

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

**IB- 639/(ND)/2022**

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 A.ES Engineers Private Limited.**

Registered Office at:

House No. 358, Block CB,

Naraina Village, New Delhi - 110028

...Applicant/Operational Creditor

**Versus**

**M/s Kiran Udyog Private Limited**

Registered Office at:

27 B/7, New Rohtak Road,

New Delhi - 110005

...Respondent/Corporate Debtor

**Coram:**

**SHRI. BACHU VENKAT BALRAM DAS, HON'BLE MEMBER**

**(JUDICIAL)**

**SHRI.RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)**

**PRESENT**

**Counsel for Applicant/ Operational Creditor:** :Adv. Sonam Gupta,  
Adv. Devansh Arya, Adv. Saumay  
Kapoor, Adv. Devraj Bhattacharjee

**Counsel for Respondent/ Corporate Debtor:** Adv. Ekta Rai,  
Adv. Adil Khan


**ORDER**

**PER: BACHU VENKAT BALRAM DAS, HON'BLE MEMBER**

**(JUDICIAL)**


**Date: 07.03.2023**

1. This is an application filed by the Applicant, M/s A.ES Engineers Private Limited through Mr. Anil Sethi, Authorised Representative of Operational Creditor, authorised vide Board Resolution dated 03.06.2022 to initiate Corporate Insolvency Resolution Process ("CIRP") under Section 9 of the Insolvency




and Bankruptcy Code 2016 ('the Code') of the Respondent M/s Kiran Udyog Private Limited for the alleged default on the part of the Respondent in clearing the debt of Rs. 3,53,49,071.9/- (Three Crores Fifty-Three Lakhs Forty-Nine Thousand Seventy-One Rupees and Ninety Paise) comprising of a principal amount 2,81,49,908/- (Rupees Two Crores Eighty-One Lakhs Forty-Nine Thousand Nine Hundred and Eight) and interest as on 20 July 2022 at 18% p.a. amounting to 71,99,163.9/- (Seventy-One Lakhs Ninety-Nine Thousand One Hundred and Sixty-Three Rupees and Ninety Paise). The details of transactions leading to the filing of this application as averred by the Applicant/Operational Creditor are as follows:

- That, the Operational Creditor is a 'small enterprise', registered under the Micro, Small and Medium Enterprises Development Act, 2006, and has filed the present application on account of failure of the Corporate Debtor to clear the operational debt of INR 3,53,49,071.9/- (Three Crores Fifty-Three Lakhs Forty-Nine Thousand Seventy-One Rupees and Ninety Paise) due under 227 invoices raised by the



Operational Creditor for supply of cast iron products to the Corporate Debtor

- That the arrangement of supply of products and payments between the Operational Creditor and the Corporate Debtor was under two Agreements - Master Service Agreement dated 28.03.2019 and Facility Agreement dated 07.08.2020.
  - There is no dispute as regards the delivery of goods by the Operational Creditor to the Corporate Debtor and hence, the liability of the Corporate Debtor is clearly undisputed and admitted.
  - The OC has sent a demand notice 22.07.2022 under Section 8 of the Insolvency and Bankruptcy Code, 2016.
  - Based on the aforesaid facts that the Operational Creditor filed this present petition to initiate corporate insolvency resolution process against the CD.
- 2.** The Counsel for the Corporate Debtor filed its reply on behalf of the Corporate Debtor as below: -
- That, the application filed by the Operational Creditor is liable to be dismissed for being frivolous, being filed during pendency of a pre-existing dispute between the parties, being a malafide



attempt of forum shopping for recovery of a disputed debt and violates the principle of *res sub-judice* since the dispute between the parties is already pending before the Hon'ble Delhi High Court in *Arbitration Petition No. 26 of 2022*, titled as "*M/s A.ES Engineers Private Limited v. M/s Ugro Capital Limited & Anr.*".


- That the Respondent had duly replied to the Demand Notice under Section 8 of the Code served by the Applicant upon the Corporate Debtor raising clear and unambiguous pre-existing dispute between the parties, however, the Applicant with mala fide intention of recovery from the Respondent, filed the present Application before this Tribunal.
- It is further submitted that the applicant had initiated Arbitration proceedings also before the Micro & Small Enterprises Facilitation Council ("MSEFC") for recovery pertaining to the default alleged in this Application, it is clear that the only intention of the Applicant in filing the present Application is recovery of money, and no intention whatsoever towards resolution of the Corporate Debtor.



- That the Applicant has filed the present application for recovery of a disputed debt. Therefore, on this ground alone the present Application is liable to be dismissed with imposition of cost on the Applicant.
- That the Applicant in its Application has imputed liability of payment of default amount on the Respondent on the basis of two separate agreements viz. the Master Service Agreement dated March 28, 2019 Master Service Agreement (hereinafter referred to as MSA) and the Facility Agreement dated August 07, 2020 (hereinafter referred to as Facility Agreement). Admittedly, none of the two agreements are between the Applicant and the Respondent. The question of liability of the Respondent on the basis of the two agreement is already sub-judice before the Hon'ble High Court of Delhi in the Arbitration Petition filed by the Applicant Therefore, the present Application does not only suffer from the infirmity of a pre-existing dispute, but is also violative of principle of res sub-judice as the liability of parties qua the two agreements, is already pending adjudication before the Hon'ble Delhi High. Court.




- It is submitted that the Applicant has placed 227 invoices raised from April, 2019 till August, 2021 in order to support its claim to the default amount alleged in its Application. More than half the invoices brought on record by the Applicant bear no signature of any party whatsoever. Moreover, many invoices do not bear any signature/ stamp signifying receipt or acknowledgment of any such invoice from the Respondent
  - It is submitted that more than half of the invoices placed on record by the Applicant pertain to the period between March 25, 2020 and March 24, 2021, default in payment of which invoices no application under section 10A of the Code can ever be filed. Therefore, in light of the statutory provisions of Section 10A of the Code, the invoices falling within the above noted period shall not be permitted to be considered for the purpose of identifying the alleged default.
- 3.** To the Reply filed by the Corporate Debtor the Counsel for the Operational Creditor has filed his Rejoinder as below
- That the Corporate Debtor has been finding ways to wriggle out and, on many dates, when the matter has been listed before the




Tribunal the Counsel of Corporate Debtor has prayed for grant of time due to one reason or the other.

- It is submitted that the case bearing number Arbitration Petition No. 260/2022, titled M/s A.ES Engineers Private Limited v. UGRO Capital Limited & Anr. (Arbitration Petition), which is presently reserved for orders before the Hon'ble Delhi High Court does not constitute a pending pre-existing dispute between the Operational Creditor and the Corporate Debtor for the following reasons:
- The Operational Creditor filed the Arbitration Petition seeking reference of disputes to arbitration under the Master Service Agreement (MSA) dated 28.03.2019 and its ancillary Facility Agreement dated 07.08.2020 whereunder, for the goods supplied by the Operational Creditor to the Corporate Debtor, payments on behalf of the Corporate Debtor were made by one UGRO Capital Limited (UGRO) at the behest of the Corporate Debtor and, at a later date, UGRO was to be repaid by the Corporate Debtor. However, owing to failure by the Corporate Debtor in repayment of dues to UGRO, the Operational Creditor has been subjected to various coercive proceedings by UGRO,




including a petition under Section 7 of IBC bearing number CP-(IB)/706/ND/2021 filed before this Tribunal, seeking to recover the monies paid on behalf of the Corporate Debtor. UGRO even filed police complaints against the Operational Creditor and took steps which led to reduction of the credit score and rating of the Operational Creditor. In fact, the Company Petition bearing no. CP-(IB)/706/ND/2021 was admitted by this Tribunal by way of its order dated 04.10.2022, which order has subsequently been stayed by the NCLAT in CA(AT)(Ins) No. 1220 of 2022 on 12.10.2022

- The Operational Creditor, thus, filed the Arbitration Petition aggrieved by the illegal actions of UGRO and its predatory tactics aimed at extorting monies from the Operational Creditor through intimidation. The primary subject matter of the Arbitration Petition is determination as to whether UGRO could initiate recovery proceedings against the Operational Creditor in the event of the Corporate Debtor failing to clear its dues.
- The Corporate Debtor has been arrayed as a Respondent / Defendant in the Arbitration Petition on account of the Corporate Debtor being a proper and necessary party to the



arbitration proceedings as the goods in respect of which liability has arisen were supplied by the Operational Creditor to the Corporate Debtor and the Corporate Debtor defaulted in payment of consideration against the goods.

- In fact, the Arbitration Petition has been filed for determination of primary liability of repayment towards UGRO; that is: (a) whether UGRO is required to directly seek repayment from the Corporate Debtor; or (b) whether UGRO can claim monies from the Operational Creditor and then the Operational Creditor is required to seek repayment from the Corporate Debtor.
- It is thus apparent that though the Arbitration Petition has been filed, the liability of the Corporate Debtor to make payment against the goods supplied to it by the Operational Creditor is not a fact-in-issue in the arbitration proceedings. It is an admitted position of all parties concerned that the Corporate Debtor has received goods from the Operational Creditor without making payment against the goods received. It is, in fact, an undisputed fact on which the Arbitration Petition is premised and there has been no denial of liability by the




Corporate Debtor. Thus, there is no pre-existing dispute with respect to the present Petition.

- It is submitted that proceedings before the MSEFC, Panchkula had indeed been initiated seeking payment of dues against goods supplied by the Operational Creditor to the Corporate Debtor. However, despite these proceedings having been initiated, the Corporate Debtor has neither made payments against the goods in the proceedings before MSEFC, nor has the Corporate Debtor disputed its liability before the MSEFC. In fact, the Corporate Debtor has not even appeared before the MSEFC to participate in the proceedings and has been evading appearance before MSEFC, in an attempt to render the proceedings non-starter. The Corporate Debtor, today, cannot be allowed to take advantage of its own wrongs by, at first, evading proceedings before the MSEFC and, then, projecting the pendency of these proceedings as a pre-existing dispute. Thus, since the proceedings for recovery of money have been of no avail, it is evident that the Corporate Debtor requires to undergo corporate insolvency resolution process.



- That the Corporate Debtor concealed from this Tribunal that it had previously been put into corporate insolvency resolution process by this Tribunal in Jaycee Castalloys Private Limited v. Kiran Udyog Private Limited [CP(IB)-BJ3/ND/2020). The Corporate Debtor thereafter settled its liability towards Jaycee Castalloys Private Limited to get out of corporate insolvency resolution process. Subsequently, there have been various other petitions filed by other parties against the Corporate Debtor for initiation of corporate insolvency resolution process which clearly indicate that that Corporate Debtor's financial health is bad, and it is in no position to meet its liabilities, besides also indicating the tendency of the Corporate Debtor to default on its liabilities. It is only through the resolution process now that the Corporate Debtor can be resolved.
- 4.** We have heard the Ld. Counsels for the Operational Creditor, Corporate debtor and have gone through the documents filed in support of pleadings.
- 5.** Firstly, the fact that the Corporate Debtor had previously been put into corporate insolvency resolution process and thereafter settled its liability towards FC to get out of corporate insolvency




resolution process has no bearing in the present case. It is observed that the Operational Creditor has clearly admitted the fact that there are disputes pending before various forums like filing of the Arbitration Petition case bearing number Arbitration Petition No. 260/2022, titled *M/s A.ES Engineers Private Limited v. UGRO Capital Limited & Anr.* Filed by the petitioner i.e. M/s A.ES Engineering Private Limited against M/s UGRO Capital Limited and M/s Kiran Udyog Private Limited wherein the primary issue is with respect to the agreement on the basis of which invoices were raised and the present application has been filed. It is pertinent to refer to para 11 of the Arbitration which is reproduced as under


*“11. There is, thus, need for an arbitral tribunal to be constituted to interpret the MSA and the Facility Agreement and to decide the disputed question of fact, including those as to liability, which have arisen between the parties to this petition”*

Under Sub Section (6) of Section 5 of the Code, dispute is defined as under: -

**(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;*

Since there is a dispute between M/s UGRO Capital Limited and Corporate Debtor with regard to the liability of payment of unpaid invoices raised by the Operational Creditor i.e. A.ES Engineering Private Limited, that issue will only be decided after the interpretation of the two agreements i.e. Master Service Agreement dated 28.03.2019 and Facility Agreement dated 07.08.2020 for which M/s UGRO Capital Limited and Corporate Debtor mutually consented to and sought to proceed with arbitration before the Hon'ble Delhi High Court. Hence, there is a dispute with respect to whether the debt is owed by the Corporate Debtor or by UGRO Capital Limited which is pending adjudication and no final order has been passed in the aforesaid petition. The dispute between UGRO Capital Limited and Corporate Debtor has a direct bearing on the present case. The outcome of dispute between UGRO Capital Limited and Corporate Debtor will clarify as to who is to pay the Operational Creditor. In other words, who will be the debtor of the



Operational Creditor in the matter. Therefore, this dispute between UGRO Capital Limited and Corporate Debtor is covered under existence of amount of debt as defined under section 5(6) of the Code.

The Hon'ble Supreme Court in *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited (2018) 1 Supreme Court Cases* 353 particularly at paragraphs 33 and 51, this Court held as under :-

***“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.”**

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.**

6. The Hon'ble Supreme Court in *k. Kishan v. M/s Vijay Nirman Company Pvt. Ltd. CIVIL APPEAL NO. 21824 OF 2017* held as under :-

18) We repeat with emphasis that under our Code, insofar as an operational debt is concerned, all that has to be seen is whether the said **debt can be said to be disputed, and we have no doubt in stating that the filing of a Section 34 petition against an Arbitral Award shows that a pre-existing dispute which culminates at the first stage of the proceedings in an Award, continues even after the Award, at least till the final adjudicatory process under Sections 34 & 37 has taken place.**

In the present case, the Arbitration Petition is pending before the Hon'ble Delhi High Court and no final order has been passed in the aforesaid petition. It is settled law that proceedings before NCLT are summary in nature and Adjudicating Authority is not expected to ascertain pre-existing disputes raised in a summary proceeding, if the Tribunal starts adjudicating these types of issues, then the purpose of the statute of enacting speedy disposal by the mechanism will be defeated. It is evident from the documents placed on record that there exists a pre-existing dispute between the parties and it is



the mandate of law that if there exists a pre-existing dispute between the parties the Adjudicating Authority must reject the application under section 9(5)(ii)(d).

In the light of the above said facts and after giving careful consideration to the entire matter and hearing the arguments of the learned counsel for the Operational Creditor as well as the reply filed by the Corporate Debtor and upon appreciation of the documents placed on record to substantiate their respective claims, this Adjudicating Authority **dismisses** this application filed by the Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016 as there is a pre-existing dispute between the parties. However, the claim under any other law, if permissible, can be pursued by the Petitioner as prescribed under that law. therefore, the Applicant may explore other legal remedies.



Certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-SD-

**(RAHUL BHATNAGAR)**

**MEMBER (TECHNICAL)**

-SD-

**(BACHU VENKAT BALRAM DAS)**

**MEMBER (JUDICIAL)**