

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

C.P. (IB) No.79/BB/2018  
U/s 9 of IBC, 2016  
R/w Rule 6 of I&B (AAA) Rules, 2016

**In the matter of:**

M/s. KEC International Limited  
'RPG House', 463,  
Annie Beasant Road, Worli,  
Mumbai – 400 030. - Petitioner/Operational Creditor

**Versus**

M/s. Delton Electric Switchgears Pvt. Ltd.  
Regd. Off: No.63/3, 3<sup>rd</sup> Floor,  
'Arham Towers', A.K. Colony,  
Off. K.R. Road, Jayanagar 7<sup>th</sup> Block,  
Bengaluru – 560 082. - Respondent/Corporate Debtor

**Date of Order: 18<sup>th</sup> July, 2019**

**Coram:** 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)  
2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

**Parties/Counsels Present:**

For the Petitioner : Shri P. Bharath  
For the Respondent : Shri Vivek B.R.

**ORDER**

**Per:** Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.79/BB/2018 is filed by M/s. KEC International Limited ('Petitioner/Operational Creditor') under Section 9 of the IBC, 2016 read with Rule 6 of the I&B (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Delton Electric Switchgears Private Limited ('Respondent/Corporate Debtor') on the



ground that it has committed default for a total outstanding amount of Rs.68,95,846/- (Rupees Sixty Eight Lakhs Ninety Five Thousand Eight Hundred and Forty-Six Only) as on 06.12.2017.

2. Brief facts of the case, as mentioned in the Company Petition as well as Synopsis of the Petition filed by the Petitioner, are as follows:

(1) M/s. KEC International Ltd. ('Petitioner/Operational Creditor') is a Public Limited Company incorporated on 18.03.2005 under the Companies Act, 1956 with CIN: L45200MH2005PLC152061 and having its registered office at 'RPG House', 463, Dr. Annie Beasant Road, Worli, Mumbai-400030. The Company is engaged in the business of manufacture and supply of power cables and various allied cable products.

(2) M/s. Delton Electric Switchgears Private Limited ('Respondent/Corporate Debtor') is a Private Limited Company incorporated on 23.09.2008 under the Companies Act, 1956 with CIN: U32100KA2008PTC047827 and having its registered office at No.63/3, 3<sup>rd</sup> Floor, 'Arham Towers', A.K. Colony, Off. K.R. Road, Jayanagar 7<sup>th</sup> Block, Bengaluru-560082. The Authorised Share Capital of the Company is Rs.10,00,000/- (Rupees Ten Lakhs Only) and the Paid-up Share Capital of the Company is Rs.9,95,000/- (Rupees Nine Lakhs Ninety-Five Thousand Only).

(3) It is stated that the Petitioner has supplied the Corporate Debtor LT cables as per the specifications provided by the Corporate Debtor vide Purchase Order No. DESPL/PO/0009/11-12 and Purchase Order No. DESPL/PO/0010/11-12 dated 31.03.2012. Accordingly, the Petitioner supplied the aforementioned cables to the Respondent at its premises 45/1, Uttarahalli Main Road, Subramanyapura Post, Bangalore-560061. On fulfilment of this order according to the

specifications provided by the Corporate Debtor, the Operational Creditor raised six distinct invoices for the LP cables supplied to the Corporate Debtor. The Corporate Debtor, pursuant to these invoices raised by the Operational Creditor, was liable to pay Rs.62,66,840/- (Rupees Sixty-Two Lakhs Sixty-Six Thousand Eight Hundred and Forty) within thirty days from date of invoice, failing which the Corporate Debtor would be liable to pay interest at 18% p.a. from the date of invoice till amount due is fully realized, which until this day has not been paid to the Petitioner.

- (4) It is stated that the Respondent between 28.12.2012 and 16.11.2013 had made part payments of Rs.33,85,557/- sporadically well outside the time period stipulated to make payments for these invoices. Subsequent to 16.11.2013, the Respondent has failed to make any efforts to make full payments even after repeated reminders from the Operational Creditor through emails and letters dated 10.03.2014, 19.08.2014, 19.11.2014, 19.08.2015, 21.09.2015, 26.10.2015, 27.10.2015 and 12.06.2016. The principal balance amount the Corporate Debtor needed to pay stood at Rs.28,81,283/- and in addition also incurred an interest of Rs.40,14,563/- at 18% p.a. from the date of invoice till 06.12.2017, in total the Corporate Debtor is liable to pay Rs.68,95,846/- as of 06.12.2017. Aggrieved by this conduct of Respondent, the Petitioner even issued notice for winding up under Section 271 of the Companies Act on 15.03.2017 and subsequently, issued statutory demand notice dated 06<sup>th</sup> December, 2017.
- (5) It is stated that the Respondent had acknowledged its liability to the Petitioner at two instances 20.11.2014 and 21.09.2015, Respondents acknowledged the outstanding due with the remarks *"As per our books of account the balance is*



Rs.28,59,900/-” in both these instances. It is contended that the case is not barred by laches and limitation as contended by the Respondent since the last transaction between the Respondent and Petitioner was happened on 16.11.2013 and the Petitioner had made subsequent communication through emails and letters two of which were even acknowledged by the Respondent. Section 18 of the Limitation Act, provides “18. Effect of acknowledgement in writing – (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.”

- (6) It is stated that the Respondent had provided acknowledgement of the due amount twice first on 20.11.2014 for which the limitation period would end on 20.11.2017 and second acknowledgement on 21.09.2015 for which the limitation period ends on 21.09.2018 whereas this Application is filed on 13.03.2018. Further, the Hon’ble NCLAT in *Engin Nasiroglu and Ors. v. RVR Projects Pvt. Ltd.* (MANU/NL/0339/2018) reiterating Hon’ble Supreme Court’s judgment in *Valliamma Champaka Pillai v. Sivathanu Pillai and Others* (MANU/SC/0379/1979: (1979) 4 SCC, which stated the essential requirements for valid acknowledgement under Section 18 of the Limitation Act is that the writing concerned must contain admission of subsisting liability. In the present Petition, the Respondent replied with a reply saying “As per our books of account the balance is Rs.28,59,900/-” which is admission of subsisting liability

clearly showing a valid acknowledgement and thus the Petition is well within the period of limitation.

- (7) It is also stated that M/s. Shiraguppi Sugar Works Limited, which is brought in by the Respondent in the instant case is wholly irrelevant and has absolutely no bearing on the instant Company Petition.
3. The Respondent has opposed the Company Petition by filing the Statement of Objections dated 13.07.2018, by inter alia contending as follows:
- (1) It is stated that the instant Petition filed by the Operational Creditor/Applicant is a gross abuse of the IBC, 2016. The Operational Creditor has not come to this Tribunal with clean hands and has filed the instant Petition with the sole motive of arm-twisting the Corporate Debtor into making payments not lawfully due to the Operational Creditor. On this ground alone, the instant Petition deserves to be dismissed with heavy costs.
- (2) It is stated that the Operational Creditor had only annexed three Invoices (bearing No.77, 51 and 64 produced at pages 22 to 29 of the Petition) to their Demand Notice issued under the Code, however the Operational Creditor in the present Petition is claiming alleged payments due for as many as 6 (Six) Invoices. It is stated that this gross mis-match between the Demand Notice and the present insolvency Petition are fatal defects and, on this ground, as well, the present Petition deserves to be dismissed.
- (3) It is further stated that the present Petition is filed in respect of a claim being made by the Operational Creditor for goods delivered to the Corporate Debtor in March-April, 2012. The transaction between the parties was concluded in April, 2012 and the Operational Creditor, after making no claims or



demands for a period of more than 6 (six) years, is now seeking to recover the dues allegedly payable to it in respect of the transaction that took place in March-April, 2012. There is a gross and severe delay in making such a claim, and hence, the present Petition blatantly and obviously suffers from the defect of delay and laches. No explanation whatsoever is forthcoming from the Operational Creditor as to any steps it has taken in the preceding 6 (six) years to recover the dues allegedly payable to it.

- (4) It is also stated that on certain occasions, the Operational Creditor had directly dealt with the purchaser namely M/s. Shiraguppi Sugar Works Limited ('SSWL') and the Corporate Debtor was merely acting as an intermediary. There were many meetings held between the Operational Creditor, Corporate Debtor and SSWL in order to discuss about the terms of supply and payment. In one such meeting held on 03.11.2011, in the presence of the Operational Creditor, Corporate Debtor and SSWL, it was agreed that the Operational Creditor would deliver the materials and the invoices would be raised on the Corporate Debtor, which in turn would raise invoices on SSWL. It is stated that SSWL was required to make payments to the Corporate Debtor based on the said arrangement.
4. Heard Shri P. Bharath, learned Counsel for the Petitioner and Shri Vivek B.R., learned Counsel for the Respondent. We have carefully perused the pleadings of both the parties along with extant provisions of the Code and Law on the issue as relied upon by the parties.
5. Shri P. Bharath, learned Counsel for the Petitioner, while pointing out various averments raised in the Company Petition and also in the



Synopsis, has further submitted that even though the claim arises out of the transactions made in the year March-April, 2012, they are in continuous correspondence with the Respondent and this they have also admitted and acknowledged their liability in the year 2014. Therefore, the application is filed in accordance with law and the debt and default is proved beyond doubt and there is no disputed raised by the Respondents and thus Petition is eligible to be admitted by initiating CIRP against the Corporate Debtor.

6. Shri Vivek B.R., learned Counsel for the Respondent, on the other hand, while reiterating various averments made in the statement of objections, as briefly stated supra, has further submitted that the claim is barred by laches and limitation and they have also submitted that the transaction in question is basing on the back to back arrangement for payment and the Respondent is merely acting as an intermediary for the transactions made with the Petitioner subject to Commission.
7. It is not in dispute that the cause of action arises against the Purchase Order dated 31.03.2012 and the same is only between the Petitioner and the Respondent and there is no third party involved in this Purchase Order as contended by the Respondent. The Purchase Order has clearly mentioned the payment period as '*30 (Thirty) days PDC*'. So basing on this Purchase Order dated 31.03.2012 bearing No.DESPL/PO/0009/11-12, Revised Purchase Order bearing No.DESPL/PO/0010/11-12 dated 31.03.2012, they have issued invoices (from page 33 to 46 of the Company Petition). Therefore, as per Purchase Order, there is no reference of interest. The invoices show, as per the Purchase Order, the payment has to be made within 30 (Thirty) days PDC and for invoices starting from 10.04.2012 till 05.05.2012, the payments have to be made maximum by the end of June, 2012. The Petitioner has not placed on record about the steps



taken to recover the outstanding amount except merely averring that the respondent has acknowledged the debt as stated to have acknowledged by the Respondent in the year 2014. Therefore, he has got issued a legal notice only on 06.12.2017 by calling upon the Corporate Debtor to pay the outstanding amount of Rs.68,95,846/- consisting of Rs.28,81,283/- being Principal amount and Rs.40,14,563/- being Interest amount. It is not in dispute that there is no contract between the Petitioner and the Respondent as per the Purchase Orders with regard to the payment of interest, and secondly, it is also not in dispute that the Petitioner itself has agreed that out of the total outstanding amount of Rs.68,95,846/-, the Respondent has paid part payment for an amount of Rs.33,85,557/- Therefore, the remaining principal amount is Rs.28,81,283/-. However, the Petitioner has added interest of Rs.40,14,563/- basing Interest Act, 1978. However, a commercial transaction starts on execution of Purchase Order followed by Invoice(s). Therefore, terms and conditions contained in the Purchase Order is basis to claim.

8. Moreover, admittedly the cause of action arises in the case in the year 2012, and it ends in June, 2012. However, the Petitioner has not taken any action except stating that they were corresponding with the Respondent. The Petitioner has not initiated any action except issuing notice for winding up under Section 271 of the Companies Act on 15.03.2017 and another statutory demand notice dated 06<sup>th</sup> December, 2017. The Petitioner has not initiated any winding up proceedings.
9. The requisite conditions to initiate in an application/petition filed U/s 9 of the Code are debt and default and no dispute. In the instant case, the alleged outstanding amount itself is not established, as it consists of alleged principal and interest for invoices issued in the year 2012. Therefore, the amount itself is disputed. The Petitioner



failed to substantiate the debt which are based on the invoices relates to the year 2012. Moreover, the Petitioner failed to take any legal action on the alleged outstanding amount till filing of the present case. It is also settled position of law that the provisions of the Code cannot be invoked to recover the alleged outstanding amount and the Adjudicating Authority cannot enter into roving enquiry in summary proceedings initiated under the Code and the law of limitation applies for the provisions of Code. We are not convinced with the reasons cited by the Petitioner that the case is within limitation.

10. It is a settled position of law that the provisions of Code cannot be invoked for recovery of outstanding amount but it can be invoked to initiate CIRP for justified reasons as per the Code. The Hon'ble Supreme Court in the case of *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*<sup>1</sup>, has inter alia, held that IBC, 2016 is not intended to be substitute to a recovery forum. The Hon'ble Supreme Court in *B.K. Educational Services Pvt. Ltd. Vs. Parag Gupta and Associates*<sup>2</sup>, has, inter alia, held that provisions of Limitation Act will apply to proceedings or appeals before NCLT/NCLAT. Section 238A of the Code make provisions of Limitation Act would apply to proceedings under the Code. In another latest judgement rendered in *Transmission Corporation of A.P. Ltd. Vs. Equipment Conductors and Cables Ltd.*,<sup>3</sup> Supreme Court of India, it is, inter alia, held that existence of undisputed debt is sine qua non of initiating CIRP. As per para 34 of judgement, it is stated that Adjudicating Authority, while examining an application filed under Section 9 of Code, will have to determine:

- i. Whether there is an 'operational debt' as defined exceeding Rs.1 Lakh?

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<sup>1</sup>(2018) 1 SCC 353

<sup>2</sup>(2018) SCC Online SC 1921

<sup>3</sup>(CA No.9597 of 2018) dated 23rd October, 2018, (2018) 147 CLA 112 (SC)

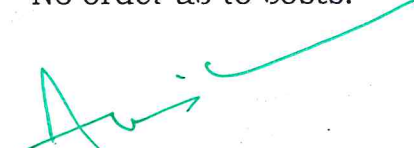


- ii. Whether documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?
- iii. Whether there is existence of dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before receipt of demand notice of the unpaid operational debt in relation to such dispute?

If any one of aforesaid conditions is lacking, the application would have to be rejected.

11. In view of the above facts and circumstances of the case, we are of the considered opinion that the alleged debt is also not established as contended by the Petitioner and it is also barred by laches and limitation. Therefore, it is liable to be dismissed.

12. In the result, C.P. (IB) No.79/BB/2018 is hereby dismissed. However, this order will not come in the way of Petitioner to invoke any other remedy available under any other law so as to redress its grievance. No order as to costs.

  
**(ASHOK KUMAR MISHRA)**  
**MEMBER, TECHNICAL**

  
**(RAJESWARA RAO VITTANALA)**  
**MEMBER, JUDICIAL**

Krishna