THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)

CA No.564/2019
And
CP (IB) No. 344/Chd/Pb/2018

Under Section 9 of Insolvency and Bankruptcy Code, 2016.

In the matter of :

Bhawani Industries Private Limited,
Registered office: Village Anjali Mandi,
Gobindgarh,Fatehgarh Sahib,
Punjab-147301. …Applicant/Operational Creditor

Versus

Txlene Forge Private Limited,
having its registered office at:
Village & P.O. Ramgarh
Chandigarh Road,
Ludhiana-141123, Punjab …Respondent/Corporate Debtor

And in the matter of:

CA No.564/2019

Txlene Forge Private Limited,
Through its Director,
having its registered office at:
Village & P.O. Ramgarh
Chandigarh Road,
Ludhiana-141123, Punjab …Applicant

Vs.

1. **Bhawani Industries Private Limited,**
   Registered office: Village Ajnali,
   Mandi Gobindgarh,Fatehgarh Sahib,
   Punjab-147301. …Respondent No.1
2. **Gurbachan Pal, General Manager,**
   Bhawani Industries Private Limited,
   R/o H.No.258, Sector 21B,
   Mandi Gobindgarh,
   Punjab-147301. …Respondent No.2

3. **Jay Goyal Parkash, Managing Director,**
   Bhawani Industries Private Limited,
   R/o H.No.416, Sector 4-C,Shastri Nagar,
   Mandi Gobindgarh,
   Punjab-147301. …Respondent No.3
4. **Sarwan Goyal, Wholetime Director,**
   Bhawani Industries Private Limited,
   R/o H.No.353, Sector 5-B,Goyal Colony,
   Mandi Gobindgarh,
   Punjab-147301. …Respondent No.4

Judgement delivered on: 19.12.2019

Coram: Hon'ble Mr. Ajay Kumar Vatsavayi, Member (Judicial)
Hon'ble Mr. Pradeep R. Sethi, Member (Technical)

For the petitioner : Mr. G.S. Sarin, Practising Company Secretary

For the Corporate Debtor : Mr. Karanveer Jindal, Advocate

Per: Pradeep R. Sethi, Member (Technical)

JUDGEMENT

CP (IB) No.344/Chd/Pb/2018

The present petition is filed by Bhawani Industries Private Limited (Bhawani) under Section 9 of the Insolvency & Bankruptcy Code, 2016 (**Code**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (**Rules, 2016**) for initiation of Corporate Insolvency Resolution Process (**CIRP**) in the case of Txlene Forge Limited (**Txlene**). The application in Form 5 is signed by Shri Gurbachan Pal and his affidavit verifying the contents of the application is at page 28 of the petition. A true copy of the resolution passed in the Board meeting of Bhawani on 05.01.2018 authorising Sh. Gurbachan Pal, General Manager is at Annexure-2 of the petition.

2. The master data of Txlene is at Annexure-1 of the petition. The registered address is Village & P.O. Ramgarh Chandigarh Road, Ludhiana-141123. Therefore, the jurisdiction lies with this Bench of the Tribunal.

3. In part IV of Form No.5, it is stated that the total amount of debt is ₹37,21,453 against bill nos. 890, 1095, 2058, 50, 140,141 and 260 for the transactions during the period 27.07.2015 to 08.05.2017 against the supply of goods/materials and is still due up to 25.08.2018. The debt is stated to have fallen due from 27.07.2015 to 08.05.2017. It is stated that Txlene in response to demand notice dated 05.02.2018 vide its reply dated 24.02.2018 tried to raise dispute which in fact is moon shine, hopeless and that Bhawani has not received any notice of dispute, before the serving of the demand notice in Forms 3 and 4 and it is only after sending the demand notice, Txlene has raised the notice of dispute regarding the sub standard material supplied vide letter dated 24.02.2018 and in the notice of dispute, no supporting documents have been attached to prove the contention of Txlene.

4. In Part III of Form No.5, no Interim Resolution Professional (**IRP**) has been proposed.

5. Vide order dated 05.11.2018, notice of the petition was directed to be issued to Txlene. Reply was filed by Txlene vide Diary No.1895 dated 11.04.2019 and rejoinder thereto was filed by Diary No.3437 dated 16.07.2019.

6. We have carefully heard and considered the arguments of the learned authorised representative for Bhawani and the learned counsel for

Txlene and have also perused the record. In the reply dated 24.02.2018 to the demand notice as well as in the reply filed during the course of the present proceedings Txlene has referred to the rejection of its consignments supplied to M/s Bajaj Sons Ltd. and others because of sub standard material supplied by Bhawani in April, 2014, 28.08.2014, 01.07.2015 and April, 2017. The total rejections till date are stated to be to the tune of ₹18,60,467.10. It is stated that Bhawani is engaged in the business of providing round/square steel rods and Txlene is engaged in the business of forging the said steel rods into bridge fork bottom or any other mould as per the requirement of the client and that one of the leading customers of Txlene is M/s Bajaj Sons Ltd. It has been stated that Txlene is ISO/TS certified and therefore, the traceability of the material supplied by one vendor and its rejection by the other can be ascertained with perfection as the records are to be maintained which are verified by an independent authority before renewal of ISO/TS certificate on annual basis. It has been submitted that there is a pre-existing dispute since Bhawani had earlier sent a letter dated 26.12.2015 demanding alleged over due payments which was replied to by Txlene vide letter dated 06.01.2016 and that in response to a legal notice dated 04.03.2016 through the counsel of Bhawani, Txlene sent their reply dated 29.04.2016 through their counsel and Bhawani thereafter did not take any legal action as contemplated by the said legal notice, which shows a plausible contention which require further investigation and pre-existence of a dispute with respect to the material supplied by Bhawani. The replies submitted by Txlene are stated to contain details of rejection of goods by the customers of Txlene including Bajaj Sons Ltd. of the forged items made from the material supplied by Bhawani and the details of the rejection are similar to the details contained in the reply dated 24.02.2018 to the demand notice and the reply filed during the present proceedings.

7. During the course of the hearing, the learned counsel for Txlene has stated that the details of the rejection are at Annexure R-1 (Colly) of the reply. It has been pleaded that in view of the judgement of the Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. (2018) 1 SCC 353 and K. Kishan Vs. M/s Vijay Nirman Company Pvt. Ltd. Civil Appeal No.21825 of 2017**, the insolvency process against a corporate debtor, at least in so far as operational creditors are concerned, is to be put only in clear cases where a real dispute between the parties as to the debt owed does not exist and that the situation under the Code is that the debt does not need to be bonafide disputed.

8. The learned authorised representative for Bhawani has pleaded that Txlene is raising dispute by giving reason of the defective material supplied by Bhawani, but no relevant document has been placed on record to prove that the material was returned due to defective material supplied by Bhawani and further, no defective material has been returned back to Bhawani till date and therefore, rejection of the goods of Txlene may be for other reason. It is further pleaded that the majority of the rejected bills attached by Txlene are pertaining the period of 2014-15 and that in the present case, more than 88% outstanding and in default is pertaining to the period of 2017.

9. We find that the contention raised by Txlene is based on rejection of the supplies by Txlene to Bajaj Sons Ltd. and other parties and on the contention that the traceability of material supplied by one vendor and its

rejection by the other can be ascertained with perfection. However, Txlene has only filed true copies of some invoices at Annexure R-1(Colly) showing rejection of material by Bajaj Sons Ltd. and other concerns to Txlene. The reasons for the rejection are not available in the invoices placed at Annexure R-1(Colly). Even though the contention of Txlene is that the traceability of the material supplied by one vendor and its rejection by the other can be ascertained with perfection, no evidence has been submitted to show that the rejection by Bajaj Sons Ltd. and other customers of the Txlene is on account of defective material supplied by Bhawani. It is not contended by Txlene that the raw material is being purchased by it only from Bhawani. Therefore, the connection between the material rejected by Bajaj Sons Ltd. and other customers on the one hand and purchases from Bhawani on the other hand becomes essential. The learned counsel for Txlene has accepted that no debit notes were issued by Txlene to Bhawani in respect of the alleged rejection of raw material. The plea of the learned counsel for Txlene is that no negative inference in this regard can be drawn. We however, find from page 540 of the application that the account of Txlene in the books of Bhawani shows the following entry on 31.03.2014:-

V. Date	***V.No.***	***V. Type***	***Narration***	***Debit***	***Credit***	***Balance***
31.03.2014	*217*	*JV*	*BY PARTY'S DEBIT NOTE NO.15 DT.20.07.2013 FOR MATERIAL SHORTAGE OF 75 KGS.*		*3696*	*5535224.00 Db*

			AGST INV. NO.1120			

10. Therefore, even for a material shortage of 75 Kgs, Txlene issued a debit note to Bhawani. But for rejection of material of much higher amount, no debit note was issued.

11. The learned counsel for Txlene has referred to **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.** (*supra*). Para 40 of the judgement is as follows:-

> *"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* <u>*Section 9(5)(2)(d)*</u> *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."*

12. The facts of the present case show that before the issue of demand notice dated 05.02.2018, Txlene had sent replies by letters dated 06.01.2016 and 29.04.2016 to letter dated 26.12.2015 and demand-cum-winding up notice dated 04.03.2016 of Bhawani respectively. In the replies, reference was made by Txlene about compensation for the rejection of forgings by the buyers of Txlene due to sub standard material supplied by

Bhawani. However, even though these letters referred to rejection of material by the customers of Txlene, the connection of such rejections with the supplies from Bhawani were not brought out. We have already discussed above that despite the assertion in the reply filed during the present proceedings that the traceability of material supplied by the vendor and its rejection by the other can be ascertained with perfection, no such details to evidence the connection between the rejections by the customers of Txlene with the material supplied by Bhawani has been placed on record. We have already stated above that the invoices issued to Txlene by the customers of Txlene in respect of the goods returned do not show any reasons for the rejection. We have discussed above that no evidence of bringing the dispute to the notice of Bhawani has been filed, except for the replies dated 06.01.2016 and 29.04.2016 (*supra*). We have discussed above that no debit notes in respect of the alleged defective material have been issued by Txlene, even though there is evidence that for short supply of only 75 Kgs, a debit note was issued by Txlene on 31.03.2014. With the reply, Txlene has enclosed copies of its balance sheets as on 31.03.2015 and 31.03.2018 (Annexure R-2) but the purpose of such inclusion is not clarified.

13. We therefore, conclude that the “dispute” sought to be raised by Txlene is an assertion of fact unsupported by evidence and is spurious, hypothetical and illusory in nature. The existence of dispute truly existing in fact is not proved.

14. The learned counsel for Txlene has argued that the invoices No.890 and 1095 dated 27.07.2015 and 20.08.2015 respectively are time barred; the invoices stated to be outstanding by Bhawani already stand fully

paid and satisfied; Bhawani cannot be allowed to adjust the payment made by Txlene towards the earlier invoices and then claim the last seven invoices to be unpaid.

15. We find that Section 61 of the Indian Contract Act, 1872 provides that where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits and if the debts are of equal standing, the payment shall be applied in discharge of each proportionably. In the present case, there is no evidence that Txlene made payments either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt. Therefore, the contention of Bhawani that the payments are to be adjusted first towards the oldest debt is accepted.

16. The details of the payment due against the invoices are at Annexure-3 of the petition. The ledger account of Txlene in the books of Bhawani has been filed as Annexure A-2 vide Diary No.4281 dated 02.11.2018. The last payment received of ₹2,75,000 shown therein is by NEFT on 19.05.2017. The account is a running account in which the payments received are not identifiable to any invoice i.e. the account is a running account. Therefore, in view of Section 19 of the Limitation Act, 1963, a fresh period of limitation is to be computed from the time when the last payment was received on 19.05.2017. The petition filed is therefore, within the period of limitation.

17. During the course of the hearing, the learned counsel for Txlene has pleaded that where the case is wholly dependent on invoices, the notice

under Section 8 of the Code is to be delivered only in Form 4. In the present case, the notice under Section 8 of the Code has been sent in both Form 3 and Form 4. We note that Rule 5(1) of the Rules, 2016 requires the operational creditor to deliver to the corporate debtor a demand notice in Form 3; or a copy of an invoice attached with a notice in Form 4. However, issue of notice in both Form No.3 and Form 4 does not appear to be legally impermissible.

18. The provisions of Section 9 (5) (i) of the Code are as under:-

> *(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—*
>
> > *(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, —*
> > *(a) the application made under sub-section (2) is complete;*
> > *(b) there is no repayment of the unpaid operational debt;*
> > *(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*
> > *(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
> > *(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*

19. We find that during the course of the hearing the learned counsel for Txlene has not made any submissions that the application under Section 9(2) of the Code is incomplete. We have already discussed above that there is unpaid operational debt of ₹37,21,453; demand notice under Section 8 of the Code was delivered to Txlene; the dispute sought to be raised by Txlene is not proved to be truly existing in fact. There is no proposal for appointment

for IRP and therefore, the issue of pendency of disciplinary proceedings against the proposed IRP does not arise.

20. In view of the above discussion, we conclude that the requirements of Section 9 (5) (i) of the Code are satisfied in the present case and we admit the application for initiation of CIRP in the case of M/s Txlene Forge Private Limited. Directions for moratorium and appointment of IRP are given below.

21. We declare the Moratorium in terms of sub-section (1) of Section 14 of the Code as under:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor 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 corporate debtor 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 corporate debtor 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 corporate debtor.

22. It is further directed that 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. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

23. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

24. Under sub-section (4) of Section 9 of the Code, the operational creditor may propose the name of Resolution Professional to be appointed as Interim Resolution Professional but it is not obliged to do so. In the instant case also the operational creditor has not proposed the name of any Resolution Professional to be appointed as Interim Resolution Professional. Section 16(3)(a) of the code says that where the application for corporate insolvency resolution process is made by an operational creditor and –

> *"a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;*
> *b) xxxxx"*
>
> *Sub-section (4) of Section 16 says that the Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against 2whom no disciplinary proceedings are pending.*

25. In this regard a letter bearing File No.25/02/2019-NCLT dated 28.06.2019 has been received from the National Company Law Tribunal, New Delhi forwarding therewith a copy of letter No.IBBI/IP/EMP/2018/02 dated 24.06.2019 along with the guidelines and the panel of resolution professionals approved for NCLT, Chandigarh Bench for appointment as IRP or Liquidator. The panel is valid for six months from 01.07.2019 to 31.12.2019. We Select Mr. Arun Gupta appearing at Serial No.36 of the panel to be appointed as Interim Resolution Professional.

26. The Law Research Associate of this Tribunal has checked the credentials of Mr. Arun Gupta and there is nothing adverse against him.

27. The following directions are issued in respect of the appointment of the Interim Resolution Professional:-

i) Appoint Mr. Arun Gupta, registered insolvency professional bearing Registration No. IBBI/IPA-001/IP-P01323/2018-2019/12055; Mobile No. 9878991186; email ID: arunsapna.ca@gmail.com as Interim Resolution Professional.

ii) The term of appointment of Mr. Arun Gupta shall be in accordance with the provisions of Section 16(5) of the Code;

iii) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the Corporate Debtor;

iv) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics and moral;

v) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of

Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;

vi) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;

vii) The Interim Resolution Professional shall after collation of all the claims received against the corporate debtor and the determination of the financial position of the corporate debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the committee within seven days of filing the report of constitution of the committee; and

viii) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.

28. A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send copy of this order to the Interim Resolution Professional at his email address forthwith.

CA No.564/2019

This CA is filed by Txlene stating that Bhawani has deliberately failed to disclose the long pending pre-existing dispute between the parties and is therefore, liable to be prosecuted for an offence under Section 76 of the Code. It has been stated that the dispute between the parties was in existence since the year 2015 and communications dated 06.01.2016 and 29.04.2016, in response to letter dated 26.12.2015 demanding alleged over due payments and legal notice dated 06.01.2016 of Bhawani, established that there was sub standard material supplied by Bhawani and Txlene has already communicated the same to Bhawani. It is prayed that the present application be allowed and cognizance taken of the offence committed by the respondents No.1 to 4 under Section 76 and other provisions of the Code and pass appropriate orders/directions against the respondents thereby punishing them for the aforesaid offences.

2. Vide order dated 17.09.2019, notice of the application was directed to be issued to Bhawani. Composite reply to the application was filed by respondent Nos. 1, 2 and 4 by Diary No.5855 dated 23.10.2019 praying for dismissal of the application; admission of CP (IB) No.344/Chd/Pb/2018; punish applicant under Section 235A of the Code for the filing of frivolous application creating/fabricating the pre-existing dispute to the maximum amount of ₹2.00 crores. Rejoinder was filed by the applicant vide Diary 6267 dated 13.11.2019 stating that appropriate punishment be given to the respondents in terms of the provisions of Section 76 of the Code.

3. We have heard the learned counsel for the applicant and the learned authorized representative for the respondent. The relevant provisions of Section 76 of the Code are as under:-

> ***76.*** *Where—*
>
> *(a) an operational creditor has wilfully or knowingly concealed in an application under section 9 the fact that the corporate debtor had notified him of a dispute in respect of the unpaid operational debt or the full and final repayment of the unpaid operational debt; or*
> *(b) any person who knowingly and wilfully authorised or permitted such concealment under clause (a),such operational creditor or person, as the case may be, shall be punishable with imprisonment for a term which shall not be less than one year but may extend to five years or with fine which shall not be less than one lakh rupees but may extend to one crore rupees, or with*
> *both.*

4. We have concluded in CP IB No344/Chd/Pb/2018 that the dispute sought to be raised by Txlene is an assertion of fact unsupported by evidence and is spurious, hypothetical and illusory in nature. It was further held that the existence of dispute truly existing in fact is not proved. In view of the above conclusions, the provisions of Section 76 are not attracted.

5. CA No.564/2019 is rejected.

Pronounced in open court.

Sd/-	Sd/-
(Ajay Kumar Vatsavayi) Member(Judicial)	(Pradeep R. Sethi) Member (Technical)

December 19, 2019
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