

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-IV

IB-3151/(ND)/2019

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

In the matter of:

M/s. Oyster Steel and Iron Private Limited

...Operational Creditor/Applicant

Versus

M/s Brilliant Metals Private Limited

...Corporate Debtor/Respondent

Coram:

SHRI. DHARMINDER SINGH, Hon'ble Member (Judicial)

MS. SUMITA PURKAYASTHA, Hon'ble Member (Technical)

Order Delivered on: 20.06.2022

ORDER

PER: SHRI DHARMINDER SINGH, MEMBER (JUDICIAL)

This is an application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent company, claimed to be the corporate debtor.





2. The applicant, M/s. Oyster Steel and Iron Private Limited has filed the present application through its authorised representative Mr. Prem Chand Gupta claiming as the operational creditor with the prayer for initiation of Corporate Insolvency Resolution Process against the respondent corporate debtor under the provisions of the Code.

3. The details of transactions leading to the filing of this application as averred by the applicant are as follows:
 - a. Operational Creditor is engaged in the business of production of metals, chemicals and related products.
 - b. The operational creditor and the corporate debtor entered into business relationship and supplied copper wire rods worth Rs. 10,58,62,877/- on credit during the period 09.05.2015 to 30.06.2015 with the understanding that on account payments would be made for the said sales within 120 days of the earliest sales in respect of which payments are pending. On failure to pay the debts due and payable, the Corporate Debtor would be liable to pay interest on late payment at the rate of 18% p.a. from the date of sale transaction.

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- c. The corporate debtor had made various on account payments in satisfaction of part of outstanding amount. That the last part payment of Rs. 24,00,000/- on account of amount outstanding against purchases made by the corporate debtor was received on 15.03.2018.
- d. The operational creditor submits that goods worth Rs. 10,58,62,877/- were supplied to the corporate debtor out of which amount of Rs. 5,15,41,000/- remains unpaid, due and payable and forms part of principal debt due.
- e. The operational creditor submit that the sales were in nature of in-transit sales. The modus operandi of the sales were as follow:-
- i. The corporate debtor would place an order for goods with the operational creditor.
 - ii. The operational creditor would place an order for the gods with its supplier Vedanta Limited.
 - iii. The operational creditor would also instruct Vedanta Limited to deliver the goods, purchased by the operational creditor to the corporate debtor directly, in order to reduce the cost and time spent in



storage, logistics and transportation to the operational creditor.

iv. Accordingly, Vedanta Limited would then deliver the goods ordered by the operational creditor directly to the Respondent as a consignee of operational creditor.

f. The operational creditor submit that various attempts were made by the operational creditor for recovery of outstanding debt from the corporate debtor.

g. The Operational Creditor sent a Demand Notice dated 06.09.2019 demanding payment of an unpaid operational debt as per provisions under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 via Speed Post.

h. The operational creditor submits that the corporate debtor replied to the demand notice on 24.09.2019 by baldly denying the debts due. However, the corporate debtor failed to show how the debt claimed to be due and payable had been discharged, if at all.

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4. The Corporate Debtor has submitted his reply . The main objections raised by the corporate debtor are as follows:

- a. The petition is not maintainable as the same is not verified by the competent person and operational creditor has further failed to put anything material on record to show that he is a director of operational creditor and same required detailed consideration, hence in view of same the present petition is not maintainable liable to be dismissed on this ground alone.
- b. The Corporate Debtor submits that the debt relates to invoices which pertains to period 05.06.2015 to 30.06.2015 whereas the petition filed somewhere in Nov 2019 and mere issuance of C Form or TDS certificate is not acknowledgement of debt, hence is not capable of extending the period of limitation, thus debt is time barred.
- c. The corporate debtor submits that the alleged contract is neither the 'goods' nor the 'services' as contemplated under section 5 (20) read with section 5 (21) of the IBC, 2016 as the transaction in the nature of "in transit sales" does not fall under the category of goods

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supplied as contemplated under the IBC as the goods were supply by another company name Vedanta. Further, none of the invoices of the Petitioner is acknowledged and not supported by any receipt thereof, since the prices were always provisional and never binding in nature at all. Further alleged that the invoices are generated by the operational creditor, thus can be modified and fabricated as per the convenience of the operational creditor. Hence, in view of the same there is serious dispute with regard to the alleged invoices which requires further consideration by way of full-blown trial hence in view of same present petition is not maintainable under the provisions of the IBC, 2016 and is liable to be dismissed on this ground alone.

- d. The Corporate Debtor also submits that the petition is not being filed as prescribed under IBC i.e. the Operational Creditor has failed to comply with the mandatory requirement for filling of present petition as they failed to give the details of total amount of debt, details of

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transactions on account which fell due and the date from which the same felt due.

- e. The Corporate Debtor alleges that the petitioner had failed in providing the information utility, which is provided under paragraph no. 4 of part V of the proforma of Form-5. The petitioner have not disclosed any record of default with information utility, thereby providing incomplete information in the said petition, despite the information being operational. Therefore, on the ground that the Petitioner has filed an incomplete proforma of Form-5, the said petition is liable to be dismissed.
- f. The corporate debtor further submits that the operational creditor has failed to show under what provisions of law, contract or any other document under which alleged operational debt is due as mandated in para 6 of para 6 of the part V of the Form-5 as filed by operational creditor and same is being mandatory.
- g. The corporate debtor further allege that the operational creditor has merely on the basis of conjecture and surmises has stated that oral credit period of 120 days was agreed between

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the parties, however the alleged invoices relied upon by the operational creditor itself provides for no credit period at all.

- h. That it is pertinent to note that as per trade parlance and usage it was always well known to the operational creditor that the invoices were always provisional invoices and the amounts stated therein were never final that is why there is never the acknowledgement of the alleged invoices.
- i. Moreover, the final amount due would be arrived at after taking into account the difference between the rate settled and rate in provisional invoice. The same difference for the financial year was captured vide debit note. On adjusting the debit note with the claimed amount no liability survives against the Corporate Debtor at all. The debit note was handed over to the Operational Creditor on account of difference between the value of the invoices which were raised on the rates prevailing on that day and rates on which the Corporate Debtor settled. In view of same the corporate debtor categorically informed the petitioner vide their reply notice

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dated 24.04.2019 that there is no due against the corporate debtor at all.

j. The ledger account of the operational creditor is not supported by any acknowledgement by the respondent hence the said ledger is self-styled and self-serving document fabricated by the operational creditor.

k. It is submitted that the operational creditor has failed in supplying the contracted quantity to the corporate debtor. That on account of short supply a debit note was also raised by hand delivery upon the petitioner which was duly accepted by the petitioner thereafter, no demand was ever made by the operational creditor since he is fully conversant with the factual situation that there is no outstanding amount due against the corporate debtor.

5. The operational creditor has filed its rejoinder and submitted as follows:

a. The Operational Creditor states that no discussions or agreement regarding the alleged adjustments on account of difference in rates or on account of any alleged short supply has ever been made. Further, no debit note had ever been received by the operational creditor. Further, no

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discussions/communications regarding any such adjustments have been placed on record communications regarding any such adjustments have been placed on record. On the contrary, the corporate debtor has for the first time mentioned the alleged debit note in it's reply to the application of operational creditor filed under section 9 of the Code, 2016. Pertinently the corporate Debtor has failed to annex the alleged debit note or provide any details thereof.

- b. The Operational Creditor further clarifies that there was an oral agreement between the parties for payment of due debt within a period of 120 days, failing which an interest of 18% p.a. to be charged on the amount dues. The interest is also reflected on the invoices annexed with the petition.
- c. The operational creditor highlights that the principle amount and the interest charged has been duly acknowledged by the Corporate Debtor by paying the TDS along with interest for the year 2015-2016 as reflected in the Form 26AS, C-Form issued by the Corporate Debtor.

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d. The Operational Creditor submits that the amount became due first on 05.06.2015 to 30.06.2015 and the amount due along with interest charged was acknowledged on the payment of due amount along with interest and TDS on 31.03.2016 and was further acknowledged time and again when payment against due debt were made by the corporate debtor. The corporate debtor maintained a running account with the operational creditor and made lump sum on account payments against the debt due for the supply of goods and in accordance with the provision of Limitation Act, 1963 the time of limitation has to be calculated from the last date of the financial year of the last transaction i.e., 2018. Thus the limitation in the present case starts running from 31.02.2018 for a period of 3 years. The Operational creditor relied on the judgement of the Hon'ble High Court in Sunil Dutt v. Shankar Gupta.

6. We have heard Ld. Counsel for the parties. We have perused the averments made in the application, reply, and rejoinder and additional affidavits filed

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by the parties. We are of the view that the proceeding under Section 9 of the I&B Code can only be initiated after delivery of the demand notice, upon the 'Corporate Debtor', under Section 8(1) of the Code, and on the occurrence of the default. Section 3(11) defines "debt" as a liability or Application in respect of a claim which is due from any person and includes Financial Debt and Operational Debt. Section 3(12) defines "default" as non-payment of debt when whole or any part or instalment of the amount of debt has become 'due and payable' and is not paid by the Debtor or the Corporate Debtor as the case may be. Further, under Section 8(1) of the Code, an Operational Creditor can deliver a demand notice only upon the occurrence of a 'default'.

7. In the instant case, the Operational Creditor had not filed a copy of the bank statement. Instead of filing the relevant document, the Operational Creditor had solely placed reliance on invoices raised by the operational creditor, Form '26AS') and Form 'C' dated 18.05.2016. Considering that a running account is maintained, considering the manner in which such businesses are conducted and accounts are kept, it would be material to consider the amount due would be arrived at after taking into account the difference between the rate settled and rate in provisional invoice. The corporate debtor vide its reply to the demand notice dated 24.09.2019 have categorically denied that that the corporate debtor have nothing to pay to the operational creditor. The corporate debtor had placed on record the ledger statement of the operational creditor in the books of account of Corporate Debtor for the



year financial years 2015-16, 2016-17, 2017-18 which evidently shows that around 26 debit notes were issued in the financial year 2016-17 by the corporate debtor to the operational creditor on account of short supply, difference between the rate settled and provisional invoice. Further, the corporate debtor made payment of the remaining balanced amount to the operational creditor in tranches, consequently the last and final payment of Rs.24,00,000/- was made by the corporate debtor to the operational creditor on 15.03.2018 as evident from the books of accounts.

8. From the perusal of the facts and documents on record we find that there is no crystallization of claim as there is no debt due or owed and default occurred, which is the sine qua non for admission of under Section 9 of the Code. The two essential requirements, i.e. existence of 'debt' and 'default', for admission of a petition under Section 9 of the code, 2016, has not been met in this case. Accordingly, the present petition (IB-3151/(ND)/2019) ***stands dismissed***, as to no order to cost.


(SUMITA PURKAYASTHA)
MEMBER (T)


(DHARMINDER SINGH)
MEMBER (J)

Pronounced today under Rule 151 of the NCLT Rules, 2016 as the Hon'ble Member (Technical) Ms. Sumita Purkayastha is not holding the court today.

Vishal Rana
20-06-2022

Court Officer