

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 433/MB-IV/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

Darshan Roadlines Private Limited

[CIN: U40100MH2008PTC178700]

...Operational Creditor/Applicant

V/s

R.D. Engineers (India) Private Limited

[CIN: U27200MH1992PTC066672]

...Corporate Debtor/Corporate Debtor

Order Dated: 09.05.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Operational Creditor(s) : Mr. Mukesh Pabari, Advocate.

For the Corporate Debtor(s) : Mr. Ashish Verma, Advocate.

ORDER

Per: Prabhat Kumar, Member Technical

1. This is an Application being C.P. (IB) No. 433/MB/C-IV/2020 filed on 03.02.2020 by Mr. Pritesh Bharat Gandhi, Director of Darshan Roadlines Private Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code)

against R.D. Engineers (India) Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Operational Creditor has filed Board Resolution dated 23.07.2019 in support of authorization in favour of signatory of this Application authorising him to file the present company application on behalf of the Operational Creditor.
 - 2.1 The Operational Creditor has claimed a total of Rs. 1,09,29,897/- inclusive of interest @18% p.a. in the Part 4 of the Application under the Code. The debt fell due on various occasions as per the Invoices raised by the Corporate Debtor to the Operational Creditor.
 - 2.2 The Corporate Debtor had appointed Darshan Roadlines Private Limited ("DRPL") i.e. the Operational Creditor for transportation services of consignments to be sent to Punjab Lloyd Limited ("PLL") from Nasik, Maharashtra to the refinery operated by Indian Oil Corporation Limited in Haldia, West Bengal and the Operational Creditor issued various bills from 23.05.2016 to 30.03.2019.
 - 2.3 The Operational Creditor via emails sent on various occasions during the period from 23.05.2016 to 30.03.2019 requested the Corporate Debtor to repay the outstanding dues but the Corporate Debtor failed to do so. The Corporate Debtor issued various cheques to discharge the liabilities towards the services provided to it by the Operational Creditor but the same were dishonoured on 24.07.2019 and 31.07.2019 with the remark "Payment stopped by Drawer".

2.4 The Operational Creditor states that therefore, on 23.07.2019, it issued a Demand Notice in terms of Section 8 the Insolvency and Bankruptcy Code, 2016 upon the Corporate Debtor with regard to outstanding liability to the Operational Creditor which was received by the Corporate Debtor on 26.07.2019 and subsequently, on 03.08.2019, the Operational Creditor issued a notice under Sec. 138 of Negotiable Instruments Act, 1881 upon the Corporate Debtor.

2.5 The Corporate Debtor in its reply to the demand notice dated 06.08.2019 stated that the Operational Creditor, in transportation of a consignment dispatched by the Corporate Debtor on 01.06.2018, delayed the delivery of the consignment for a period for over 10 (ten) months where the expected date of delivery was around 30-40 days. On 23.03.2019 when the consignment finally reached the project site at Haldia, the Corporate Debtor was informed by PLL that the consignment was partly damaged in transit and some parts were missing and the details of such missing and damaged parts of the consignment, as received from PLL, were forwarded to DRPL. However, the Operational Creditor gave no credible explanation for such delay and damage.

2.5.1 The Corporate Debtor, on an urgent basis, manufactured the replacement parts in its Nasik factory and replaced the damaged parts of the consignment after sending a team on site in West Bengal thereby incurring expenses of about Rs. 50,00,000/- (Indian Rupees Fifty Lakhs Only) and additionally, as a result of the delay in the delivery of the consignment, PLL raised a debit note of Rs. 61,09,419 - (Indian Rupees

Sixty One Lakh Nine Thousand Four Hundred and Nineteen Only) on 27.03.2019 upon the Corporate Debtor. PLL has also revoked Bank Guarantee dated 27.04.2016 of Rs. 22,55,000/- (Indian Rupees Twenty Two Lakh Fifty Five Thousand Only) on 25.07.2019 and there is a possibility that PLL may invoke whole or part of the performance bank guarantee, amounting to Rs.1,00,00,000 (Indian Rupees One Crore Only) given by the Corporate Debtor in favour of PLL as a result of delivery of damaged equipment and the additional cost which was incurred in repairing the equipment, which were delivered damaged by the Operational Creditor. The Corporate Debtor has also suffered substantial loss of goodwill and business opportunities, which the Corporate Debtor is in the process of quantifying, due to negligent and unsatisfactory service provided by the Operational Creditor.

2.5.2 The Corporate Debtor states that on the contrary, the Corporate Debtor has a counter claim against the Operational Creditor on account of substantial loss suffered by the Corporate Debtor due to negligent and unsatisfactory service provided by the Operational Creditor amounting to Rs. 1,11,09,419/- (Rupees One Crore Eleven Lakhs Nine Thousand Four Hundred and Nineteen Only), without even taking into account the legal expenses the Corporate Debtor undertaking to defend itself and the reputational damage that the Company has suffered.

- 2.5.3 The Corporate Debtor states that it is not liable to pay anything to the Operational Creditor. On the contrary, the Corporate Debtor has a counter claim against the Operational Creditor on account of substantial loss suffered by the Corporate Debtor due to unsatisfactory service provided by the Operational Creditor.
3. The Corporate Debtor in its reply dated 13.07.2022 to the present petition stated that believing the assurances made by the Operational Creditor to safely deliver the "Rich Amine Flash Drum" within a period of 1 to maximum 3 months from the Corporate Debtor's facility at Sinnar, Nashik to IOCL, Haldia, the Corporate Debtor placed a Purchase Order dated 29/05/2018 for an amount of Rs. 53,00,000/- (Rupees Fifty-Three Lakhs Only) upon the Operational Creditor as was agreed between the parties. The Corporate Debtor further states that the Operational Creditor illegally stopped the transit of the consignment and demanded for an additional Rs. 10,00,000/- to deliver the consignment to IOCL, Haldia. The Operational Creditor employed illegal tactics to extort money from the Corporate Debtor. The Corporate Debtor under the tremendous pressure from Punjab Lloyd Limited and IOCL to deliver the consignment agreed to the illegal demands of the Operational Creditor and issued a revised purchase order dated 18/03/2019 for an amount of Rs.63,00,000/- (Rupees Sixty Three Lakhs Only). The Operational Creditor delivered the consignment on 26/03/2019, after an inordinate and extravagant delay of almost 10 months. The Corporate Debtor states that Punjab Lloyd Limited not only raised the aforesaid debit note for Rs.61,09,419/- (Rupees Sixty One Lakhs Nine Thousand Four Hundred and Nineteen Only) upon the Corporate Debtor, but also proceeded to encash two bank guarantees of Rs.22,55,000/- (Rupees Twenty Two Lakhs Fifty

Five Thousand Only) each, total amounting to Rs.45,10,000/- (Rupees Forty Five Lakhs Ten Thousand Only) for the excessive delay in delivery.

3.1 The Corporate Debtor stated that Operational Creditor with further mala fide intentions withheld the information of damage in transit to "Rich Amine Flash Drum" and it was only brought to the notice of the Corporate Debtor when Punjab Lloyd Limited upon receipt of the delivery of "Rich Amine Flash Drum" inspected the same and found it in a damaged condition with some components even missing. Punjab Lloyd Limited sent email correspondences with photographs of the damaged components to the Corporate Debtor with regards to the damage to "Rich Amine Flash Drum" delivered by the Operational Creditor.

3.2 The Operational Creditor has also filed legal proceedings against the Corporate Debtor before the Micro Small Enterprises Facilitation Council (Hereinafter referred to as "MSEFC") under the provisions of MSMED Act, 2006 for recovery of an alleged amount of Rs. 98,22,768/- (Rupees Ninety-Eight Lakhs Twenty-Two Thousand Seven Hundred and Sixty-Eight Only) from the Corporate Debtor based on same alleged cause of action that has been taken by the Operational Creditor in the present suit, which is evident from the notice dated 18/09/2021 issued by the MSEFC to the Corporate Debtor. The Corporate Debtor further states that it most pertinent to note that while the amount claimed by the Operational Creditor in the present petition is Rs. 1,09,29,897/- (Rupees One Crore Nine Lakhs Twenty-Nine Thousand Eight Hundred and Ninety-Seven Only), the Operational Creditor has only claimed an amount of Rs.

98,22,768/- (Rupees Ninety-Eight Lakhs Twenty-Two Thousand Seven Hundred and Sixty-Eight Only) against the Corporate Debtor before the MSEFC, despite the said claim being filed by the Operational Creditor at a later stage in the year 2021, making it further apparent that two separate amounts are being claimed by the Operational Creditor in two separate proceedings filed based on same cause of action.

- 3.3 The Corporate Debtor further states that it addressed and served a legal notice dated 18/10/2021 against the Operational Creditor for a claim of Rs. 1,34,80,000/- (Rupees One Crore Thirty-Four Lakhs Eighty Thousand Only) which is greater than the claim of the Operational Creditor and the Corporate Debtor further plans to file a counter-claim for the said amount against the Operational Creditor in the MSEFC proceedings initiated by the Operational Creditor. The Operational Creditor replied to the notice dated 18/10/2021 on 08/11/2021 and a bare perusal of this reply in itself establishes the existence of several pre-existing disputes between the Operational Creditor and the Corporate Debtor.
4. The Corporate Debtor has filed an Additional Affidavit dated 14.03.2023 pursuant to the directions given by this court in the order dated 16.02.2023. Vide the said Affidavit, the Corporate Debtor has placed on record the order dated 18.09.2021 passed by the MSFC dismissing the claim application filed by the Operational Creditor and the details of Commercial suit No. 246/2022 filed at the Hon'ble Bombay High Court and a counter claim to such claim filed by the Corporate Debtor bearing No. 38973/2022.
5. We have carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

- 5.1 On perusal of records, this Bench finds that there are claims of Corporate Debtor for damages caused to it on account of deficient service on the part of the Operational Creditor. The Corporate Debtor had received an email dated 26.07.2019 from PLL clarifying that they have issued a debit note for Rs.61,09,419/- (Rupees Sixty One Lakhs Nine Thousand Four Hundred and Nineteen Only) upon the Corporate Debtor and later also proceeded to encash two bank guarantees of Rs.22,55,000/- (Rupees Twenty Two Lakhs Fifty Five Thousand Only) each, aggregating to Rs.45,10,000/- for inordinate delay of 10 months for delivery due to which it suffered a huge loss. The Corporate Debtor also states that it had to urgently manufacture the replacement parts in its Nasik factory and replace the damaged parts of the consignment by sending a team on site in West Bengal, for which it incurred expenses of about Rs. 50,00,000/-. The Corporate Debtor filed a reply dated 06.08.2019 to the Demand Notice issued upon it by the Operational Creditor through which it raised a dispute on the abovementioned grounds relating to the outstanding dues.
- 5.2 On perusal of the documents available on record, it is noticed that Operational Creditor has previously filed application for recovery of claims before Micro and Small Felicitation Council which was dismissed vide an order dated 18.09.2021 and suit for recovery before the Hon'ble Bombay High Court, which is pending till date. The amount claimed under each case is different despite pertaining to the same cause of action.
- 5.3 It is trite law that an Application under Section 9 of the Code cannot be admitted in relation to disputed debt as held by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited*.

- 5.4 This Bench is of the considered view that the Corporate Debtor vide email dated 27.03.2019 had sought for explanation from the Operational Creditor in relation to delivery of material in damaged condition. This fact is further confirmed from a letter dated 08.08.2019 from the Operational Creditor to its transport agent seeking explanation for the damaged delivery and asking it to pay the amount stated in the damage claim notice from the Corporate Debtor. Further, the Corporate Debtor in its reply to the Demand notice dated 06.08.2019 notified the existence of dispute and raised a counter claim of Rs. 1,11,09,419/- as indemnification of the amount claimed by PLL from the Corporate Debtor. The Demand notice was issued on 23.07.2019 and the fact of existence of dispute is borne out from evidences pertaining to period prior to the date of demand notice. In light of the facts available on record, there is no doubt that there existed a dispute in relation to the debt claimed in default. Further, this Bench feels that act of filing multiple cases before different forums is another step in series of its action to recover the dues, alleged to be payable by the Corporate Debtor and indicates that the Operational Creditor has attempted to go forum shopping with an intention to recover the dues payable to it by the Corporate Debtor which is contrary to the intent and object of the Insolvency and Bankruptcy Code, 2016.
- 5.5 In view of the above, we find that the present case is fit for dismissal under Section 9(5)(ii)(d) read with Section 8(2)(a) and Section 5(6) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties with respect to the purported claims and counter-claims of both the parties, which requires adjudication which is beyond the powers vested in this Bench in proceedings

arising from an application filed under sec. 9 of the code and deserves to be dismissed.

ORDER

6. This Application being C.P. (IB) No. 433/NCLT/MB/C-IV/2020 filed under Section 9 of I&B Code, 2016, filed by Darshan Roadlines Private Limited, Operational Creditor/ Applicant against R.D. Engineers (India) Private Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed**.
7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
/LRA Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)