

Allahabad Bench

CP No.(IB)379/ALD/2018

ATTENDANCE - CUM-ORDER SHEET OF THE HEARING OF ALLAHABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 23.08.2019

NAME OF THE COMPANY: M/s IFB Industries Ltd V/s M/s Attero Recycling Pvt Ltd

SECTION OF I & B CODE: 9 IBC

<u>Sl. NO.</u>	<u>Name</u>	<u>Designation</u>	<u>Representation</u>	<u>Signature</u>
<u>1.</u>	P. K. Pandey	Adv	Petitioner	Pandey
<u>2.</u>				

CP NO.(IB)379/ALD/2018

Sh. P.K. Pandey, Advocate for petitioner is present.

Order pronounced in the open court.

Petition is allowed, vide separate order-sheet.

IRP is appointed. List the matter on 9th September, 2019 for filing progress report.

Dated: 23.08.2019

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SAROJ RAJWARE
MEMBER (T)

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A.R.K. SINHA
MEMBER (J)Typed by:
Kavya Prakash Srivastava
(Stenographer)

IN THE NATIONAL COMPANY LAW TRIBUNAL AT ALLAHABAD
BENCH

CP NO. (IB) 379/ALD/2018
(Section 9 and other applicable provisions
of the Insolvency and Bankruptcy Code,
2016)

IN THE MATTER OF :

M/S IFB INDUSTRIES LIMITED

.....**OPERATIONAL CREDITOR.**

VS

M/S ATTERO RECLYLING PRIVATE LIMITED

.....**CORPORATE DEBTOR.**

ORDER DELIVERED ON 23.08.2019

CORAM : HON'BLE SH. A.R.K. SINHA, MEMBER (J)
: HON'BLE MS. SAROJ RAJWARE, MEMBER (T)

For the Petitioner : Sh. Rahul Chaudhary, Adv.
For Respondent : Sh. N.C.Gupta, Advocate

PER SE : SH. A.R.K. SINHA, MEMBER (J)

ORDER

1. The instant Petition has been filed on behalf of the M/s IFB Industries Limited (Operational Creditor) under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule, 6 of the Insolvency and Bankruptcy Application (Adjudicating Authority) Rules, 2016 for initiation of CIRP against M/s Attero Recycling Private Limited Registered Office at 2, Green Park, Saharanpur Road, Dehradun, Uttarakhand, 248001.
2. **The facts of the case in short is that:**

The Corporate Debtor is a Private Limited Company which was incorporated under the provisions of Companies Act, 1956, having its Registered Office at 2, Green Park, Saharanpur Road, Dehradun,

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Uttarakhand, 248001 and is engaged in the business inter-alia of collection of E-Waste materials & recycling the same.

3. The Authorised share capital of the said Company as per the information derived from the website of the Registrar of Companies (ROC) is Rs. 39,17,50,000/-, with paid up capital of Rs. 38,45,53,160/-
4. The Operational is a public Limited Company incorporated under the Provisions of Companies Act, 1956 having its Registered Office at 14, Taratolla Road, Kolkata 700088, West Bengal. Mr. Kartik Muchanid, Senior finance manager, the authorised representative of the applicant Operational Creditor Company and is duly authorised by virtue of Resolution passed by board of Directors in their meeting dated 29.05.2018 in his favour to institute, file, verify and present this petition before this Hon'ble Tribunal on behalf of the Operational Creditor.
5. The Corporate Debtor ("Service Provider") entered into an Service Agreement dated 18th December, 2014 for the period of One year, with the Operational Creditor Company ("Recipient") to perform services in the nature of Collection, Recycling the e-waste that it shall collect from various locations of the operational creditor throughout the country. Further the Corporate Debtor had to provide such other services as are more fully described in Schedule 1 ("Service") during the term of the agreement.
6. The Recipient in response agreed to permit the service provider for collection and purchase of E-Waste material on "as is where is" basis. The service provider further agreed to collect the E-Waste at the rates as may be agreed by the parties in writing from time to time.
7. The above agreement came an end on 18th December , 2015 on which date the said service agreement was re executed between the parties for the further period of one year i.e., till 18th December, 2016 on the same terms and conditions.

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8. It is relevant to mention here that as per the agreement the applicant/operational creditor was required to pay E-waste Management Service Annual Fee.
9. The service Provider/Corporate Debtor commenced its work w.e.f., 08.12.2015 pursuant to which the Corporate Debtor purchased/collected E-Waste material from the Recipient/Operational Creditor, against which the applicant company raised Invoices from time to time as per the agreed terms. The invoices were never disputed by the Corporate Debtor Company or any of its authorities at any point of time. The said invoices raised from time to time were submitted with the corporate debtor for payment a maximum credit period of 30 days. The invoices so raised by the operational creditor became due for payment within 30 days of delivery of the material as per the terms of the invoices/agreement. The details of the said invoices issued, paid and outstanding as on 31.07.2018 are mentioned at page 5-9 of the petition. It is evident from the statement that the Principal Amount is Rs. 9,30,865/- and interest thereon of Rs. 4,63,870/- totalling thus to Rs. 13,94,735/- (Rupees Thirteen Lacs Ninety Four Thousand Seven Hundred Thirty Five Only) as on 31.07.2018.
10. The Operational Creditor maintains running statement of accounts/ledger relating to the Corporate Debtor which clearly reflects the due payment establishing the default/due in respect to the E-Waste collected and purchased by the Corporate Debtor in terms of the Service Agreement resulting into the huge default of Rs. 9,30,865/- (Rupees Nine Lacs Thirty Thousand Eight Hundred Sixty Five Only) as outstanding and payable by the corporate Debtor to the Operational Creditor.
11. Further the Operational Creditor upon the dues/ default repeatedly requested for clearing the outstanding dues but despite of admitted liability and repeated assurance of payment, the Corporate Debtor has failed to make the payment.

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12. Further the Operational Creditor send demand notice under Section 8 of the of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy(Adjudicating Authority) Rules, 2016 dated 05.07.2018, demanding the pending dues in respect of a total Sum of Rs. 93,08,65/- alongwith interest and the said notice is duly served upon the Corporate Debtor on 10.07.2018 and duly received and also acknowledged. But the Corporate Debtor failed to give reply within the period prescribed under the law i.e within 10 days.
13. Further, although the Corporate Debtor had not chosen to reply the demand notice, but on 18.07.2018, he sent an email in reply to the email of the operational creditor, by which the Corporate Debtor requested to withdraw the Demand Notice and further submitted a payment plan to make due good.
14. Therefore, the present petition has been filed for a total due of Rs. 13,94,735/- out of which 9,30,865/- is principle amount and Rs. 4,63,870/- interest calculated @ 24% from the date of its due.
15. On receiving the notices Corporate Debtor appeared and filed the reply. The facts mention in the reply in short is that he claims that the instant petition is not maintainable and made allegations against the Corporate Debtor that he has concealed the true and correct facts.
16. In Para 7 of the reply, the Corporate Debtor admits this fact that the Operational Creditor and Corporate Debtor had entered into a service agreement dated 18.12.2014, whereby operational creditor agreed to avail the services of the Corporate Debtor. It is important to mention here that according to the said service agreement the operational creditor engages services of the corporate debtor and the corporate debtor accept to provide services to the operational creditor during the term of the said service agreement which was one year. It was also agreed upon that; the operational creditor shall not engage the services of or deal with any third party in any manner to refurbish/recycle or deal in any manner with e-waste. Simultaneously,

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operational creditor also liable to pay a fee of Rs. 5,00,000/- per annum to the corporate debtor towards its services.

17. Further after the completion of the terms of service agreement dated 18.12.2014, Operational Creditor and Corporate Debtor had entered into an fresh/new/another service agreement executed on 18.12.2015 and whereby Operational Creditor agreed to avail the services of the corporate debtor and the terms of the said service agreement dated 18.12.2015 was similar to the service agreement dated 18.12.2014, however the term of the agreement was enhanced to three years and accordingly the operational was liable to pay a fee of Rs.5,00,000/- per annum to the corporate debtor towards its services.

18. Further that the Operational creditor had not paid the annual fee of Rs.5,00,000/- to the Corporate Debtor.

19. Further the Operational creditor is also liable to face and bear the consequences for breaching the Engagement Clause in the said service agreement dated 18.12.2015, as they had also appointed M/s TES-AMM (India) Private Limited (competitor to the Corporate Debtor).

20. Further the Operational Creditor on 01.04.2018 had written e-mail to the corporate Debtor stating that as per their books of account Rs. 17,48,296.76/- is outstanding, so they had requested the corporate debtor to provide accounts for reconciliation. Accordingly, Corporate Debtor vide e-mail dated 09.04.2018 had stated that after adjustment of service fee and credit note a sum of Rs. 9,30,865/- is outstanding and the information about the losses was also stated in the said e-mail. Copy of the e-mail dated 01.04.2018 is enclosed herewith and marked as Annexure R3 where Copy of the e-mail dated 09.04.2018 is enclosed herewith and marked as Annexure R4.

21. Further after the notice of the instant application, the Corporate Debtor had paid Rs. 5,00,000/- on 20.02.2019 and 1,50,000/- on 25.30.2019 to the Operational Creditor and the chart shows the

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amount which has been paid and adjusted towards the payment made by the Corporate Debtor to the Operational Creditor.

22. Further the above mentioned amounts payable and chargeable has been calculated which are at Para 16 of the reply.
23. In view of that facts shown in the chart, the Corporate Debtor is not liable to pay any amount.
24. We have heard the learned counsel appearing for the Applicant/Operational Creditor as well as the Respondent/Corporate Debtor and perused averment made in the petition filed on behalf of the Corporate Debtor as well as the reply and rejoinder to the reply filed by the parties.
25. Learned counsel appearing for the Applicant in the course of the arguments submitted that the applicant has enclosed the invoices which are from page 87 to 132 which shows that on different dates the Operational Creditor has supplied the materials, as per the rate mentioned in the invoices.
26. He further submitted that as per the terms and conditions of the agreement, if any, such defects are found in the goods supplied by the Operational Creditor then it must be intimated to the Company in writing within 30 days from the date of receipts of goods, but here in the case, no such objection has been raised nor any defects have been communicated to the company within that period.
27. He further submitted that this is also one of the terms and conditions, if the amount is not paid within due date, the applicant shall charge interest @ 24% per annum.
28. He further submitted as per section 8 of the of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 when the payment was not made within the time as agreed between the

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parties then on the occurrence of a default, the Operational Creditor delivered a demand notice of unpaid Operational Debt. Copy of invoices of remaining payment of amount involved in the default to the Corporate Debtor in the prescribed form and it is admitted by the Respondent that he has not given any reply to the demand notice. In para 13 of counter affidavit respondent admits the debt and also admits that the said amount has not been paid.

29. He further submitted that the Respondent has not raised the dispute regarding the unpaid Operational Debt within the period prescribed under the law. So the application filed by the Corporate Debtor may be admitted and order may be passed in the light of provision contained under Section 9 of the IB Code.
30. On the other hand, learned counsel appearing for the Respondent submitted that although no reply in respect of the demand notice has been issued by the Corporate Debtor but in reply to the email dated 01.04.2018 sent by the Operational Creditor the Corporate Debtor vide its email dated 09.04.2018 had stated that after the payment of service fees and credit note, a sum of Rs. 9,30,865/- is outstanding and the information about this loss was also stated in the said email.
31. He further submitted that Para 16 of the Reply, the Corporate Debtor mentioned the amount, which was paid to the Operational Creditor on different dates and claim that after that payment nothing is due and the Corporate Debtor is not liable to pay any amount rather the Operational Creditor is only liable to pay Rs. **8,25,736 and 96 Paise** to the Corporate Debtor.
32. He further submitted on this ground alone the present application is liable to be dismissed.
33. We have carefully considered the submissions made on behalf of the parties and after going through the averments made in the application, rejoinder and reply to the rejoinder and the documents attached with the application and rejoinder, we find that the Corporate

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Debtor has admitted this fact that there was an agreement between the parties regarding the purchase/collection to e-waste material from the Operational Creditor against which the applicant company raise invoices from time to time, as per the agreement terms.

34. We further find that it is also admitted fact that when a demand notices as required under Section 8 of the I&B Code was issued and delivered upon the Respondent on 08.10.2018 which may be evident from the Annexures 10 available at Page 317 to 328 no reply was given by the Corporate Debtor within the period prescribed under the law i.e. within 10 days from the date of delivery of the notice or invoice demanding payment under Sub Section 1 of Section 8.
35. We further find that there was an email communication between the parties, which would be evident from Annexures 11 at page 329 to 330 of the Application, which shows that debt of Rs.9,30,865/- was admitted by the Corporate Debtor and this has also been admitted in his reply by the Corporate Debtor.
36. On the basis of that email, it can be said that the said amount was not paid by the Corporate Debtor on the date of filing of application and that has also been corroborated by a certificate given by the authorised signatory of the HDFC Bank on 03.08.2018 under Section 9 (3) (c) of the Insolvency and Bankruptcy Code, 2016 and on the basis of that certificates issued by the financial Institution maintaining accounts of the Operational Creditor we came to the conclusion that the amount claimed by the Operational Creditor has not been paid by the Corporate Debtor.
37. Therefore, we are of the considered view that as per Section 8(2) (a) of the I&B Code 2016, we are convinced that there is no existence of a dispute or record of the pendency of the suit or arbitration proceeding, filed before the receipt of such notice or invoice in relation to such dispute.

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38. Therefore, in view of the discussions made in the aforementioned Para we are of considered view that there is a debt which the Corporate Debtor is liable to pay and that has not been paid. Therefore, there is a default of payment of the debt which is more than one lakh and we are also of the view that there is no existence of dispute raised by the Corporate Debtor before the receipt of the demand notice issued under Section 8 of the I&B Code read with Rule 5 of the I&B, Rules, 2016.
39. The Petitioner, in this case, has complied section 9 (3) (b) and 9(3)(c), affidavit to the effect that there is no notice given by the corporate debtor relating to dispute of unpaid operational debt by the respondent, is produced. As the petitioner fulfils the required criterion for invoking CIRP under Section 9 of the Code, this petition is liable to be admitted.
40. Further, the Operational Creditor has proposed name of the CS Babita Jain as Interim Resolution Professional affirming that he is eligible to be appointed as IRP and Disciplinary proceeding are pending against him (***Copy of the consent of IRP is annexed at page 4 of the Application***)
41. The Operational Creditor had not received the outstanding Debt from the Corporate Debtor, and the requirements as prescribed under IB Code have been completed by the Petitioner thus we are of the view that this application deserves to be admitted. Accordingly, we admit the application under Section 9 of the Code and declare a moratorium for the purpose referred to in section 14 of the Code with following direction: -
- (1) Subject to provisions of sub-sections (2) and (3), on the insolvency Commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: —

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(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.

(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.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

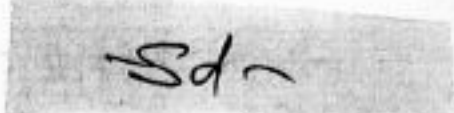
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(4) The order of moratorium shall affect the date of 23.08.2019 till the completion of the corporate insolvency resolution process as prescribed Under section 12 of the code.

42. We at this moment appoint **CS Babita Jain having Registration No IBBI/IPA-002/IP-N00321/2017-2018/10926** as Interim Resolution Professional.
43. IRP is directed to cause public announcement of CIRP immediately as provided in Section 15 of the Code.
44. Registry is directed to communicate this order to Operational Creditor, as well as to Corporate Debtor and also to IRP.
45. Urgent Photostat certified copies of this order, if applied for, be supplied to parties upon compliance of requisite formalities List on 09.09.2019 for the filing of the progres report.


(Ms. Saroj Rajware)
Member (Technical)


ARK SINHA
Member(Judicial)

Dated:23.08.2019

Typed by:
Shubham Kr. Singh
(PS)