

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-813/ (ND)/2020

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 Jaycee Castalloys Private Limited

Registered office at:

B-4/143, Pashvim Vihar

New Delhi- 110063

...Applicant/Operational Creditor

Versus

Kiran Udyog Private Limited

Registered Office at:

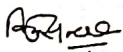
27 B/7, New Rohtak Road

New Delhi- 110005

Also at:

Plot No-14, Sector- 3

IMT, Manesar, Gurugram – 122050



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Plot No. 40, Sector- 5
Phase II, Industrial Area Bawal
Rewari, Haryana

Plot No. 47, Gali No. 06
Anand Parbat Industrial Area
New Delhi - 110005

...Respondent/Corporate Debtor

Coram:

SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)

SHRI.BINOD K. SINHA, Hon'ble Member (Technical)

Counsel for Applicant: Mr Rajat Mittal, Advocate

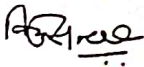
Counsel for Respondent: Mr. Pranshu Goel, CA

ORDER

Per SH. P.S.N. PRASAD, MEMBER (JUDICIAL)

Date. 14.12. 2021

1. This is an application filed by the Applicant M/s Jaycee Castalloys Private Limited through its Authorized

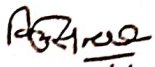


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Representative Mr. Satish Kumar Aggarwal seeking to initiate corporate insolvency resolution process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") of the Respondent Kiran Udyog Private Limited for the alleged default on the part of the Respondent in clearing the debt of Rs. 3,51,99,422/- (Rupees Three Crore Fifty One Lakhs Ninety Nine Thousand and Four Hundred Twenty Two only), as alleged by the applicant, towards the goods provided by the Applicant. The details of transactions leading to the filing of this application as averred by the Operational Creditor are as follows:

i. That the Operational Creditor is engaged in the business of manufacturing auto parts. The Corporate Debtor approached the Operational Creditor for supply of auto-parts. On representations made by the Corporate Debtor, the Operational Creditor agreed to supply the same. From time to time and as and when required, the Corporate Debtor issued Purchase Orders/Telephonic Orders upon the Operational Creditor for supply of specified quantity of autoparts ("Goods") to the Corporate Debtor. Pursuant to which, the Operational Creditor supplied goods to the Corporate Debtor

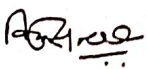


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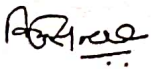
from its four units located at: Plot No. 391-392, Part A, Modern industrial Area, Bahadurgarh, Jhajjar, Haryana; Plot No. 27A, Part B, Modern industrial Area, Bahadurgarh, Jhajjar, Haryana; Plot No. E -8, Red Cross Road, Part B, Modern industrial Area, Bahadurgarh, Jhajjar, Haryana; and Plot No. 27A/11, Part B, Modern industrial Area, Bahadurgarh, Jhajjar, Haryana respectively against several invoices in accordance with the terms and conditions contained in the invoices. These auto-parts were supplied to the Corporate Debtor to its three units located at Plot No. 40, Sector -5, Phase II Industrial Area, Bawal, Rewari, Haryana; Plot No. 14, Sector -3, IMT Manesar, Gurugram, Haryana; and Plot No. 47, Gali No. 6, Anand Parbat Industrial Area, New Delhi. As per the terms and conditions agreed between the parties, the payment terms for the Goods were agreed on Credit of 60 days (duly specified on the Purchase Orders issued by the Corporate Debtor) and the payment for supply of Goods was to be made via electronic mode in the bank account of Operational Creditor.





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- ii. There is no dispute regarding the fact that the ordered quantity of goods were duly received and accepted by the Corporate Debtor. The invoices have been duly endorsed by the Corporate Debtor. The Corporate Debtor also made part payments towards Goods supplied by the Operational Creditor.
- iii. The Operational Creditor maintained an open and running account in the regular course of business in respect of Goods supplied by it to the Corporate Debtor. When the goods were delivered, the value of the goods was debited in the debit column, and when the amounts were paid by the Corporate Debtor to the Operational Creditor, the amount was entered in the credit column. As per the running account, the total balance due and payable by the Corporate Debtor to Operational Creditor is Rs. 3,51,99,422/- (Rupees Three Crores Fifty-One Lakhs Ninety-Nine Thousand and Four Hundred Twenty-Two Only)
- iv. That Operational Creditor submits that a statutory Demand notice dated 20.03.2020 under section 8 of IBC, 2016 was delivered to the Respondent dated 24.03.2020. It was further



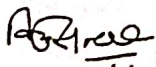
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submitted by the applicant that no reply or payment of any dues has been received till date.

2. Consequent to the notice issued by this Tribunal, the Counsel for the Corporate Debtor filed its reply Affidavit dated 01.12.2020 on behalf of the Corporate Debtor stating the following:

- i. That no demand notice has been received from the petitioner. The demand notice was not sent on the official email address of the respondent.
- ii. That the amount claimed by the operational creditor is totally a disputed amount and that there is a pre-existing dispute between the parties in regard to certain invoices mentioned in the application, therefore, the corporate debtor claims that the present application is not maintainable.
- iii. Further it was also stated by the corporate Debtor in its reply that the application dated 15.05.2020 is premature as the limitation period of 10 days for filing reply to notice dated 24.03.2020 was extended by Supreme Court in light of the coronavirus pandemic.



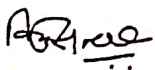
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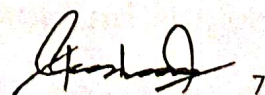


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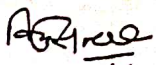
3. The Operational Creditor filed rejoinder affidavit dated 14.01.2021 stating that:

- i. The Operational Creditor made several requests to the Corporate Debtor to pay the unpaid invoiced amount. However, despite receiving the goods, the Corporate Debtor failed to do so. However, the Corporate Debtor vide its e mails sent the ledger account maintained by it acknowledging the liability of Rs. 3,17,62,360/- due and payable by the Corporate Debtor to the Operational Creditor. Due to non-receipt of payment from the Corporate Debtor for a long time, Operational Creditor sent a statutory demand notice to the Corporate Debtor under Section 8 of the Insolvency and Bankruptcy Code, 2016. The said Demand Notice was sent by the Operational Creditor to the Corporate Debtor vide email dated 24.03.2020. The said email has been delivered to the Corporate Debtor at the email addresses used by the Corporate Debtor to communicate with the Operational Creditor in ordinary course of business





and no 'failure delivery' notification has been received by the Operational Creditor. Copy of the Email dated 24.03.2020 is marked and annexed to the application as Annexure — R2. It is important to note that Demand Notice email was sent to the email id of the Managing Director of the Company akjain@kiranudyogindia.com;abbhinaav@kiranudyogindia.com;accountskiranudyog@gmail.com;accounts@kiranudyogindia.com. It is submitted that the Corporate Debtor was regularly corresponding through all these emails with Operational Creditor; therefore, there is no question of non-receipt of demand notice. It is further submitted that Demand Notice was sent through email because on March 24, 2020 lockdown was imposed all over India by the Central Government due to which all the services including postal services were suspended. However, in the first week of April, the Advocate-on-Record of the Applicant, Mr. Rajat Mittal also sent the Demand Notice through Registered Post from the Lajpat Nagar Postal Station to the Registered Addressed of the Corporate Debtor. Therefore, the contention of the Corporate Debtor that Demand Notice was



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not served is nothing but a moonshine defense without any merit. The Operational Creditor also places reliance on Rule 5(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules which provides the mechanism for service of the Demand Notice, as under:

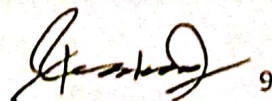
5. Demand notice by operational creditor.—(2) *The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,*

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

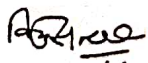
- ii. That no reply has been sent by the Corporate Debtor to the statutory demand notice sent by the Operational Creditor under Section 8 of the Insolvency and Bankruptcy Code, 2016. However, the Corporate Debtor issued email and letter claiming force majeure, on account of Covid-19 pandemic,



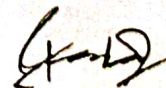
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for suspending its contractual obligations including payment to all its suppliers in general without any specific reference to the Demand Notice issued by Operational Creditor. A copy of the email and the attached letter dated 01.04.2020 whereby the Corporate Debtor suspended its obligation to make any payment is already part of the Section 9 petition filed by the Operational Creditor. The fact that the Corporate Debtor used COVID 19 and consequent lockdown imposed as a ground for suspending its contractual obligation to make payment reflects that the conduct of the Corporate Debtor is not above board.

- iii. That in these circumstances, the Insolvency Petition was filed by the Operational Creditor on May 15, 2020 which was duly served on the Corporate Debtor. A copy of the Service Email is marked and annexed with the application as Annexure - R3. Further, the email was duly acknowledged by the Corporate Debtor. A copy of the acknowledgment is also marked and annexed as Annexure — R4. It is important to note that there was a gap of over two months between the service of Demand Notice and the Insolvency Petition filed by the Operational Creditor. In such circumstances, it is



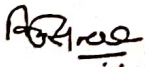
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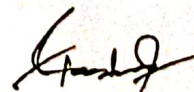
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completely wrong on the part of the Corporate Debtor to contest that sufficient time was not given to respond to the Demand Notice before filing the Insolvency Petition.

- iv. That after filing the captioned petition, the Operational Creditor kept getting repeated calls from the Corporate Debtor to withdraw the petition which the Operational Creditor declined. The Corporate Debtor thereafter requested the Operational Creditor to continue supplying goods to the Corporate Debtor so that it could continue as a going concern business. The Corporate Debtor also made an offer that Corporate Debtor will make advance payment to the Operational Credit against which the Operational Creditor can supply goods of half the value. That way the Corporate Debtor would be able to partly discharge the old dues. A copy of the email from Corporate Debtor requesting for such an arrangement is already annexed as Annexure R5 to the instant Application. It is submitted that pursuant to said discussion, Operational Creditor supplied goods worth Rs. 81, 08,572/- to the Corporate Debtor against advance receipt of payment of Rs. 1, 68, 87, 830/- from the Corporate Debtor. It is submitted that the understanding

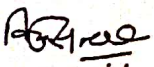


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between the Operational Creditor and the Corporate Debtor was that out of the total payment made in advance, payment will be appropriated against the goods supplied after filing the Insolvency Petition and the balance payment would be appropriated against the old invoices on first in first out basis (FIFO) basis. That is to say that as on date out of total receipt, a payment of Rs. 2, 64, 20, 164 is pending to be paid by the Corporate Debtor [Rs. 3,51,99, 422/- + Rs. 81,08,572/- (-) Rs. 1, 68, 87, 830/-]. It is submitted that total outstanding of Rs. 2, 64, 20, 164/- pertains to the old invoices in respect of which the Corporate Debtor is admittedly a defaulter. That even otherwise even if the books of accounts of the Corporate Debtor is to be relied upon the total outstanding is Rs. 2, 29, 83, 102/- which is far more than the threshold of Rs. 1 crore to trigger the insolvency under the provisions of the Code.

- v. It is submitted that there is no pre-existing dispute between the Operational Creditor and the Corporate Debtor. It is submitted that at no point of time, the Corporate Debtor raised any dispute about the ordered quantity of goods as and when they were supplied by the Operational Creditor.



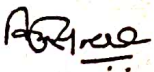
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Further, the invoices have been duly endorsed by the Corporate Debtor. The Corporate Debtor also made part payments towards Goods supplied by the Operational Creditor. Therefore, to contest now that there is a pre-existing dispute between the parties is completely wrong. In this regard, the Operational Creditor submits the following:

- The fact that debt is due is admitted by the Corporate Debtor itself in the Reply Affidavit.
- The fact that Operational Debt is due to be paid by the Corporate Debtor to the Operational Creditor is also evident from the ledger account shared by the Corporate Debtor which itself acknowledges the debt.
- Minor difference of amount in the books of the parties is not an evidence of pre-existing dispute.
- No Notice of pre-existing dispute was served on the Petitioner pursuant to the service of the Demand Notice as mandated by the Code.

Therefore, the Corporate Debtor cannot now turn and say that there is a pre-existing dispute between the Parties. The understanding of the pre-existing dispute was recently cleared by the three-member bench of Hon'ble NCLAT, in the case of

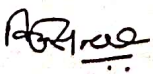


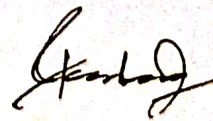
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Ahluwalia Contacts (India) Ltd Vs Raheja. In appeal before NCLAT it was argued that the Arbitration Proceedings were initiated by the Operational Creditor after serving of the demand notice as per S.8(1) of IBC. After observing this, NCLAT dismissed the order passed by NCLT and held that *“the of dispute must be pre-existing i.e., it must exist before the receipt of the demand notice or invoice”*. Moreover, NCLAT also said that the application under S.9 of IBC cannot be rejected on the mere the grounds of the claim being *Disputed Claim* and held that *“disputed claim” cannot be a ground to reject an application under Section 9 of the Insolvency and Bankruptcy Code (IBC) to initiate insolvency proceedings if it is not raised before issuance of demand notice*. Further, it is a settled law that a minor difference in the books will not constitute a dispute between the parties.

4. Vide order dated 08.10.2021, both the parties were directed to file their written submissions. The written submissions have been filed by both the parties.

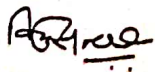




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5. The Counsel for the Operational Creditor has filed its written submissions in respect to the submissions made in the counter affidavit:

- i. There is no dispute regarding the fact that the ordered quantity of goods were duly received and accepted by the Corporate Debtor. The invoices have been duly endorsed by the Corporate Debtor.
- ii. The corporate debtor has acknowledged the debt in the counter affidavit as well as through ledger account shared by it.
- iii. The demand notice was duly served in electronic mode.
- iv. A slight difference in the amount of debt does not mean that there is a pre existing dispute. Merely because there is a slight difference in the amount of debt due as per the books maintained by the Operational Creditor and Corporate Debtor that will not mean that there is a pre-existing dispute between the parties. In this regard, reliance is placed on Order dated 02.09.2019 passed by Hon'ble NCLAT in *Manjeet Kaur Saran Vs. Tricolite*



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Electrical Industries Ltd. (Company Appeal (AT) (Insolvency) No. 894 of 2019) and Judgment dated 24.07.2019 passed by the Hon'ble NCLAT in the case of **Pederson Consultants India Pvt. Ltd. Vs. Nitesh Estates Limited** (Company Appeal (AT) (Insolvency) No. 720 of 2018).

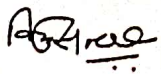
v. The Corporate Debtor has stated that the application is pre mature as statutory time of 10 days to reply to notice was not given. However, the Operational Creditor submits that there was a gap of over one and half months between serving of demand notice and filing of petition.

6. The Counsel for the Corporate Debtor has filed its written submissions in respect to the submissions made in the application:

i. It was submitted that the demand notice has never been served upon the Corporate Debtor hence, the corporate Debtor could not submit any reply under section 8(2) (a). Petitioner in the affidavit stated that since "no failure delivery notification is received" the Notice of Demand be

considered as served. Just because "no failure delivery notification is received" that cannot be a proof that the email was delivered. It is impossible to adjudicate whether any failure delivery notification has been received by the Petitioner or not. The onus is on the Petitioner to substantiate with credible evidence on record that the Demand Notice has been duly served. Having said so, without prejudice, no credence should be given to the affidavit of service of demand notice, as the same was deposed by the Director of the Petitioner and not by the counsel who in actual e-mailed the said Notice of Demand on behalf of the Petitioner. In other words, the affidavit of service of demand notice should have been deposed by the counsel who in actual emailed the Notice of Demand. Reliance in this regard is placed on the following judgments:

(i) Shailendra Sharma v. Ercon Composites and Otehrs [Company Appeal (AT) (Insolvency) No. 159 of 2020] @ Para(s): 39,40,43,46,47,53 to 60 (Page to of Case Law Paper Book) (ii) Era Infra Engineering Limited v. Prideco Commercial Projects (P) Ltd. [NCLAT Company Appeal (AT)



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(Ins) No. 31 of 2017] @ Para(s): 2,3,7,8 and 9) Page 55 to 60
of Case Law Paper Book)

ii. It is further submitted by the Corporate Debtor that Without Prejudice, the limitation period of 10 days of replying to the suggested statutory Demand Notice dated 24.03.2020 was extended by the Hon'ble Supreme Court vide its order dated 23.03.2020 in Sou Motu Writ Petition (Civil) No(s).3/2020 in view of the current pandemic situation. The Application dated 15.05.2020 filed in a tearing hurry, exceeds the right of the Respondent Company to file its reply on record and thus is premature.

7. We have heard the Ld. Counsels for the Operational Creditor and Corporate debtor and perused the averments made in the application as well as the documents enclosed with the application.
8. Going by the above details the operational creditor has clearly established the existence of debt and default on the part of the corporate debtor. The fact that Operational Debt is due to be paid by the Corporate Debtor to the Operational Creditor is also evident from the ledger account shared by the Corporate Debtor

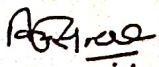
which itself acknowledges the debt. Minor difference of amount in the books of the parties is not an evidence of pre-existing dispute. In view of the above situation, this Tribunal **admits** this petition and **initiates CIRP** on the Respondent with immediate effect :

(1) A moratorium in terms of Section 14 of the Code is imposed forthwith in following terms:

(a) the institution of suits or continuation of pending suits or proceedings against the Respondent 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 of by the Respondent 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 Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;



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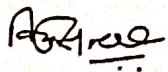


(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Respondent.

(2) The supply of essential goods or services to the Respondent as may be specified shall not be terminated or suspended or interrupted during moratorium period.

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

(4) Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

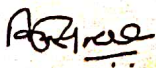




(5) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.”


(6) The interim resolution professional (“IRP”) proposed by the Applicant is Mr. Aditya Kumar, (Mobile No. - 9855400428) Reg. No: IBBI/IPA-001/IPP00338/2017-18/10609 is being confirmed by this Bench. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench.

9. In the light of the above said facts and after giving careful consideration to the entire matter, hearing the arguments of the learned counsel for the Operational Creditor as well as the Learned Counsel for the Corporate Debtor and upon appreciation of the documents placed on record to substantiate their respective claims, this Adjudicating Authority **admits** this





application and **initiates CIRP** on the Corporate Debtor with immediate effect.



(DR. BINOD K. SINHA)
MEMBER (TECHNICAL)



(SH. P.S.N. PRASAD)
MEMBER (JUDICIAL)

*Pronounced today under Rule 151 of NCLT Rules, 2016 as
Hon'ble Member (T) Dr. Binod K. Sinha, is not holding the
Court today.*



COURT OFFICER

14.12.2021