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IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR (COURT NO. I)

CORAM: DR. POONDLA BHASKARA MOHAN,
HON'BLE JUDICIAL MEMBER

SHRI RAGHU NAYYAR,
HON'BLE TECHNICAL MEMBER

Company Petition No. (IB)-93/9/JPR/2018

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule
6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority)
Rules, 2016

IN THE MATTER OF:

Mrs. KANCHAN OSTWAL,
Sole Proprietor of M/s J.K. ELECTRICAL

...Operational Creditor/Applicant

VERSUS

MEC SHOT BLASTING EQUIPMENT
PRIVATE LIMITED

...Corporate Debtor/Respondent

Mrs. Kanchan Ostwal Sole Proprietor of M/s J.K. Electrical
Versus
Mec Shot Blasting Equipment Pvt. Ltd.



For the Applicant:

Vimla Rupani, PCS
Praveen Kumar Sharma, PCS

For the Corporate Debtor: Anurag Kalavatiya, Adv.
Akansha Noval

MEMO OF PARTIES

Mrs. Kanchan Ostwal,
Sole Proprietor of M/s J.K. Electrical
Office At: - 32, Baktawarmalji ka Bagh, Chopasani
Road, Jodhpur, Rajasthan (342003)

...Operational Creditor/Applicant

VERSUS

MEC SHOT BLASTING EQUIPMENT PRIVATE LIMITED
Registered Office at: E- 279, Marudhar Industrial Area,
Phase II, Jodhpur, Rajasthan (342005)

...Corporate Debtor/Respondent

Mrs. Kanchan Ostwal Sole Proprietor of M/s J.K. Electrical
Versus
Mec Shot Blasting Equipment Pvt. Ltd.



Order Pronounced On: 18.09.2019

ORDER

1. The present application is filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'Code, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mrs. Kanchan Ostwal, Sole Proprietor of M/s J.K. Electrical (for brevity 'Applicant') claiming to be an operational creditor with a prayer for initiation of Corporate Insolvency Resolution Process against Mec Shot Blasting Equipment Private Limited (for brevity "Corporate Debtor").
2. The Applicant is the Sole Proprietor of M/s J.K. Electrical. The PAN No. of Applicant is AAAP04480A and her address is at 32, Baktawarmalji ka Bagh, Chopasani Road, Jodhpur- 342003 (Rajasthan).
3. The Corporate Debtor is a Private Limited Company, incorporated under the provisions of Companies Act, 1956 on 09.08.1990, duly registered with Registrar of Companies, Jaipur having CIN: U29299RJ1990PTC005537, and its Registered Office is located at E- 279, Marudhar Industrial Area, Phase II, Jodhpur, Rajasthan (342005). The Authorized share capital of the Corporate Debtor is Rs.4,00,00,000/- and Issued, Subscribed and Paid up share capital of the company is Rs. 3,91,50,000/-.

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4. It is the case of the applicant that the applicant has supplied motors and switchgears to the Corporate Debtor as per the Purchase Order placed by the Corporate Debtor during 2011. The applicant had raised 27 invoices from 26.04.2011 to 16.07.2011 for the total amount of Rs.53,65,668/- against the Purchase Order. The copies of Purchase Order and invoices are annexed as Annexure B. When the debt became due, the applicant stopped supplying further goods and demanded dues through various emails and letter dated 20.06.2012 but no payment was made. Thereafter the corporate debtor approached the applicant to supply the goods against advance payment of goods and assured payment of old dues. On such negotiation the applicant started supplying goods to the corporate debtor against advance payment of each invoice. But despite the same the corporate debtor did not pay the old dues.
5. The corporate debtor through letter dated 30.01.2016 issued 97 cheques of Rs. 81,000/- each and one cheque of Rs. 1,104/- in total amounting to Rs. 78,58,104/- to the applicant. Out of such 97 cheques, 16 cheques were honoured and cleared in total amounting to Rs. 12,16,104/- and 30 cheques were dishonoured. Thereby the applicant has taken legal action under section 138 of Negotiable Instrument Act, 1881 against corporate debtor for dishonour of 24 cheques and received Rs. 3,24,000/- before filling of this application and Rs. 81,000/- after filling this application. The corporate



debtor has paid through NEFT between November 2016 and February 2017 a total amount of Rs. 4,86,000/- to the applicant.

6. It is further seen from the annexed emails that the corporate debtor has requested the applicant to not to present cheques of Rs. 81000/- prior to clearing of pending cheques. Therefore, applicant has not presented 48 cheques to the banker and they become time barred. Thus, the applicant issued a notice under Section 8 of the Insolvency and Bankruptcy Code demanding an amount of Rs. 53,65,668.74/- on 16.11.2018 on the Corporate Debtor, which was returned as undelivered to the applicant with remark "Refused Return to Sender". Copy of the cover with remark is annexed. Thereafter the applicant has sent Section 8 notice through email dated 21.11.2018 to the corporate debtor but the Corporate Debtor has neither replied to the Demand Notice nor raised any dispute of the unpaid Operational Debt. Thus, the applicant filed the present application under section 9 of Insolvency and Bankruptcy Code, 2016.
7. In Part-IV of the present application, the Operational Creditor has given the details of the total amount of the Operational debt and the transactions on account of which the debt fell due:



PART IV

Sr. No.	Particulars of Operational Debt	
1.	Total amount of debt	Rs. 1,24,25,009.01
2.	Amount claimed to be in default and the date on which the default occurred	The Corporate debtor is required to make payments to the applicant in lieu of 27 invoices raised by the applicant after ending the credit period and stipulated in the respective purchase orders. All the 27 invoices remain unpaid.

8. It is seen from the records that on 08.03.2019 the counsel for the Corporate Debtor represented that there is pre-existing dispute by way of a suit for permanent injunction bearing C.O. No. 153/2018 as between the Applicant and Corporate Debtor pending before the Civil Court and also filed an affidavit along with the copy of the plaint and Order sheets. On perusal of the plaint it is seen that the Applicant has prayed that the Defendant should be prohibited by permanent injunction that it may not dispense with or dispose of the properties of MEC SHOT BLASTING EQUIPMENT PVT. LTD in favor of any person, institute nor sale or transfer any property of the Company in name of any person”.

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9. The Corporate Debtor has filed an affidavit vide Dairy No. 1280/2019 along with copy of reply filed in C.O. No. 153/2018 and submitted that the above-mentioned suit bearing C.O. No. 153/2018 is filed by Applicant Company on 15.11.2018 involving the same subject matter before the Civil Judge and Metropolitan Magistrate No. 1, Jodhpur, a day before issue of notice in Form-3 under IBC, 2016 and that there is pre-existing dispute between the parties as defined under Section 5(6) of the Insolvency and Bankruptcy Code, 2016.
10. The Applicant has filed a reply to the Corporate Debtor's Affidavit vide Dairy No. 1418/2019 and submits that Corporate Debtor has submitted the reply in the Civil Court after four months of filling the Application under Section 9 of IBC, 2016. It is also submitted that the Corporate Debtor has not raised any dispute within 10 days of receipt of Demand Notice under Section 8 of IBC, 2016. It is further submitted that the subject matter of the Civil Suit and of the Application filed under the IBC, 2016 are totally different.
11. The Applicant has filed Written Arguments on 11.09.2019 and submits that the Application filed by the Applicant is complete in all respects, and the claim amount exceeds Rs. 1,00,000 and demand notice was properly served. It is further submitted that despite being given numerous opportunities by this Tribunal, the Corporate Debtor has not filed any reply. The Corporate



Debtor has acknowledged the outstanding amount of Rs. 78,58,104/- vide letter dated 30.01.2016 to the Applicant and had also issued 98 cheques toward the payment of outstanding amount. Thus, the Applicant submits that the Application is well within limitation period. The Applicant further submits that the goods were supplied earlier and the Corporate Debtor did not raise any dispute as to quality of goods before, nor there is any breach of representation or warranty and therefore there is no pre-existing dispute. The Applicant also submits that the plea of the Corporate Debtor regarding pendency of Civil Suit is not maintainable as the said civil suit was filed on the apprehension that the Corporate Debtor is disposing off the property with intent to defraud its creditors and the said apprehension arose when the Applicant saw Public Notice in "Danik Bhaskar" Newspaper dated 07.01.2018 regarding sale of one of the properties of the Corporate Debtor.

12. The Corporate Debtor has filed written Arguments on 13.09.2019 and submits that prior to receipt of Demand Notice under Section 8, the Applicant has filed Civil Suit bearing C.O. No. 153/2018 captioned M/s J.K. Electricals versus Mec Shot Blasting Equipment Private limited & Ors. pertaining to permanent injunction on 15.11.2018. The Corporate Debtor further submits that the affidavit filed by the Applicant under Section 9 (3) (b) along with the Application under Section 9 of IBC, 2016 concealed the fact pertaining to the existence of a pre-existing dispute.



13. The learned counsel for both the parties advanced detailed arguments. The point to be considered for discussion is "Whether the dispute as raised by the Corporate Debtor is genuine or can be categorised as moonshine dispute":

(a) Section 5 (6) of the Insolvency and Bankruptcy Code, 2016 defines the term Dispute as under:

"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;

(b) As seen from above the Corporate Debtor has acknowledged the debt by letter dated 30.01.2016. Despite being given enough opportunity the Corporate Debtor has not filed reply. It is seen that Civil Suit bearing no. 153/2018 filed by the Applicant on which the Corporate Debtor has relied is for Permanent injunction and the Applicant has prayed in the said civil suit that the Corporate Debtor be prohibited from selling his property. The said civil suit is not in respect of claim as to recovery of amount of debt. The corporate debtor has nowhere stated or objected/ disputed the invoices or its contents. The defence raised of dispute is lame and without any supporting evidence can be categorised as moonshine dispute.



- (c) Further the Hon'ble Supreme Court in the matter of "Mobilox Innovative Private Limited vs. Kirusa Software Private Limited", held as follows:

"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."



In the given case there is no proof that a dispute exists relating to the subject matter of this Application.

- (d) In the matter of **Topsgrup Services Ltd. Versus BLS IT-Services (p.) Ltd.** in IB -602/ND/2017, the Hon'ble NCLT, New Delhi held as follows:

“Respondent has taken the stand that there is existence of dispute with respect to the debt and demand in question. There has been no clear communication of dispute to the applicant about deficiency in services. No damage/counter claim has been lodged. No arbitration and/or legal proceedings in the matter are pending. When there is absolutely no document or particulars to support the claim of existence of dispute, the mere claim of dispute that rose in the reply given belatedly after issue of notice u/s 8 of IBC and in the pleadings in defence can be termed as motivated to evade the liability and thus, dismissed.”

Thus, the above observations support the finding arrived at that the belatedly raised dispute without establishing nexus and relevance cannot be termed as genuine dispute.

14. The registered office of Corporate Debtor is situated in Jodhpur and therefore this Tribunal has jurisdiction to entertain and try this application.

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15. Section 25 of Indian Contract Act, 1872 provides as follows:

Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law - An agreement made without consideration is void, unless –

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless.

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.

(3) it is a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay wholly or in part debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.

Explanation 1 : Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.



Explanation 2 : An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

16. Though the invoices were raised in 2011 but the Corporate Debtor has acknowledged its debt vide letter dated 30.01.2016 and issued cheques in lieu of payment of the debt. Irrespectively, despite such acknowledgement of debt by issuance of cheque towards admitted outstanding amount as a matter of fact, even considering the law in terms of Section 25(3) of the Indian Contract Act, 1872 the matter is within the purview of Law of Limitation.
17. In the given facts and circumstances, the present application is complete and the Applicant is entitled to claim its dues, establishing the default in payment of the operational debt beyond doubt. In the light of above facts and records the present application deserves to be admitted and this application is admitted.
18. The Applicant has not proposed the name of any Interim Resolution Professional. In view of the same, this Tribunal appoints Mr. Anoopkumar Goyal having Registration No. IBBI/IPA-001/IP-P00563/2017-18/11039 and email address doctor.anoop@gmail.com and contact number

9820291680, as the IRP of the Respondent. The IRP is directed to take all such steps as are required under the statute, inter-alia in terms of Sections 15,17,18,19,20 and 21 of the Code.

19. The consequences of initiation of CIRP shall be inter alia are as follows: -

- (i) The Resolution Professional Mr. Anoopkumar Goyal, having Registration No. IBBI/IPA-001/IP-P00563/2017-18/11039 is hereby appointed as the Interim Resolution Professional (IRP) to take over the affairs of the Corporate Debtor and duties as required to be performed by him under the Provisions of IBC, 2016, including issue of publication in widely circulated newspapers as contemplated under the Provisions of IBC, 2016 and calling for the claims from the creditors of the Corporate Debtor and collating of the same shall be done.
- (ii) Further as a consequence of admission, moratorium as envisaged under Section 14 of IBC, 2016 is invoked in relation to the Corporate Debtor which will be in vogue during CIRP of the Corporate Debtor. The IRP shall carry out Corporate Insolvency Resolution Process strictly as per the timelines specified and as envisaged under the Provisions of IBC, 2016 in relation to the Corporate Debtor.
- (iii) The said IRP shall act strictly in compliance with the provisions of IBC, 2016. With a view to defray his expenses to be incurred and fees on account, the Operational Creditor is directed to deposit a sum of Rs.



2,00,000/- (Two Lakh only) to the account of IRP within 3 days from the date of this order. The IRP shall duly file the status report appraising this Tribunal about the progress of CIRP unfolded in relation to the Corporate Debtor. In terms of Sections 17 and 19 of IBC, 2016 all personnel of the Corporate Debtor including its promoters and Board of Directors, whose powers shall stand suspended will extend all cooperation to the IRP during his tenure as such and the management of the affairs of the Corporate Debtor shall vest with the IRP.

- (iv) In terms of Section 9 of IBC, 2016 a copy of this order shall be communicated to the Operational Creditor, Corporate Debtor as well as the Interim Resolution Professional appointed by this Tribunal to carry out the CIRP at the earliest not exceeding one week from today. A copy of this order shall also be communicated to IBBI for its records.

In the circumstances this Application is admitted.

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**SH. RAGHU NAYYAR,
MEMBER (TECHNICAL)**

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**DR. POONDLA BHASKARA MOHAN
MEMBER (JUDICIAL)**