

IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOCHI BENCH

TIBA NO.34/KOB/2019

(CP 1316/2018 of NCLT Chennai Bench)

(Under Section 9 Rule 6 of IBC, 2016)

Date of Order: 26.11.2019

Applicant/Operational Creditor

Wittur Elevator Components India Pvt.Ltd
No.3&4, Adjacent to SIPCOT Pondur Village,
Sreiperumbadur, Kanchipuram
District-402105, Tamilnadu.

Vs.

Respondent/Corporate Debtor

Axiomata Elevators Pvt. Ltd.
Room No.10A,B & B Building,
Power House Road, Opp.Sharon
Marthoma Church, Palarivattom PO
Cochin-682025, Kerala.

Counsel for applicant

.. M/s Surana and Surana

Counsel for respondent

.. M/s Vipin Warriar & Vidyalakshmi.

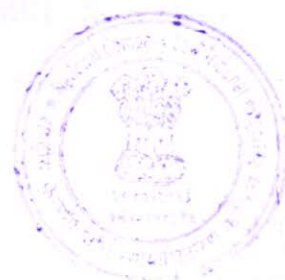
ORDER

1. This is an Application filed under Section 9 of Insolvency & Bankruptcy Code, 2016 (hereinafter as **I&B Code**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) by the Operational Creditor **M/S. WITTUR ELEVATOR COMPONENTS INDIA PRIVATE LIMITED** (hereinafter as '**Operational Creditor**') against **M/S**



AXIOMATA ELEVATORS PRIVATE LIMITED (hereinafter as 'Corporate Debtor').

2. The Operational Creditor is involved in the business of supplying elevator components and undertook supply of such materials to Corporate Debtor.
3. The Operational Creditor submitted that based on the purchase order the Operational Creditor supplied custom made goods to the Corporate Debtor. The Operational Creditor continued its business with Corporate Debtor and raised various invoices claiming the outstanding debt. Accordingly, a sum of ₹ 60,78,450/- (Rupees Sixty Lakh Seventy-Eight Thousand Four Hundred and Fifty Only) is payable by the Corporate Debtor.
4. The Operational Creditor further submitted that on 21.11.2016 a letter was sent to Corporate Debtor requesting payment of the outstanding dues. The Operational Creditor reminded the Corporate Debtor that as per the agreed terms of payment the Corporate Debtor ought to have made the payment within 30 days from the date of invoice. However, the Corporate Debtor failed to make the payments for over 500 days. Therefore, the Operational Creditor sent another mail dated 24.11.2016. Thereafter the Corporate Debtor issued 6 cheques amounting to ₹17,00,000/- (Rupees Seventeen Lakhs only) which were dishonoured under the Caption 'payment stopped by the drawer'.
5. Under such circumstances the Operational Creditor filed a petition under The Negotiable Instruments Act 1881 on 23.09.2017. The Corporate Debtor through a reply letter dated 19.10.2017 acknowledged the debt due and seek more time to settle the same due to financial crisis of their clients.



6. The Operational Creditor further submitted that due to continuous failure of the Corporate Debtor to honour its commitments, the Operational Creditor had issued a statutory notice dated 26.10.2017 as per Section 8 of the Insolvency and Bankruptcy Code 2016. The Operational Creditor through demand notice demanded payment of an outstanding due to the tune of ₹38,83,488/- (Rupees Thirty-Eight Lakhs Eighty-Three Thousand Four Hundred and Eighty-Eight Only). The Corporate Debtor sent a reply dated 10.11.2017 and taken a stand contrary to what was earlier admitted and is merely attempting to conjure up what is nothing but a moon shine defence.
7. The Operational Creditor further contented that at no instance prior to the reply notice the Corporate Debtor whisper about the alleged 'low production problem'. It is nothing but an afterthought of Corporate Debtor to avoid rightful claim of Operational Creditor.
8. At this juncture, the Operational Creditor quoted the judgement in ***Mobliox Innovations Private Limited Vs. Kirusa Software Private Limited (AIR 2017 SC4532)***, to prove that a 'dispute' should not be patently feeble legal argument or an assertion of fact unsupported by evidence, as is the case of the Corporate Debtor herein.

"40. 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

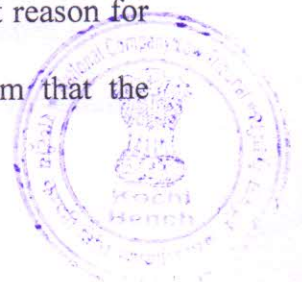


requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to 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."

9. Hence, the Operational creditor filed this Application to initiate Corporate Insolvency Resolution Process, declaration of Moratorium and appointment of Interim Resolution Professional under Section 9 of the Code.

10. The Corporate Debtor submitted that a bonafide dispute existed even before the issuance of statutory notice under Section 8 (1) of the I&B code, regarding the quality and quantity of the materials supplied by the Operational Creditor. It is also submitted by Corporate Debtor that the letter dated 19.10.2017 is not an acknowledgement of debt by the Corporate Debtor but a letter of dispute. Therefore, it is evident from the letter that materials in excess of requirement was dumped on the Corporate Debtor by the Operational Creditor. And also, the Corporate Debtor is willing to pay what was actually due, if any after reconciliation based on the dispute raised by the Corporate Debtor to which the Operational Creditor has not responded.

11. In the statutory notice dated 26.10.2017 the Operational Creditor stated that "all materials sent by our client have been received by you and are in your custody. Merely because your end customer has not completed the project, the same is not reason for our client's bill not to be paid." Therefore, it is clearly evident from that the



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Operational Creditor did not even deny the dispute raised by the Corporate Debtor to the effect that excess materials were supplied and demanded the payments due. Therefore, in reply to the statutory notice the Corporate Debtor categorically denied any liability to pay and reiterate the dispute with respect to quantity as well as quality. The Counsel for the Corporate Debtor in order to substantiate his argument referred to **Mobliox Innovations Private Limited Vs. Kirusa Software Private Limited (supra)**,

25. *"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? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows 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?

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

12. It is clear from aforesaid judgement that the adjudicating authority must reject the application under 9 (5) (2) (d) if notice of dispute has been received by the Operational Creditor under S. 9 (3) (b) of the code, so as to enable such rejection, mandates that an application under Section 9(1) shall be accompanied by an affidavit to the effect that there is no notice given by Corporate Debtor relating to a dispute of the unpaid operational debt. But in the instant application, the Operational Creditor affirmed that it has not received any notice relating to dispute in reply to their demand notice under Section 8 (1) of I & B Code 2016. The Operational Creditor suppressed the fact that the



statutory notice was accompanied by a reply dated 30.05.2018 which clearly spells out the existence of the dispute in this matter.

13. It is also submitted by the Corporate debtor that the Application filed by the Operational Creditor is barred by limitation in terms of Section 238 A of the I & B Code. Therefore, the invoices produced along with application filed by the Corporate Debtor evidences that the period of 3 year have elapsed even from the date of invoice except for the invoices dated 30.11.2015 and 30.12. 2015. To provide evidence to support their contention they referred to ***B.K Educational Services Pvt Ltd v. Parag Gupta and Associates*** (CIVIL APPEAL NO.23988 OF 2017).

"27. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets 53 attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

14. Referring to the aforesaid reasons the Counsel for the Corporate Debtor submitted that the application is to compel the Corporate Debtor to pay disputed claims wherein the operational creditor had ample opportunities to file a civil suit. However, the Operational Creditor chooses not to pursue such remedies and choose to initiate IRP proceedings wherein a fact finding with respect to a dispute is not permissible.

15. In view of above the Corporate Debtor also referred to the judgement of Hon'ble Supreme Court in ***K.Kishan Vs. M/s Vijay Nirman Company Private limited;***



"13. Following this judgment, it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardize an otherwise solvent company worth several crores of rupees. Such a company would be well within its rights to state that it is challenging the Arbitral Award passed against it, and the mere factum of challenge would be sufficient to state that it disputes the Award. Such a case would clearly come within para 38 of Mobilox Innovations (supra), being a case of a pre-existing ongoing dispute between the parties. The Code cannot be used in terrorem to extract this sum of money of Rs. two lakhs even though it may not be finally payable as adjudication proceedings in respect thereto are still pending. We repeat that the object of the Code, at least insofar as operational creditors are concerned, is to put the insolvency process against a corporate debtor only in clear cases where a real dispute between the parties as to the debt owed does not exist. "

16. It is also submitted by the Corporate Debtor that the Petition filed under section 138 of Negotiable Instruments Act 1881 is also pending before the Court. Therefore, for the above said reasons the petition be dismissed along with costs to the Corporate Debtor and penal actions may be initiated under Section 76 of the I & B Code.

17. We heard both the Counsels and also perused the whole case records including counter, re-joinder and photocopies appended with the case records. It appears from the record that the Operational Creditor had sent several E-mails demanding the repayment of the debt due. The said E-mails were sent on various dates 07.06.2015, 26.08.2016, 09.09.2016, 12.09.2016, 19.09.2016, 21.09.2016, 28.09.2016 and 14.10.2016.



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Thereafter the Corporate Debtor issued 6 (six) cheques totalling to amount of ₹17,00,000/- (Seventeen Lakhs Only) on 13.09.2017 out of total outstanding ₹38,83,488/- without raising any disputes. However, the aforesaid cheque was dishonoured ultimately with the objection "payment stopped by drawer". Apart from that the Corporate Debtor has not raised any objection at the instance of goods supplied. Therefore, this clearly indicates the intention of Corporate Debtor to wrongfully denying the amount due to the Operational Creditor.

18. Further the Corporate Debtor had sent a letter dated 19.10.2017 stating the disputes on the supplied materials after a long time. The aforesaid letter dated 19.10.2017 is nothing but an acknowledgement of debt and cannot be claimed as an expression of dispute. Which proved that the letter was sent as an afterthought when the Corporate Debtor could not find an appropriate market to sell the products he ordered. The following sentence from the above said letter dated amply proves the said fact.

".... give us more time to settle the payment after completing the projects (your material supplied). We are also ready to pay the amount in instalment also".

Therefore, the argument put by the Corporate Debtor is nothing but to avoid the rightful claim of the Operational Creditor.

19. The Corporate Debtor also took the view that the invoice which is due and payable is time barred except two which are issued on 30.11.2015 and 30.12.2015 for ₹ 540834 (Rupees Five Lakh Forty Thousand and eight Hundred and Thirty-Four Only) and ₹1601462 (Rupees Sixteen lakhs One Thousand Four Hundred and Sixty-Two Only) respectively. Even assuming other invoices are time barred as per Corporate Debtor's claim, the two



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Invoices which are within the limitation far exceeds the minimum amount i.e., ₹1 lakh stipulated under Section 4 of I & B Code 2016.

20. In the light of above findings, we are of the view that the instant Application deserves to be admitted. The Application, **TIBA/34/KOB/2019** is **ADMITTED** and the moratorium is declared for prohibiting all of the following in terms of Section 14(1) of the Code as amended:

- a) 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;
- b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor

21. It is further directed that the services to the Corporate-Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The moratorium shall however not apply to such transactions as may be notified by the Central Government in



consultation with any financial regulator and to a surety in a contract of guarantee to a Corporate Debtor.

- a. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench 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.
- b. That the public pronouncement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of IBC.
- c. The Operational Creditor has not recommended name of IRP, therefore this Bench at this moment appoints **Mr. SATHIQ BUHARI** *having registration No. IBBI/IPA-001/IP-P00758/2017-2018/11307 (Email – sathiq33@gmail.com) residing at Sagreen Law Chamber, Vanchiyoor, Thiruvananthapuram, Kerala, 695035* as Interim Resolution Professional to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard.
- d. We direct the Operational Creditor to deposit a sum of Rs. 2 lakhs with the Interim Resolution Professional to meet out the initial expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days for the date of



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receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.

- e. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional.

Dated this the 26th day of November, 2019

Sd/-
(Veera Brahma Rao Arekapudi)
Member (Technical)

Sd/-
(Ashok Kumar Borah)
Member (Judicial)

Certified to be True Copy

[Signature]
26/11/2019
Deputy Registrar
National Company Law Tribunal
Kochi Bench

Memo No. TIBA/34/KOB/2019/173

Date: 26.11.2019

1. M/s Surana & Surana, Advocates, No.61-63, Dr.R.K.. Salai, Mylapore, Chennai-600 004 (Counsel for the applicant).
2. M/s Vipin Warriar & Vidyalakshmi Vipin, GF-A.19, Casa Major Road, Egmore, Chennai-600 008 (Counsel for the respondents)

3. **Mr. SATHIQ BUHARI** residing at Sagreen Law Chamber, Vanchiyoor, Thiruvananthapuram, Kerala, 695035 (Interim Resolution Professional).

