

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

C.P. No. 152/IBC/MB/2022

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 Shree Satya Industries

Though its designated partner
D-14/34, Sec-8, Rohini
Delhi - 110085

...Operational Creditor

Vs

M/s Windsor Machines Limited

Through its MD/Authorized
Representative
102/103, Devmilan Co. Op Housing
Soc., Next to Tip Top Plaza, L.B.S.
Road, Thane (West), MH-400604

.....Corporate Debtor

Reserved for order on: 02.08.2022

Order Pronounced on: 12.08.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

For the Petitioner: Mr. K. Sunil

For the Respondent: Mr. Rashmin Khandekar

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

Order

1. This Company petition is filed by *M/s Shree Satya Industries* (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *M/s Windsor Machines Limited* (hereinafter called “Corporate Debtor”) by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of a sum of Rs. 4,58,71,486.57/- (Rupees Four Crore Fifty Eight Lacs Seventy One Thousand Four Hundred Eighty Six and Fifty Seven Paise Only) being an Operational Debt due and payable by the Corporate Debtor.
2. The brief facts of the case are as follows:
 - i. The Operational Creditor placed an order for purchase and supply of the goods/ material. After placing the order, the said machine was delivered to Operational Creditor on 31.03.2021.
 - ii. Immediately after the installation of the machine regular problems were occurring in the machine for number of times.
 - iii. Despite the fact that the Corporate debtor tried to make the machine functional through their team of engineer who have visited on Several occasions at the cost and expenses of the Operational Creditor, but could not set the machine right as the same is inherently defective machine.
 - iv. Thus, the Corporate Debtor was under obligation to take back the inherently defective machine and pay the outstanding amount of Rs. 4,58,71,486.57/- (Rupees Four Crore Fifty Eight Lakhs Seventy One Thousand Eighty Six and Fifty Seven Paise). The Corporate Debtor is liable to compulsory ordered to undergo the Corporate

Insolvency Resolution Process (CIRP). As defaulted and unable to pay the Operational Debt and it would be expedient in the interests of Justice and equitable that this Tribunal be pleased to pass an order for undergoing the CIRP against the Corporate Debtor.

3. The Corporate Debtor filed affidavit in reply dated 22.02.2022 of Mr. Santosh Priyadarshan Salins, the authorized representative of the Corporate Debtor opposing the above Company Petition. The main contentions raised by the Corporate Debtor is on maintainability, claim amount, pre-existence of dispute and jurisdiction. The Corporate Debtor mainly raised his defences in Para. 3, Para. 4, Para. 6, Para. 7, Para. 8, Para. 9, Para. 10, Para. 11, Para. 12, Para. 13, Para. 14, Para. 15, Para. 16, Para. 17 and Para. 18 of the reply which are extracted here under:

Para. 3

I state that the Corporate Debtor is in the business of manufacturing multilayer film plants and has been in the said business for more than 30 years. I state that the Corporate Debtor sent the Quotation for Multilayer Film Plant Windsor Model Duke-2200 dated February 04, 2021 through an email dated February 04, 2021 to the Operational Creditor (hereinafter referred to as the "Quotation") Hereto annexed a copy of email dated February 04, 2021 along with the Quotation for Windsor Model Duke-2200 (hereinafter referred to as "Duke-2200 machine"). In furtherance of the above, Tax Invoices dated March 31, 2021 bearing No.0000005375 were issued for the Duke-2200 machine.

Para. 4

At the outset, it is respectfully submitted that the present Petition is wholly misconceived and not maintainable either in

law or on the facts. The Operational Creditor has seriously erred in choosing a correct forum for filing the present Petition, suppressed several material facts and misrepresented facts in an attempt to mislead this Hon'ble Tribunal.

Para. 5

I submit that the present Petition is not maintainable and should be dismissed at the outset. I state that there exists a contractual dispute between the Operational Creditor and Corporate Debtor and the same has been brought to the notice of the Operational Creditor by the Corporate Debtor. Thus, the appropriate jurisdiction to resolve the dispute between the parties is a court of law and not this Hon'ble Tribunal. In view of the same, the present Petition is not maintainable and should be dismissed at the outset.

PETITIONER DOES NOT FALL UNDER DEFINITION OF
"OPERATIONAL CREDITOR"

Para. 6

At the outset, I state and submits that the Operational Creditor is attempting to play a mischief on this Hon'ble Tribunal by misrepresenting the facts of the present dispute.

Further, I state that there exists no creditor and debtor relationship between the parties herein. I state that an operational creditor is to whom a sum of money is owned for the provision of goods and service. I state that a claim for payment for supply of goods or service having become due is not paid by the corporate Debtor. I state that in the present matter, it is the Corporate Debtor that supplied the goods to the Operational Creditor that supplied the goods to the Operational Creditor. Thus, the claims of the Operational Creditor that the

Corporate Debtor has defaulted on a debt are malicious and fraudulent.

NO DEFAULT IN PAYMENT OF DEBT BY CORPORATE DEBTOR

Para. 7

I state and submit that the trigger for initiating a corporate insolvency resolution process is the occurrence of 'default' in payment of a debt the corporate debtor, and the same has not occurred in the present scenario. I state that in order establish a default by a corporate debtor, the operational creditor needs to first ascertain that there was a non-payment of debt which had become due and payable and was not repaid by the corporate debtor. The impugned transaction is not in the nature to be under the scope of the Insolvency and Bankruptcy Code, 2016 (IBC).

Para. 8

I state that the alleged operational debt of Rs. 4,58,71,486/- (Rupees Four Crores Fifty Eight Lakhs Seventy One Thousand Four Hundred Eighty Six Only), which the Operation Creditor claims is due and payable under the present petition, has no justification in law or fact and is in complete contradiction to the provisions of the Insolvency and Bankruptcy Code, 2016. I state that the Operational Creditor has failed to establish that the Corporate Debtor had any liability or obligation in respect of the alleged operational debt which was due to be paid. Further, I state that a 'debt' indicates a definite sum of money that is owned and not a sum of money which is capable of being ascertained, as it is in the present matter. I state that the Operational Creditor has included amounts relating to, intra alia, damages, compensation, and

loss of revenue in their calculation of the alleged operational debt, all of which are estimated amounts and cannot form part of the alleged operational debt under the provisions of the IBC.

EXISTENCE OF DISPUTE BETWEEN THE PARTIES BEFORE DEMAND NOTICE

Para. 9

I state that the Corporate Debtor erected and installed the aforesaid Duke-2200 machine on the premises of the Operational Creditor in the month of June, 2021. I state that soon after erection and installation of the aforesaid Duke-2200 machine, the Operational Creditor couldn't procure and install the web-aligner which was in its scope of work. Further, I state that the Quotation stipulates the cooling ring temperature to be between 8 degree Celsius to 10 degree Celsius for better cling effect. However, the stipulated temperature was not maintained by the Operational Creditor, which resulted in issues in the output produced by the Duke-2200 machine. I further state that the Quotation also stipulates the gauge variation to be +/- 8% or +/-4 microns, whichever is higher, and further states that the film output and gauge variation are dependent on the polymer grade (raw material) used. However, the Operational Creditor was using substandard polymer grade raw material, and the same resulted in a gauge variation of 11-12%, which was way about the stipulated range. I state that the aforesaid examples are only a few of the many instances wherein the Operational Creditor has failed to adhere with parameters set in the guidelines for operation and all these communications are on record. Thus, there is a commercial dispute and this case does not fall under the scope and provisions of IBC.

Para. 10

I state that the business of the Corporate Debtor is very technical in nature and the final product produced by the machine heavily depends on, among other things, the quality of the input or raw materials fed into the machine, and the same is stated in the Quotation. I state that despite the Operational Creditor knowing that the output of Duke-2200 machine depends on various factors, including the quality of raw material, the Operational Creditor refused to purchase the prescribed quality raw materials and equipment and chose to use inferior/ sub-standard quality raw materials and equipment. Hereto annexed a copy of screenshot of a WhatsApp chat between Mr. Satish Gupta of the Operational Creditor and Mr. Aditya Gautam of the Corporate Debtor dated October 06, 2021 reflecting Operational Creditor's refusal to purchase the prescribed quality of raw material. The entire transcript of the WhatsApp chat can be provided as and when required.

Para. 11

I state that due to the inferior quality of raw materials and equipment used by the Operational Creditor, the output produced by the Duke-2200 machine was severely affected. In view of the aforesaid, I state that several disputes arose pertaining to wrongful claims made by the Operational Creditor and the same can be established by virtue of the email correspondence between the Operational Creditor and Corporate Debtor. I further state that the Corporate Debtor responded to the aforesaid wrongful claims and explained to the Operational Creditor that issues with the Duke-2200 machine were due to the substandard quality of raw materials used by the Operational Creditor. I state that the Corporate Debtor further clarified and demonstrated that the performance of the Duke-2200 machine was satisfactory when the prescribed raw materials were used by the Corporate Debtor.

dated November 03, 2021 reflecting the clarifications regarding performance of the Duke-2200 machine.

Para. 12

I state that in view of the aforesaid dispute, the Operational Creditor sent a letter dated October 23, 2021 to the Corporate Debtor outlining the recent disputes. The Operational Creditor further sent the Corporate Debtor a Legal Notice dated October 28, 2021 to which the Corporate Debtor sent a Reply dated December 17, 2021.

Para. 13

I state that the afore said paragraphs clearly indicate that there were pre-existing disputes between the Operational Creditor and Corporate Debtor when the Operational Creditor sent the Demand Notice under Form 3 of IBC to the Corporate Debtor outlining the particular of the alleged operational debt. I state that in response, the Corporate Debtor sent a Reply dated December 28, 2021 denying all the claims in the said Demand Notice.

Para 14.

I submit that in the aforesaid Reply dated December 28, 2021, the Corporate debtor unequivocally informed the Operational Creditor that there existed several disputes between the Corporate Debtor and the Operational Creditor. I state that the Operational Creditor sent a Rejoinder dated January 06, 2022 to the aforesaid Reply dated December 28, 2021, further indicating that the pre-existing disputes were brought to the notice of the Operational Creditor.

Para 15.

I state that the existence of disputes between the Corporate Debtor can be ascertained by virtue of the plethora of communications and notices exchanged between the parties and the documents hereto relied upon. Further, I state that the aforesaid Replies by Corporate Debtor and the Rejoinders by the Operational Creditor clearly establish that there exist disputes regarding the facts of the present matter and the same requires to be determined by the court of law, if necessary. Further, I state that the Adjudicating Authority is statutorily required to reject petitions for initiation of corporate insolvency resolution process in the event the notice of the dispute has been received by the operational creditor:

JURISDICTION

Para 16.

In view of the aforesaid facts and circumstances, I state that this Hon'ble Tribunal does not have the jurisdiction or authority to resolve the present dispute. I state that this Hon'ble Tribunal has the jurisdiction to adjudicate disputes which solely arise from or relate to the insolvency of the corporate person under the provisions of the IBC.

Para 17.

In view of the aforesaid paragraphs, it is now clear that:

- a. The Petitioner does not fall within the definition of "Operational Creditor".
- b. There is no 'operational debt' owed to the Operational Creditor;
- c. There is no default in payment of a debt by the Corporate Debtor; and

d. There are pre-existing dispute between the parties and the same was brought to the notice of the Operational Creditor.

Hence, the present proceedings are not maintainable before this Hon'ble Tribunal.

Para18.

In view of the aforesaid, I state that the subject matter of the present Petition is in the nature of a contractual dispute and thus cannot be heard by this Hon'ble Tribunal. Further, I state that any question, dispute, or difference arising out of or in connection with the abovementioned Quotation, is to be decided and adjudicated solely by a civil court. In view of the aforesaid, the present Petition is liable to be dismissed by this Hon'ble Tribunal.

FINDINGS / OBSERVATIONS

4. Heard both sides and perused the material available on record. It is the very case of the petitioner both in the pleadings as well as during the course of final arguments that the present application is filed under Section 9 of the Code claiming damages in a sum of Rs. 4,58,71,486.57/- for the defective machine supplied by the Corporate Debtor which caused huge loss to the Operational Creditor. The petitioner very clearly stated in part-IV column-6 of the petition to the effect that the operational debt has become due and payable by corporate debtor under Sections 37, 73 and 74 of Indian Contract Act besides law of compensation and other laws in this behalf and not towards supply of any goods or services by the Operational Creditor. In brief the claim of the petitioner is reverse in nature of an operational creditor. Therefore, the above petition is liable to be dismissed per se looking into the nature of the claim made by the Operational Creditor.

5. In addition to the above it is observed that the petitioner has sent a notice dated 20.10.2021 through their advocates M/s K Sunil and associates calling upon the Corporate Debtor to pay the above amount claimed by them in the present CP for which the Corporate Debtor has sent a detailed reply dated 17.12.2021 through their advocates Narayanbhai R Patel and Millan N. Patel denying the claim of the Operational Creditor which is self-explanatory. Thereafter, the petitioner got issued a Demand Notice in form -3 of the Code on 16.12.2021 for which the Corporate Debtor sent reply dated 28.12.2021 reiterating the earlier reply averments and once again denying the claim of the Operational Creditor. The Petitioner also sent rejoinder dated 06.01.2022 through their advocate in response to the reply dated 17.12.2021 to the Corporate Debtor. The Operational Creditor is alleging that the machine supplied by the Corporate Debtor is defective and the officials working in the Corporate Debtor company are not bothered to rectify the defects. Similarly, the Corporate Debtor is alleging that the the subject matter of machine was supplied by the CD at the behest of the OC even without receiving full consideration of the machine basing on the security of post-dated cheque issued by the CD on humanitarian grounds. The CD further contends that the officials of the OC did not allow the service engineers of the CD into their premises for inspection as a result of which they were forced to call back their service engineers. It is very clear from the above correspondence exchanged between both the parties that both the parties are in loggerheads even prior to the issuance of demand notice on various issues more so with respect to the quality of machine. In fact, the petitioner himself annexed certain emails addressed by them to the Corporate Debtor much prior to the date of issuing of demand notice which itself speaks that there are disputes between the parties.

6. In this context, It is appropriate to mention here that as per the law laid down by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited Versus Kirusa Software Private Limited*, the Supreme Court clearly held that what 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.
7. Similarly, the Hon'ble Supreme Court recently in M/s. S. S. Engineers V/s Hindustan Petroleum Corporation Ltd. In Civil Appeal No. 4583/2022 held that if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed - It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an Operational Creditor. Applying the above principles laid down by the Hon'ble Supreme Court in the above judgement to the present case on hand, this bench is of the considered opinion that there are no merits in the above Application and the above Application is liable to be rejected on both the grounds of "maintainability" and "pre-existing disputes" between the parties. Accordingly, the above Company Petition is dismissed.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)