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IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA
C.P. (IB) No. 862/KB/2019

IN THE MATTER OF:

An application under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of Insolvency and Bankruptcy Code 2016 (Application to Adjudicating Authority) Rules, 2016 for initiation of Corporate Insolvency Resolution Process.

And

In the matter of:

M/s Dyechem International Private Limited, having its office at 5, Ashu Biswas Road, 2nd Floor & 3rd Floor, Kolkata, West Bengal 700025

Operational Creditor /Applicant

-Versus-

M/s Abhinandan Dyeing Private Limited, having its office at 46, Jamuna Lal Bajaj Street, Ground Floor, Room No. 14, Kolkata, West Bengal 700007

Corporate Debtor / Respondent

Date of hearing 12 February, 2020

Order Delivered on 21 February, 2020

Coram :

Madan B. Gosavi, Member (Judicial)

Virendra Kumar Gupta, Member (Technical)

For the Appellant / Petitioner : Mr. A.K. Shrivastava, Advocate

: Mr. Akash Sharma, Advocate

For Respondent : Ms. Urmila Chakraborty, Advocate

: Ms. Shivangi Thard, Advocate

: Ms. Sweta Mohanty, Advocate

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Per Virendra Kumar Gupta, Member (T)

1. This application has been filed u/s 9 of IBC, 2016 by the Operational Creditor for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor, M/s Abhinandan Dyeing Private Limited. The amount due and the default has been claimed at Rs. 25,66,221 including interest.

2. The facts, in brief, are that the Operational Creditor supplied goods during the period 14.07.2017 to 07.10.2017. The goods were duly received and acknowledged. However, payment has not been made by the Corporate Debtor to the Operational Creditor. The Ld. Counsel appearing on behalf of the Operational Creditor narrated the facts relating to the dispute and drew our attention to copies of invoice which were raised by the Operational Creditor. Our attention was also drawn to the bank statement to show that payment had not been received by the Operational Creditor. It was also contended that demand notice under section 8 of IBC, 2016 was duly served and it was replied by the Corporate Debtor. Copies of the demand notice dated 25.03.2019 and reply dated 05.04.2019 were placed at page 177 and 189 of the paper book respectively. It was also contended that reminders were sent in March 2019 further to first reminder on 12.09.2017 and such reminders remained un-responded. However, for the first time, dispute was raised by the Corporate Debtor regarding defective quality and Debit Note was issued on 05.03.2019 claiming recovery of loss suffered by Corporate Debtor. In this regard, it was pointed out that such Debit Note was a nullity in law as it could not be raised by the receiver of goods as per provisions of GST laws and drew our attention to section 34(1), (2) and (3) of GST Act, 2017 as amended on February 1, 2019. It was again reiterated that since September 2017, no response was given to the mail of the Operational Creditor.

3. The Ld. Counsel for the corporate debtor initiated his argument by stating that the corporate debtor has raised a genuine, pre-existing and contemporaneous dispute much prior to the issue and delivery of notice under section 8 of IBC, 2016, i.e., in July, 2017. Several rounds of negotiations happened regarding quality of the dyes and chemicals to be supplied by the operational creditor. It was also contended

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that corporate debtor asked the operational creditor to compensate the corporate debtor for the losses suffered by the corporate debtor. On assurance of the corporate debtor small orders were placed to test whether chemicals and dyes supplied were upto the mark. It was emphatically argued that the debit note for Rs. 19,50,000/- was raised on 05.01.2019 on account of losses suffered by the corporate debtor and after set off of such claim only Rs. 63,834/- remains due and payable to the alleged operational creditor which corporate debtor was ready to pay.

4. The Ld. Counsel for the operational creditor in the rejoinder submitted that Debit Note was issued just prior to email sent requiring the corporate debtor to make the payment and no material has been brought on record in support of such claim, hence, so called dispute remain un-substantiated. Our attention was further drawn to the strength calculation report, copy of which is placed at page 15 of the rejoinder. The Ld. Counsel again harped on the fact that the demand was raised for the first time on September 12, 2017 and the corporate debtor never raised a dispute with regard to the quantity or quality of the material supplied.

5. We have considered the submissions made by both the sides and material on record. It is noted that supply of the goods have been made during July 2017 to October 2017. A number of invoices have been raised during this period. It is however, noted that some dispute arose between the parties in July itself as regards to quality which are claimed to have been resolved and which is supported by the fact that orders were placed by the corporate debtor thereafter as well. Small payments have also been made by the corporate debtor. Even supplies have been made during November 2018 up to January 2019. No material has been brought on record by the corporate debtor to show that there existed claim / loss / damages suffered by corporate debtor on account of quality issues in regard to supplies made in 2017. On the contra, the mail has been written by operational creditor in September, 2017 which has remained un-answered. There have been subsequent transactions but the outstanding amount for earlier supplies has not been paid. We have also carefully perused the debit note dated 5.3.2019 which does not show as to on what basis this amount has been arrived at. Further, this has been done almost 1 ½ years after the supplies. It is also noteworthy that such debit note can be issued by

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the receiver of the goods as per the provisions of GST Act, 2017 which stipulates that in such circumstances, a credit note is required to be issued by the supplier. Issue of such credit note results into recovery of GST liabilities which has already been paid by the supplier. Thus, by such action of the corporate debtor, the operational creditor is deprived of not only of the payment but of reversal of GST liabilities as well which it could have had there been some dispute. Further, no material of whatsoever nature has been brought on record to support such claim. In the case of Mobilox, Hon'ble Supreme Court had laid down parameters for ascertaining of the fact of pre-existing dispute. In our considered opinion, dispute raised in this case does not comply with those requirements and appears to be an instance of feeble argument without bringing the required material on record to support such claim. Accordingly, we reject this contention raised by the corporate debtor.

6. Debt is due and payable and default has occurred in payment thereof. The debt is not barred by limitation. Affidavit under section 9 (3) (b) of IBC, 2016 has been placed on record. Notice under section 8 of IBC, 2016 has been duly served.

7. Name of IRP has not been proposed which is not mandatory. Hence, we will appoint the IRP from the approved list maintained by IBBI. In case such person does not accept the assignment, then another person would be appointed.

8. Thus, considering the overall facts and above discussions, we are of the view that this application is liable to be admitted.

9. The application is otherwise complete and defect free and stands admitted. We order as under :

ORDER

i. The application filed by the Operational Creditor under section 8 and 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, namely M/s Abhinandan Dyeing Private Limited, is hereby admitted.

ii. We declare a moratorium and public announcement in accordance with Sections 13 and 15 of the IBC, 2016.

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iii. Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, 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 (54 of 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.

v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during moratorium period.

vi. 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.

vii. The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

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viii. Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

ix. Necessary public announcement as per Section 15 of the IBC, 2016 may be made.

x. **Mr. Sanjeev Jhunjhunwala** IBBI Regn. No. IBBI/ IPA-001/ IP-P00325 /2017 -18/10595 email - sanjeevjhunjhunwala@gmail.com is appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan.

xi) The Operational Creditor to pay a sum of Rs. 50,000/- (Rs. Fifty Thousand) to IRP as advance fee as per Regulation 33(2) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill. In case further funds are required during Corporate Insolvency Resolution Process and if not provided by Committee of Creditors then IRP/RP can approach this Tribunal for that purpose.

xii) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

xiii) Registry is hereby directed under section 7(7) of the I.B.Code, 2016 to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through e-mail.

10. List the matter on 07.04.2020 for the filing of the **progress report**.

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

21/2/2020

(Virendra Kumar Gupta)
Member (T)

21/2/2020

(Madan B. Gosavi)
Member (J)

Signed on 21 February, 2020