

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

C.P. (IB) No. 33/KB/2018

IN THE MATTER OF:

An application under Section 8 of the Insolvency and Bankruptcy Code, 2016

-And-

IN THE MATTER OF:

M/s. Electro Pole Products Private Limited

... Applicant

-Versus-

IN THE MATTER OF:

M/s. Indo Nabin Projects Limited

...Respondent

Coram: Shri Jinan K.R., Hon'ble Member (Judicial)

For the Operational Creditor :

1. Mr. Ravi Asopa, Advocate

For the Corporate Debtor :

1. Mr. Vivek Basu, Advocate

Date of pronouncement of the Order : 14-08-2019

## ORDER

Per Shri Jinan K.R., Member(Judicial)

1. This is an Application filed by M/s. Electro Pole Products Private Limited / Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016, read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution process ( in short CIRP) as against the against M/s. Indo Nabin Projects Limited/Corporate Debtor. The Operational Creditor is engaged in supply of MS Steel Tubular Poles. As per Exhibit 'B', purchase order, the Corporate Debtor placed an order for supply of Steel Tubular Poles upon the terms and conditions as provided in the Annexure 'B', purchase order. The Operational Creditor has supplied and delivered goods in terms of the said purchase order in three different lots as per the request received from the Corporate Debtor. The corporate Debtor has received the materials from the Operational Creditor. The Operational Creditor also generated invoices along with the required documents as specified in the purchase order, for release of payment by the Corporate Debtor in accordance with the terms and conditions stipulated in the purchase order. The Tax Invoices generated by the Operational Creditor are annexed as Exhibit 'C' in the Application. The Operational Creditor has supplied material worth Rs. 1,07,71,020/- ( Rupees One Crore Seven Lakh Seventy one Thousand twenty only) and out of three Letters of Credits(LC) which were open in raising inland bills by the Operational Creditor for the supply of materials. The Bankers of the Corporate Debtor had honoured two Letters of

Credits for a sum of Rs. 36,37,454/- (Rupees Thirty six lakh thirty seven thousand four hundred fifty four only) and another for a sum of Rs. 36,30,750/- (Rupees Thirty six lakh thirty thousand seven hundred fifty only) , after receiving clearance from the Corporate Debtor. The above said payments have been credited by the Banker of the Corporate Debtor. It is further alleged that the Banker of the Corporate Debtor has refused to honour the third Letter of Credit dated 21-07-2016 for a sum of Rs. 36,37,454/- (Rupees Thirty Six lakh thirty seven thousand four hundred fifty four only ) and therefore, the Operational Creditor has filed this Application for initiating the CIRP as against the Corporate Debtor. In order to substantiate the above said contentions, the Operational Creditor has produced correspondence exchanged in between the Bank and the Corporate Debtor which include Bill of Exchange- Annexure 'D', 'E', third Letter of Credit – Annexure 'G'. The correspondence evidencing the payment exchanged in between the Operational Creditor and the Corporate Debtor are also produced and marked as Exhibit 'H', 'I', 'J', 'K'. Upon the above said contentions, the Operational Creditor contends that they are entitled to claim, despite receiving the documents as required to credit the same amount in the account of the Operational Creditor. Despite, repeated demands, the Corporate Debtor failed to pay the above said amount of Rs. 36,37,454/- (Rupees Thirty Six lakh thirty seven thousand four hundred fifty four only ) with interest @ 24% per annum from September 20, 2016. It is further contended that all the requirements are meted for initiating CIRP as against the Corporate Debtor by the Operational Creditor. The demand notice has been issued. The notice has been served upon the Corporate Debtor and the Corporate Debtor sent reply raising untenable contentions which are denied by the Operational Creditor. Upon the said contentions, the Operational Creditor prays for admission of the Application. The respondent turned up and filed the reply affidavit raising

certain disputes in regard to claim of the Operational Creditor. The only one dispute raised on the side of the Corporate Debtor allegedly existing even at the time of issuance of demand notice is that the Corporate Debtor could not pay the amount as demanded, only because of the breach of terms in the purchase order. According to the Corporate Debtor, they have forcibly withheld the dues due to the Operational Creditor for want of submission of the 'C' Form related to the goods supplied to them as per the purchase order referred to in the Application. It further contends that there is no debt due or payable by the Corporate Debtor to the Applicant as there is serious disputes pertaining to the breach of terms in respect of delivery of goods to the Corporate Debtor. The Corporate Debtor has raised a counter claim against the Operational Creditor which cannot be decided in a proceeding of this nature. The Corporate Debtor admitted the issuing of purchase order and receipt of the goods as per the invoices referred to in the Application. According to the Corporate Debtor, as per Clause 7, the Operational Creditor failed in issuing 'E1' Form for supplies made to the Respondent. It further contends that as per Clause 7 in the purchase order, upon submission of 'C' Forms by the Corporate Debtor to the Operational Creditor, the Operational Creditor has to issue the corresponding E1 Form. That has not been issued so far. Therefore, the amount in demand is not payable as claimed by the Operational Creditor. The issue regarding issuance of E1 Form or the credit to be resolved by the Applicant upon receipt of a copy of the Demand Draft covering the balance due and payable by the respondent. However, so far it has not been issued and therefore, there exists a dispute between the parties and therefore, the Application filed is not maintainable.

2. The Operational Creditor filed rejoinder denying averments raised by the Corporate Debtor in the reply affidavit and reiterated the contentions raised in the Application and further would submit that there is no counter claim lying

due and payable as claimed by the Corporate Debtor and that the Operational Creditor is having a legitimate dues pending receivable from the end of the Corporate Debtor as per the goods supplied to them. But the Corporate Debtor forcibly withheld the dues of the Operational Creditor and without submission of the 'C' Form related to the goods supplied to them as per the purchase order dated 04-05-2015 asking for the deposit of E1 Form though the Operational Creditor has agreed to submit the same but without having the Form 'C' issued and/or deposited with them it could not be possible to submit E1 Form to the Corporate Debtor and that E1 Form is ready and lying with the Operational Creditor and copy of which has been produced along with rejoinder as Annexure R-3. It further alleged that non submission of E1 Form has no connection with the payment of the entire dues under the purchase order dated 04-05-2015 and therefore, the dispute raised on the side of the Corporate Debtor is frivolous and raised without any bona fide to delay the payment legitimately due to the Operational Creditor. The dispute being non sustainable under the law, the Operational Creditor prays for admission of the Application.

3. This case is taken up on 07-08-2019. When it was taken up in the morning, the Ld. Counsel for the Operational Creditor was present. However, when the Application was taken up for hearing at about 1 p.m., nobody turned up on the side of the Operational Creditor. Therefore, we heard the Ld. Counsel appearing on the side of the Corporate Debtor in the absence of the Ld. Counsel on behalf of the Operational Creditor.

4. Perused the records.

5. Upon hearing the argument advanced on the side of the Corporate Debtor and perusal of the contentions in the Application as well as in the rejoinder and the contentions taken on the side of the Corporate Debtor, the only one point

for consideration is whether submission of E1 Form as per the terms stipulated in the purchase order, is a pre condition for enabling the Corporate Debtor to pay the amount in demand.

6. The business dealings in between the Operational Creditor and the Corporate Debtor is an admitted fact. It is also an admitted fact that the Operational Creditor has supplied goods as per the invoices referred in the Application and the Corporate Debtor has received the materials supplied as per the invoices and Letter of Credit has been raised with the Bank of the Corporate Debtor for payment of the amount claimed in the Application. However, due to some alleged discrepancies raised on the side of the Banker of the Corporate Debtor against the Letter of Credits of which the amount is to be credited. The Bank did not credit the amount in favour of the Operational creditor and thereafter, due date of the Letter of Credit has also expired. After expiry of the Letter of Credit, the Applicant demanded the amount from the Corporate Debtor. But the Corporate Debtor refused payment on the allegation of non submission of E1 Form. According to the Corporate Debtor, submission of E1 Form is a pre condition for due payment of the amount in demand and that Form being not submitted, the Corporate Debtor is not bound to pay the amount and therefore, according to the Ld. Counsel for the Corporate Debtor, no amount is due as demanded by the Operational Creditor and it is a pre existent dispute existing before the issuance of the demand notice. In order to substantiate his argument, he referred to Clause 7 in the Annexure 'B' purchase order :

Clause 7.

“Sales Tax Concessional Sales Tax as applicable against 'C' form will be paid extra. You will submit E1 Form immediately after receipt of 'C' form. Way bill will be issued on confirmation of despatch/inspection of materials.”

7. The above said being one among the terms which would be complied by the Operational Creditor, non payment by the Corporate Debtor cannot be held to be in accordance with the terms agreed in between the parties. A reading of the rejoinder and supplementary affidavit filed dated 06-08-2019 what it reveals is that E1 Form has not been issued to the Corporate Debtor alleging that the physical form of 'C' has not been issued by the Corporate Debtor to the Operational Creditor. According to the Corporate Debtor, it has issued 'C' form but as per the contention on the side of the Corporate Debtor, the Operational Creditor since issued copy of 'C' form by way of E-mail. They could not issue form 'C' in its physical form to the Corporate Debtor and so far not at all issued. It is alleged by the Operational Creditor in the rejoinder that the Corporate Debtor purposefully failed to submit the related Form 'C' with the Applicant herein and the delay in obtaining E1 Form is due to non submission of form 'C' by the Corporate Debtor and that copy of the E1 Form has already been communicated to the Corporate Debtor and number of communications have been produced along with the supplementary affidavit. A reference to that communication shows that it was issued on 05-08-2019 i.e. two days before the date of hearing of the Application. So, on the date of filing of this Application, dispute related to issuance of 'C' Form by the Corporate Debtor and in return issue of E1 Form by the Operational Creditor was pending for consideration and the letters of correspondence as evidenced from the Annexure with the Application itself reveals that correspondence were exchanged in between the Operational Creditor and the Corporate Debtor as to non issuance of 'C' Form as well as 'E1' Form. One among the letter referred to at page 130 is good to read. The extract of the letter reads as follows :

"From : "P Sadani", [ps@indonabin.in](mailto:ps@indonabin.in)

Date Thursday, February 9, 2017 1:33 PM

To : "A AGARWAL[VP SALES-ELECTRO POLES]"

Subject : Re.: MOST URGENT RELEASE OF PAYMENT VIDE ILC OVER DUE FOR SUPPLY OF ST POLES MANIPUR

Dear Sir,

We are in receipt of your mail dated 02-02-17 stating that you have received the E-I from the sales tax department. In this connection we wish to inform you the following :-

1. We doubt the authenticity of your message because there is no documentary evidence attached along with your mail.
2. We have repeatedly requested you to expedite the E-I form vide various mails dtd. 20.10.2016, 07.11.2016, 11.11.2016, 18.11.2016, 24.11.2016, 06.12.2016, 16.12.2016, 19.12.2016, 02.01.2017, 11.01.2017 as our assessment is under process. Finally, we had sent you a mail dated 18-01-2017, wherein we have informed you to submit the E-I form before 28-01-2017. Due to your failure in submitting the E-I form to us, we would not keep our commitment to our Manipur Sales Tax Department.
3. Now, we understand that Manipur Taxation department has demanded the tax (Demand notice is yet to receive) against your supply against which we could not submit E-I Form till date. Therefore, we once again request you to handover the E-I forms which you have received from West Bengal against the C form issued by us to you for the year 2014-2015 & 2015-2016, so that we will request Manipur Sales Tax department to accept your E-I and withdraw the

50

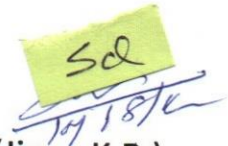
demand notice. Further we will also request Manipur Sales Tax department to issue C form against your supply made in 2016-2017.

Considering the gravity of the situation, we once again request you to handover the E-I form immediately failing which we will have no other option to recover the demand of Manipur Sales Tax department from your dues. Until then, we will not entertain any of your claim in this regard.”

8. So, on a reference to all these documents, there is a pre existent dispute as alleged by the Corporate Debtor in respect of the payment of the debt due to the Operational Creditor and therefore, this Application is liable to be rejected.

9. Accordingly, the CP(IB) No. 33/KB/2018 is rejected.

10. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

  
(Jinan K.R.)  
Member (Judicial)

Signed on this, the 14<sup>th</sup> day of August, 2019.

GOUR\_STENO