

408

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

IBA/1449/2019

(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. SH Haryana Wires Limited

M/s. SH Haryana Wires Limited

Reg. Off:

B-9, Kalindi Colony,
New Delhi – 110 065

... Operational Creditor

-Vs-

M/s. Venture Power Systems India Private Limited

Plot D6 Phase II, Zone B Mepz,
Tambaram, Chennai – 600 045

... Corporate Debtor

Order pronounced on 4th October 2021

CORAM:

**R. SUCHARITHA, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

For Operational Creditor : Avinash Krishnan Ravi, Advocate

For Corporate Debtor : A.G. Sathyanarayana, Advocate

ORDER

Per: R. SUCHARITHA, MEMBER (JUDICIAL)

Under Consideration is an Application filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 ("hereinafter referred to as IBC, 2016") by **M/s. SH Haryana Wires Limited** (hereinafter called as "*Operational Creditors*") for the purpose of initiating the Corporate Insolvency Resolution Process (CIRP) against **M/s.**

Venture Power Systems India Private Limited (hereinafter called as "*Corporate Debtor*")

2. Part – I, of the Application discloses the fact that the Applicant/Operational Creditor herein is a public limited company with CIN- U31300DL1980PLC010756. Part-II of the Application gives all the particulars of the Corporate Debtor from which it is evident that the Corporate Debtor is a Private Limited Company with CIN:U31901TN2001PTC047708 which was incorporated on 07.09.2001 and that its Authorized Share Capital and Paid up Share Capital are Rs. 14,50,00,000/- and Rs. 13,74,60,000/- respectively. The Registered Office of the Corporate Debtor as per the Application is stated to be situated at Plot D6 Phase II, Zone B Mepz, Tambaram, Chennai – 600045 .

3. Part – III of the Application discloses the fact that the Operational Creditor has not proposed the name of the Interim Resolution Professional and left it to the discretion of this Tribunal to appoint an Interim Resolution Professional from the list furnished by the Insolvency and Bankruptcy Board of India.

4. It was submitted that the Operational Creditor is a Manufacturer of insulated wire, cable, coaxial cable, insulated

conductors, enamelled copper wires and insulated strips used in large capacity machines, transformers, electric motors and control equipment. As part of their business, the operational creditor was supplying Enamelled Copper Wires to the Corporate Debtor herein. It is further submitted that the Corporate Debtor is a Special Economic Zone Company (herein after referred to as 'SEZ Company') situated at Madras Export Processing Zone, Tambaram (MEPZ). It is further submitted that the supplies made by the operational creditor are accompanied by bill of export for duty free goods along with invoices duly signed and stamped by the custom officer of MEPZ – SEZ evidencing the receipt of the supplied materials. On account of such business between the operational creditor and the corporate debtor it is submitted that close to 20 invoices raised between 02.05.2018 and 27.06.2019 to the tune of Rs. 1,51,13,149/- inclusive of 18% interest is due and payable by the corporate debtor. The date of default is mentioned as on the date of the first pending invoice dated 02.05.2018.

5. Part V of the Application shows that the applicant has attached few relevant documents in order to prove the existence of the Operational debt and the amount in default,

- i. Copies of 4 Purchase Orders.
- ii. Copies of Twenty Invoices.
- iii. Form 4 - Demand Notice, dated 29.10.2019.

- iv. Bank & Accounts statement of Operational Creditor.
- v. Accounts statement issued by the Corporate Debtor.

6. On perusal of the records, it is found that the operational creditor has sent a Demand Notice in Form -4 along with invoices, for which a reply was also sent by the corporate debtor disputing the format of the demand notice received. The typed set of papers also holds the mail conversation between the parties along with the Ledger Accounts and Account statements.

7. The Learned Counsel for the Corporate Debtor has filed the Reply and submitted that the Demand Notice sent under Form 4 is invalid, however a notice under Form 3 should have been given. It is further submitted that there exists prior dispute referring to the email conversations attached in the typed set in Pg. Nos. 98-104. The Learned Counsel for the Corporate Debtor has also submitted that several invoices among the relied invoices are not signed, it is further averred that the respondent having agreed to compromise had also issued a compromise memo after paying 5000 USD for which there is no response till date. The Learned Counsel for the Corporate Debtor has relied upon "*Mobilox Innovations Private Limited Vs. Kirusa Software Pvt. Ltd.*" and '*K.Kishan Vs. M/s. Vijay Nirman Company Pvt. Ltd.*' in order to elucidate that the debt is disputed whereby the application shall be dismissed. 'Accordingly, in



the reply to the Demand Notice the corporate debtor questions the commercial relationship between the operational creditor and also questions the validity of the demand notice sent.

8. The first issue arises for consideration is that whether the Demand Notice under Section 8 of IBC, 2016 served by the Operational Creditor as per Form 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 does satisfy the mandatory requirements as required under the statutory requirements as per relevant provision of IBC, 2016 and Rules framed thereunder. In order to answer the said issue, it is necessary to refer to the relevant provisions;

8. Insolvency resolution by operational creditor. –

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –

(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the payment of unpaid operational debt-

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation. – For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred

9. Together with Section 8(1) of IBC, 2016, the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, speak of Demand Notices by the Operational Creditor and applications by the operational creditor in the following terms:

5. Demand notice by operational creditor.—

(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely.- (a) a demand notice in Form 3; or (b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in subsection (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.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any

10. Thus, from perusal of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, it emerges that the Demand Notice under Section 8 of IBC, 2016 can be issued by the Operational Creditor in two formats i.e. **Form 3** and in **Form 4**. In the present case, the Operational Creditor has

preferred to send the Demand Notice to the Corporate Debtor in Form - 4 on 29.10.2019. However it is the contention of the Learned Counsel for the Corporate Debtor that the Demand Notice sent in Form 4 is invalid and incomplete. It is to be noted that whether the invoices sent by the Operational Creditor is able to prove that the 'operational debt' is due and payable by the Corporate Debtor.

11. Thus, in the present case, it is seen from the Demand Notice which is attached along with the typed set and at page 14, the Operational Creditor has attached the following documents along with the Demand Notice.

- i. Outstanding List with Interest
- ii. Purchase Orders
- iii. Invoices Raised
- iv. Export Promotion Copy.

12. On the question of pre-existing dispute between the parties, it is seen from the typed set filed along with the Applicant that a series of emails have been exchanged between the parties and that the Corporate Debtor has not raised any dispute in relation to the goods supplied by the Operational Creditor, however has only sought time to pay the outstanding amount.



13. Therefore, from the email conversation as filed in the typed set and also from the preliminary Counter and the documents on record it is manifest that the Corporate Debtor has not disputed the supply of goods nor the amount claimed, the only issue raised is "pre-existing dispute" no documents have been enclosed along with the counter in order to support the stand. However, the Corporate Debtor alleges that there exists a prior existing dispute only based on the documents / emails attached along with the application. In which no such dispute as to the goods or amount claimed is disputed, however, the issues between the parties is found to be only on the account of INR and USD currencies and related exchange rate variations..

14. In matter of Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd., the Hon'ble Apex Court held as follows:

"40. It is clear, 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 served 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 a 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 or is not spurious, hypothetical or illusory, the Adjudicating Authority has to reject the application.

15. Based on the documents in the typed set, more particularly, the balance confirmation mail by Corporate Debtor dated 29.07.2019 in Pg. No. 104 of the typed set is more than sufficient to prove the existence of the 'operational debt' and hence the contentions raised by the Learned Counsel for the Corporate Debtor in this regard are not sustainable and valid in the eye of law, there is no such pre-existing dispute and also the Demand Notice issued by the Operational Creditor does not suffer from any legal infirmities.

16. Thus taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition as filed by the Operational Creditor is required to be admitted under Section 9(5) of the IBC, 2016. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period between July - December 2021 appoints **Mr. Thilagar Murugesan**, with Reg. No. *IBBI/IPA-001/IP-P01659/2019-*

2020/12715 (email id:- mthilagar@tacas.org) as the "Interim Resolution Professional" subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

- 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;



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

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

17. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

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

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services

shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

- (3) The provisions of sub-section (1) shall not apply to
- (a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
 - (b) a surety in a contract of guarantee to a corporate debtor.

18. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

- (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

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.

19. The Operational Creditor is directed to pay a sum of **Rs.1,00,000/-** (*Rupees One Lakh Only*) to the Interim Resolution



Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond