

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

CP. (IB) No. 4350/MB/2018

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

In the matter of

Kerliee Investment Limited

... Operational Creditor/Petitioner

Vs.

Swastik Tungsten Private Limited

...Corporate

Debtor/Respondent

Order delivered on :23.12.2021

Coram:

Shri Bhaskara Pantula Mohan : Member (Judicial)

Shri Shyam Babu Gautam : Member (Technical)

Appearances (Through video conferencing):-

For the Operational Creditor :Mr. Sandeep Bajaj, Advocate

For the Corporate Debtor :Mr. Uttam Hathi, Advocate

ORDER

Per: Shyam Babu Gautam (Technical)

1. This is a Petition filed under section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter as **Code**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) on 24.06.2021 by the Petitioner Kerliee Investment Limited in the capacity of “**Operational Creditor**”, against Swastik Tungsten Private Limited (hereinafter as ‘**Corporate Debtor**’) having registered address at C-14 and C-15, Shrirampur MIDC, Ahmednagar, Maharashtra – 413709.

A) The Petitioner has submitted Form-5 as prescribed under the rules. In the requisite Form, under the Head “Particulars of Operational Debt” the total amount in default is stated as Rs.1,56,22,028.45/- for the dues against Invoice bearing No. 015/02 dated 15.01.2015 and amount of Rs. 1,06,14,939.36/- for the dues against Invoice bearing No. 015/03 dated 15.01.2015.

B) Submissions by the Operational Creditor :

2. The Operational Creditor is a company registered under the laws of the United Kingdom. The Petition has been filed by the Operational Creditor in the light of the outstanding debt owed by the Corporate Debtor for a sum of Rs. 4,10,52,885.29/- (Rupees Four Crores Ten lakhs Fifty Two Thousand Eight Hundred and Eighty Five Only) as on 29.06.2021. Calculation of the Outstanding Dues is reproduced herein :-

Particulars	Amount (USD)	Amount (INR)
Dues against Invoice bearing No. 015/02 dated 15.01.2015 (A)	210,174.07/-	1,56,22,028.45/-
Dues against Invoice bearing No. 015/03 dated 15.01.2015 (B)	142,810.20/-	1,06,14,939.36/-
Total A+B =C	352,984.27/-	2,62,36,967.80/-
Due Date	15.01.2015	
Interest from 16.01.2015 upto 10.12.2015 at the rate of 18% per annum (10 months 26 days) (D)	352,984.27*0.91*0.18 = 57,818.82/-	42,97,615.07/-
Amount receivable under Invoice dated 10.12.2015 for shipment of 6600 kgs (C-D = E)	39,600/-	29,43,428.40/-
Interest from 10.12.2015 upto 13.09.2016 at the rate of 18% per annum (9 months 4 days) (F)	2,84,224.27/- * 0.761*0.18 + 38,933.04/-	28,94,219.90/-
Amount receivable under Invoice dated 13.09.2016 for shipment of 3000 kgs	68,760/-	51,10,862.04/-

(G)			
Total Principal Amount of Debt (C-(E=G) + H)		2,44,624.27/-	1,81,84,976.83/-
Interest from 14.09.2016 upto 29.06.2021 at the rate of 18% per annum (4 year 9 months 15 days)		2,44,624.27 * (4 year + 9/12+15/365)* 0.18 =2,10,993.46/-	1,56,78,480.93/-
(I)			
Total Interest (D+F+I=J)		3,07,745.32/-	2,28,67,908.46/-
Cummulative Debt on 29.06.2021		5,52,369.59/-	4,10,52,885.29/-

3. The Operational Creditor and the Corporate Debtor had entered into an agreement in the year 2014 with respect to the transport of the Ore. In pursuance of the said agreement, two shipments of ore were transported by the Operational Creditor to the Corporate Debtor and invoices raised are detailed as under :-

Sr. No.	Invoice Number	Specification of Wofarmite ore	Quantity Kgs.	Rate/Kg (USD)	Date if Invoice	Amount (USD)
1	015/02	Grade min : 60.46% HS Code : 2610000	15,450	13.6035	15/01/2015	210,174.07

2	015/03	Grade min : 68% HS Code : 2610000	9,334	15.30		142,810.20
Total						3,52,984.27

4. The Operational creditor submits that the said shipment was duly received and acknowledged by the Corporate Debtor. To substantiate, the Petitioner has produced on record copy of courier receipts and also the tracking reports corresponding to the courier receipts. The Payment due from the Corporate Debtor is outstanding till date. Thereafter, in the year 2015 and 2016 under a reciprocal arrangement, the Corporate Debtor had transported two shipments to the Operational Creditor by way of the following invoices as under:-

Sr. No	Invoice Number	Specifications	Quantity	Invoice Date	Amount (USD)
1.	STPL/EXP/04/15 -16	Tungsten Trioxide HS Code: 28259090	3000 Kg	10/12/2015	68,760/-
2.	STPL/EXP/02/16 -17	Wolfarmite ore	6600	13/09/2016	39,600/-
Total					1,08,360/-
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5. Thereafter, it was agreed by the Operational Creditor and the Corporate Debtor that the amount abovementioned under the two invoices of the Corporate Debtor would be set off against the amounts due and payable to the Operational Creditor. The amount of USD 39,600/- and USD 68,760/- was set off and adjusted against the total sum of USD 352,984.27/- due and payable to the Operational Creditor and the same was duly acknowledged by the Corporate Debtor vide its email dated 20.06.2016. The Corporate Debtor also assured that the Payment would be made as early as possible as the Corporate Debtor was in the process of arranging the funds for the remaining amount payable to the Operational Creditor.

6. However, the payment remained outstanding. On various occasions the Corporate Debtor sought time to make the payments. In light of the same, the Operational Creditor issued Demand Notice under section 8 in Form 3 and Form 4 of the Code seeking the payment of amount due. The said Demand Notice was acknowledged and in view of the said Demand Notice an email dated 02.04.2018 was received from the Corporate Debtor stating that the Corporate Debtor Company are in Financial Problems and getting some market for products. The Corporate Debtor also assured to clear the outstanding amount on or before 30.09.2018, however nothing fructified.

7. The Operational Creditor has also annexed the copy of the Bank Certificate along with the copy of statements from January 2015 to May 2015 wherein it states that amount of USD 210,174.07 and USD 142,810.20 have not been credited in the account of the Operational Creditor.

8. As on date no proposal or payment has been received by the Operational Creditor. It is finally argued that since the Corporate Debtor is not making the payment and all the procedural formalities have been complied with, this Petition/Application may be Admitted for the initiation of the CIRP.

C) Contentions of the Corporate Debtor

9. The Respondent further submits that in a subsequent oral arrangement, the Operational Creditor and the Respondent agreed to set off the loss to the Respondent due to substandard/inferior Wolframite Ore and adjusted the amount due after arriving at it from return of part Wolframite ore from the Wolframite ore supplied and finished product Tungsten Trioxide which would be returned to the Operational Creditor.
10. The Respondent further submits that in consonance with the oral arrangement, the same Ore was returned by the Respondent at a unit price less than the amount priced by the Operational Creditor when it was originally supplied. The Respondent submits that the Operational Creditor concealed the facts about the existence of the dispute. The Respondent further submits that both the parties have not decided the discount ought to be given on the said inferior Ore due to which the Respondent suffered huge losses. The Respondent further submits that the amount payable if any by the Respondent is still in dispute as the sum to be paid is yet to be finalised and approved by the Respondent after the adjusted amount as proposed by the Operational Creditor.
11. The Respondent submits that the Corporate Debtor agreed to pay the dues but there was no mutual consensus on the total amount to be paid by the Corporate Debtor. The Respondent submits that the Operational

Creditor has obscured the facts pertaining to the subsequent arrangements between the parties.

12. The Respondent further contends that in the email dated 02.04.2018 the Respondent stated that the Corporate Debtor Company were facing Financial Problems due to inferior quality of goods supplied by the Operational Creditor due to which the Respondents faced huge losses and also accepted that it was their own responsibility for the said losses.
13. The Respondent further submits that as the transactional currency of the Operational Creditor Company is Dollar (USD), the Petitioner has failed to present the interest calculation. The Respondent states that unless the loss due to inferior ore is ascertained by both the parties, the petition is not maintainable and the Petitioner has not approached the Tribunal with clean hands.

D) Rejoinder by the Operational Creditor

14. The Operational Creditor submits that the Written Statement of the Corporate Debtor reveals that there is no dispute raised over the question of liability. The Corporate Debtor has raised the issue in respect of ambiguity of the debt amount to be paid to the Operational Creditor.
15. Further the Operational Creditor submits that from the reply of the Corporate Debtor it is evident and an admitted position that through invoice bearing 01502 and invoice bearing 01503, the Operational Creditor had supplied goods worth USD 352,984.27/-. Thereafter the Corporate Debtor had supplied goods worth USD 108,360/-. Hence

it is clear that the amount is due from the Corporate Debtor.

16. The Operational Creditor submits that the Corporate Debtor admitted that there was an oral understanding between the parties as to an amount USD 108,360 was to be adjusted however, certain amounts (on account of alleged inferior quality of goods was to be deducted is an afterthought. The Operational Creditor further submits that the email of the Corporate Debtor to sought time to clear the outstanding amount in response to the Notice under Section 8 of the Code itself shows the admitted liability of the Corporate Debtor to pay the outstanding amount.
17. The Operational Creditor vide its Written Submissions dated 24.06.2021 have submitted the detailed calculation of the outstanding dues along with the interest calculation.

E) Findings: -

18. We have gone through the submissions and pleadings on record. On the basis of the evidences on record the Operational Creditor has established through the Invoices that the shipment of Ore had been transported to the Corporate Debtor and the amount of which is still due and payable.
19. While dealing with this matter, we would like to proceed

chronologically. To begin with, we find it important to state that the Operational Creditor had supplied the shipment of Ore in the year 2014 and the said shipment was duly received and acknowledged by the Corporate Debtor. Thereafter, under a subsequent arrangement between the parties, the Corporate Debtor supplied Ore to the Operational Creditor and the said amount was set off against the amount which was due and payable by the Corporate Debtor for the shipment supplied in the year 2014. After the amount adjusted towards the shipments supplied by the Corporate Debtor to the Operational Creditor, an amount of USD 108,360 is still due and payable by the Corporate Debtor to the Operational Creditor and the same is accepted and recognised by the Corporate Debtor in its Written submissions. We have also noticed from the reply of the Corporate Debtor that the Corporate Debtor had raised the dispute regarding the quantum of debt as to the total amount payable (if any) by the Corporate Debtor is in dispute as the sum has not been finalized and approved by the Corporate Debtor upon the proposal of settlement put forth by the Operational Creditor. Here it is evident from the reply of the Corporate Debtor that a sum is due and payable by them to the Operational Creditor.

20. It is further observed by this Bench that due to outstanding amount payable, the Operational Creditor had sent Demand Notice under

section 8 of the Code on 17.03.2018 demanding the amount due from the Corporate Debtor. It can be seen from the records that the said Demand Notice was acknowledged by the Corporate Debtor and the Corporate Debtor replied to the Operational Creditor vide email dated 02.04.2018 asking for some time to clear the outstanding amount as the Corporate Debtor were facing Financial problems. The Corporate Debtor also for the very first time in the email dated 02.04.2018 raised the issue of inferior quality of the goods supplied to them.

21. The contentions of the Corporate Debtor regarding the issue of substandard and inferior quality of Ore supplied to them is raised only after the receipt of the demand notice. The Corporate Debtor is not successful in proving that the dispute raised by them as to the quality of existed even before the issuance of the Demand Notice. Whereas, the Corporate Debtor has admitted its liability to pay the outstanding amount due to the Operational Creditor.

22. Here, it has become important to place reliance upon the judgment of the Hon'ble Supreme Court in the matter of *Mobilox Innovations Private Limited v. Kirusa Software Private Limited [(2018) 1 Supreme Court Cases 353]*, wherein it was held in paragraph 51 that: 51.

“It is clear, therefore, that once the operational creditor has filed an

application, which is otherwise complete, the adjudicating authority must reject the application, under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

Also, the paragraphs 15 and 18 of the judgment of Hon’ble NCLAT in the matter of *Ahluwalia Contracts (India) Ltd. V. Raheja Developers Ltd. (NCLAT – Company Appeal (AT)(Insolvency) No. 703 of 2018*, need to be relied upon which runs as follows: In an application under Section 9, it is always open to the ‘Corporate Debtor’ to point out pre-

existence of a dispute. It is to be shown that the dispute was raised prior to the issuance of the demand notice under Section 8(1). 18.

23. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. In the instant case, there is not even a shred of evidence as to existence of any definite Pre-existing Dispute between the parties. Further, it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs.1 Lakh and the application shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any 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', the application under Section 9 cannot be rejected and is required to be admitted."
24. The first and foremost thing we need to look into while dealing with this matter is that whether the dispute raised is a 'bona fide' dispute. It was only after the demand notice was sent that the existence of the said dispute was brought to the notice of the operational creditor by the corporate debtor. If the dispute existed prior to sending the demand notice, the corporate debtor should have taken some steps to initiate a proper proceeding against the operational creditor. A plain reading of Section 5(6) of the Code explains the term dispute: Section

5(6) “dispute” includes a suit or arbitration proceedings relating to –
(a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.

25. Further, it is also important to go through the provision of Section 8 of the Code which runs as follows: Section 8 – Insolvency Resolution by Operational Creditor: “(1) an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed. (2) the corporate debtor shall within a period of 10 days of the receipt of the demand notice a copy of the invoice mentioned in sub section (1) bring to the notice of the operational creditor- (a) existence of a dispute [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute; (b) the [payment] of unpaid operational debt- (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

26. Hence, in view of the above observations it can be safely concluded that it is an admitted liability on the part of the Corporate Debtor that

they are liable to pay the amount due to the Operational Creditor and the same is also evident from the email produced by the Operational Creditor wherein the Corporate Debtor had sought time to make the payment. The Corporate Debtor as an afterthought contended as to the alleged inferior quality of the goods supplied and also about the oral discussion about the discount. The contentions raised by the Corporate Debtor cannot be relied upon. Also, they have defaulted in repaying the debt the amount of which is more than Rs.1,00,000/-.

27. Therefore, keeping presumably admitted facts in mind that, the Operational Creditor has not received the outstanding Debt from the Corporate Debtor and that the formalities as prescribed under the Code have been completed by the Operational Creditor. Therefore, it is our conscientious view that this Petition deserves '**Admission**' specially wherein the Debtor is accepting its default.

28. Therefore, this Tribunal having been satisfied with the Petition filed by the operational creditor which is in compliance with the provisions of section 8 & 9 of the Insolvency and Bankruptcy Code, 2016, admits this petition declaring moratorium with the directions as mentioned below:

(a) That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the

corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(b) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(c) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(d) That the order of moratorium shall have effect from **the** pronouncement of this Order till the completion of the corporate insolvency resolution process or until this Tribunal

approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

29. That this Bench hereby appoints Mr. Mukul Chopra, having Registration No: IBBI/IPA-002/IP-N00810/2019- 20/12616 as an interim resolution professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
30. That the Corporate Debtor is directed to deposit initial cost of CIRP amounting to Rs. 2 lakh with the IRP.
31. Accordingly, this Petition is allowed.
32. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.
33. The IRP is directed to communicate this Order to Registrar of Company, where the Corporate Debtor is Registered.

SHYAM BABU GAUTAM
MEMBER (TECHNICAL)

BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)

NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

4. C.P.(IB)-4350(MB)/2018

CORAM: SHRI BHASKARA PANTULA MOHAN, HON'BLE MEMBER (J)
SHRI SHYAM BABU GAUTAM, HON'BLE MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE
NATIONAL COMPANY LAW TRIBUNAL ON 23.12.2021

NAME OF PARTIES:- Kerilee Investments (KI) Limited
V/s
Swastik Tungsten Private Limited

Section: 9 of the Insolvency & Bankruptcy Code, 2016.

ORDER

The matter is taken up through Virtual Hearing (VC). Counsel, Ms. Aakanksha Nehra appeared for Operational Creditor. Counsel, Mr. Saurabh Gandhi appeared for Corporate Debtor. **The Company Petition bearing no. (IB)/4350(MB)/2018 is admitted** vide separate order.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)
23.12.2021

Sd/-

BHASKARA PANTULA MOHAN
Member (Judicial)