the Section 8 Demand Notice served by the Operational Creditor upon on 27.07.2021, the Corporate Debtor, in a misconceived and surreptitious manner, after having received the Demand Notice from the Operational Creditor on 27.07.2021 vide courier dated 28.07.2021 served a backdated letter dated 19.07.2021 upon the Operational Creditor, wherein the Corporate Debtor alleged that there were certain complaints regarding breakage and finish in the materials that the Operational Creditor had supplied to the Corporate Debtor.
- viii.** The Operational Creditor wishes to submit that the said backdated letter is clearly an afterthought and a malafide attempt by the Corporate Debtor to try to raise a spurious, hypothetical and illusory dispute which is a mere bluster. Surprisingly, the said backdated letter surfaced after the Operational Creditor had served the Demand Notice referred to above upon the Corporate Debtor vide email on 27.07.2021. A copy of the letter dated 19.07.2021 is filed along with the application.
- ix.** It is clear from the tracking report of the said Letter that the Corporate Debtor had couriered the letter dated 19.07.2021 to the Operational Creditor on 28.07.2021 through DTDC, which was a day after the Operational Creditor had served the Demand Notice under Section 8 upon the Corporate Debtor. A copy of DTDC's tracking report is filed along with the application.

3. Submissions of the Respondent:

- i. It is submitted that the instant Application is barred by the Section 10A of the IBC. The proviso to Section 10A prescribes



that no insolvency proceedings can ever be instituted against any entity whatsoever for the default arising on or after 25.03.2020 till one year from such date (as notified). It is submitted that the operation of Section 10A was extended by the government up till 24.03.2021. It is noteworthy that all the alleged invoices in the Application in the instant case are dated 01.12.2020 to 07.03.2021, which clearly fall within the ambit of Section 10A of the Code. Thus, the alleged claim of the Applicant is barred by Section 10A of the Code.

- ii. It is submitted that the Section 9 petition under Reply is legally untenable and liable to be dismissed outrightly since the Section 8 notice in furtherance of which the instant Section 9 Petition has been filed is not in accordance with the law. It is submitted that from a plain reading of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, it is evident that an Operational Creditor has to deliver either a Demand Notice in FORM 3 or a copy of an invoice attached with a notice in FORM 4 to the Corporate Debtor. However, the Operational Creditor, against the aforesaid provision, has issued a Demand Notice under Form 3, despite their being invoices issued by the Operational Creditor in the transaction in question. It is submitted that the Applicant has issued alleged invoices for the transaction between the parties. Thus, the issuance of Demand Notice under FORM-3 at the outset vitiates the entire notice under Section 8 of the IBC as the transactions involving the invoices in FORM-4 have to be issued. Therefore, the instant Application based on the faulty demand notice deserves to be dismissed by this Tribunal.
- iii. The Applicant demanded an exorbitant interest amount of Rs. 4,11,084/- at the rate of 12% calculated from 22.04.2021 which is not payable by the Corporate Debtor. It is relevant to note that the interest component was never agreed upon between the parties. The Applicant has failed to provide any legal basis for



claiming the exorbitant rate of interest. It is submitted that the alleged amount claimed on account of interest has been stated for the sole purpose to arm-twist the Corporate Debtor. While coming into the contract, providing interest was never a consensus ad idem of the contract. There is no agreement or document to show that the interest was payable to the Applicant in case the Corporate Debtor does not pay because of a quality issue or a dispute. Therefore, the demand of interest being disputed by the Corporate Debtor has resulted in the issuance of a faulty demand notice under Section 8 of the Code as the same contains the demand of interest. It has been held in the catena of judgments of the Hon'ble Supreme Court and of the Hon'ble NCLAT that CIRP cannot be initiated under Section 9 in case the notice issued under Section 8 contains serious discrepancies and the amount claimed under the same is disputed.

- iv. It is submitted that the instant application under reply preferred by the Applicant is not maintainable as the Applicant has failed to place on record a certificate in terms of Section 9(3)(c) of the IBC. It is submitted that the Applicant failed to annex a copy of the certificate from the financial institutions, which maintain accounts of the Operational Creditor, thereby confirming that there is no payment of an unpaid operational debt by the Corporate Debtor. As the Applicant failed to adhere to the procedural aspect, the instant petition under reply is liable to be dismissed at the threshold itself.
- v. It is submitted that the Applicant, with malafide intentions, erroneously construed the essence of the IBC by preferring the instant Application under reply. The very purpose of IBC is to secure the Financial Interests of a creditor when a Corporate Debtor is "unable" to pay its "undisputed" debts to its creditor. It is well settled that the provisions of the IBC cannot be invoked for the recovery of the outstanding amount but can be invoked



to initiate CIRP for justified reasons as per IBC. It is stated that the proceedings under the IBC is not intended to substitute recovery forum. It is further submitted that the Corporate Debtor itself is an MSME. The objective of the IBC is not recovery but value maximization. In the instant case, the Applicant has attempted to use the IBC only to recover the alleged amounts from Corporate Debtor which is a solvent entity.

4. In Rejoinder, the Operational Creditor submitted that Section 10A only bars applications where a "default" has arisen during the period prescribed in Section 10A i.e. between 25th March 2020 to 24th March 2021. Section 10A has limited applicability and cannot be stretched to cover within its ambit each and every application filed under the Code. It is abundantly clear from a plain reading of Section 10A that it only applies when the period of "default" arises between 25th March 2020 to 24th March 2021, and to no other case. The Corporate Debtor's suggestion that the Operational Creditor's application is not maintainable since the invoices raised by the Operational Creditor are between 1st December 2020 to 7th March 2021 and therefore come within the purview of Section 10A is absolutely absurd and contrary to law. Further, the Vakalatnama filed by the advocates purportedly appearing on behalf of the Corporate Debtor is in the name of a law firm going by the name of "Dhir and Dhir Associates". In terms of the Resolution dated 29.11.2018 passed by the Bar Council of India, a Vakalatnama cannot be in the name of a law firm as a law firm is not an "Advocate" as defined under the Advocates Act, 1961. The Advocates allegedly appearing on behalf of the Corporate Debtor therefore cannot represent the Corporate Debtor as they do not have any authority to do so. A copy of the resolution passed by the Bar Council of India is filed along with the Rejoinder. The Operational Creditor is a "Small" enterprise as defined under the Micro, Small and Medium Enterprises Act, 2006 ("MSME Act") and



is registered with the relevant Council having Udyam Registration Number UDY AM-DL-04-0003248. As such, the provisions of the MSME Act are applicable to the Operational Creditor. As per the statutory mandate of Section 15 of the MSME Act, no payment can remain due to the Operational Creditor for a period beyond 45 days, since Section 15 of the MSME Act prohibits the agreed date between the buyer and seller to be beyond the period of 45 days, the Parties had expressly agreed to 45 days is the outer limit for the due date by which the Corporate Debtor ought to have made the payment to the Operational Creditor.

5. **Analysis and Findings**

- i. We have heard the Ld. Counsels appearing for both parties. Records as well as pleadings and written submissions have been perused.
- ii. The first and foremost question to be adjudicated, therefore, is whether the period of the invoices raised is barred by Section 10A of the Code.
- iii. In response to the first question, we are of the opinion that all the invoices as claimed to be due and payable fall within the period of suspension of proceedings under the Code. The invoices are dated 01.12.2020 to 07.03.2021. So, the present Application is barred by Section 10A of the Code.
Be that as it may, in any case, the proviso to Section 10A prescribes that no insolvency proceedings can ever be instituted against any entity for the default arising on or after 25.03.2020, till one year from such date (as notified). The operation of Section 10A was made applicable w.e.f. 25.03.2020 to 24.03.2021. Therefore, the instant petition is legally untenable.
- iv. After going through the averments made by the parties, we observe that the Operational Creditor in response to the objection of the Corporate Debtor sought to place reliance on the payment terms of the purchase order in view of which the



invoices were payable after the 45 days from the date of invoices. Assuming without admitting the said submission of the Operational Creditor only the 4 invoices fall outside the time period of Section 10A of IBC, which are as follows:

S. No.	Invoice No.	Date of Invoice	Alleged date of payment	Amount (In INR)
1.	GST/20-21/494	25.02.2021	11.04.2021	9,44,000/-
2.	GST/20-21/495	27.02.2021	13.04.2021	9,44,000/-
3.	GST/20-21/503	05.03.2021	19.04.2021	9,44,000/-
4.	GST/20-21/506	07.03.2021	21.04.2021	4,72,000/-
TOTAL AMOUNT				33,04,000/-

It is amply clear from the above-cited terms of the invoices that the total sum of the invoices is Rs.33,04,000/-, which is less than the threshold of Rs.1,00,00,000/- as enshrined under Section 4 of the Code. Thus, the present application is legally untenable even after the argument of the Applicant is taken into consideration.

- v. By going through the invoices dated 01.12.2020 to 07.03.2021, falling within the period of suspension of proceedings as barred by Section 10A of Code and the Operational Creditor failing to satisfy the minimum default amount of Rs.1,00,00,000/- as enshrined under Section 4 of the Code, we do not find any cogent reason to entertain this application, which is liable to be dismissed on this ground alone.

In view of the above, we are inclined to **dismiss** this application.

6. Order

In view of the above facts and circumstances and the foregoing discussion, we are satisfied that the present petition fails to fulfill the criteria laid down under Section 9 of the Code and therefore, is inadmissible. It is accordingly, hereby ordered as follows: -

- i. The Application bearing **IB-522/ND/2021** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the



Adjudicating Authority Rules for initiating CIRP against the Respondent is hereby **dismissed**.

- ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.
- iii.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

No order as to costs.

-SD-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

-SD-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**