

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-VI

CP (IB) No. 3968/MB/2019

[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:

M/S. CARYAIRE EQUIPMENTS INDIA PRIVATE LIMITED

[CIN:U74899DL1989PTC037976]

Registered Office: Shop No. 2F-201, 2nd Floor
Plot No. 1 & 2, LSC, Block - G Kondli Gharoli
Mayur Vihar Phase-III,
Delhi-110096.

...Operational Creditor

VERSUS

M/S. KELVOLT (INDIA) PRIVATE LIMITED

[CIN: U29253MH2009PTC195793]

Registered Office: Flat No. 102 A, Plot No. 6
Sector 19, Airoli, Thane- 400708
Maharashtra

...Corporate Debtor

Pronounced: 19.03.2024

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances : Hybrid

Operational Creditor: Adv. Samrudhi Gholap

Corporate Debtor: None present

ORDER

[Per: SANJIV DUTT, MEMBER (TECHNICAL)]

1. BACKGROUND

- 1.1 This Application bearing C.P.(IB) No.3968/MB/2019 was filed by M/s. Caryaire Equipments India Private Limited, the Operational Creditor on 07.10.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) in respect of M/s. Kelvolt (India) Private Limited, the Corporate Debtor.
- 1.2 The Operational Creditor is in the business of manufacturing and sale of Air Distribution Products, Sound Control Products, etc. The Corporate Debtor is engaged in business of manufacturing of machinery and equipments.
- 1.3 The Corporate Debtor approached the Operational Creditor to procure items such as Damper, Diffuser, Grills, etc., resulting in the issuance of Purchase Orders and subsequent invoicing from the financial years 2013-14 to 2015-16. The Operational Creditor in Part-IV of the Application has claimed operational debt of Rs.24,12,582/- (Twenty-Four Lakhs Twelve Thousand Five Hundred and Eighty-Two Rupees) as on 30.04.2019 which remains unpaid by the Corporate Debtor. This comprises principal debt of Rs.13,84,255/- along with accrued interest calculated at the rate of 18% per

annum amounting to Rs.10,28,327/- for the products supplied by the Operational Creditor to the Corporate Debtor.

- 1.4 Subsequently, the Operational Creditor issued Demand Notice on 20.05.2019 to the Corporate Debtor, as required under Section 8 of the Code. Despite the issuance and service of the notice, the Corporate Debtor failed to make payment of the aforementioned operational debt due and payable to the Operational Creditor. Consequently, the Operational Creditor preferred the present Application seeking initiation of CIRP in respect of the Corporate Debtor.

2. AVERMENTS OF OPERATIONAL CREDITOR

- 2.1 The Operational Creditor submits that it supplied various items such as damper, diffuser, grills, etc. to the Corporate Debtor during the period from 2013-14 to 2015-16. Consequently, the Operational Creditor raised respective invoices for these supplies based on the purchase orders issued by the Corporate Debtor from time to time. The said invoices and materials were duly accepted by the Corporate Debtor without any objection. As per the terms of the purchase orders, the invoices were to be submitted within fifteen days along with signed delivery challans.
- 2.2 The Operational Creditor further submits that despite making certain initial and random payments, the Corporate Debtor intentionally delayed and avoided making payments after receiving the products and services to its satisfaction.

- 2.3 According to the Ledger maintained by the Operational Creditor, there is an admitted outstanding liability/balance of Rs.13,84,255/- as on 30.04.2019 excluding accrued interest @ 18% P.A. amounting to Rs.10,28,327/-.
- 2.4 The Operational Creditor submits that it communicated the outstanding dues to the Corporate Debtor on numerous occasions. Assurances were given by the Corporate Debtor that the outstanding payment would be made in due course of time. Further, the Corporate Debtor issued Ledger confirming the principal liability. The Operational Creditor has placed on record copies of e-mail communications of the Corporate Debtor dated 29.07.2016 and 29.09.2017 informing that the latter was in the process of collecting its old outstanding dues from its customers so as to clear and release payment of the amount due to the former. However, despite these communications and assurances, the Corporate Debtor failed to pay the outstanding amount of operational debt.
- 2.5 Consequently, several legal/demand notices dated 19.08.2016, 29.08.2018 and 18.12.2018 were issued to the Corporate Debtor. The statutory Demand Notice under Section 8 was issued *vide* letter dated 20.05.2019 which was duly delivered to the Corporate Debtor on 22.05.2019. However, the Corporate Debtor neither replied to the Demand Notice nor made any payment nor raised any dispute till date.
- 2.6 The Operational Creditor has placed on record copy of a Certificate dated 04.09.2019 under Section 9(3)(c) of the Code issued by its bank, namely, Axis Bank, certifying that the last payment received from the Corporate Debtor was of Rs.1,00,000/- on 03.10.2018. The Bank has confirmed that

no payment has been received from the Corporate Debtor in the account of the Operational Creditor from 03.10.2018 to 28.08.2019.

- 2.7 It is submitted that the amount of operational debt in question is due and payable by the Corporate Debtor against supply of goods and materials. As the Corporate Debtor is unable to pay its creditors, the Operational Creditor prays that it may be admitted to CIRP under Section 9 of the Code.

3. CONTENTIONS OF CORPORATE DEBTOR

- 3.1 It is observed from the record that the Operational Creditor diligently served notices of hearing to the Corporate Debtor through speed post/registered post on several occasions, i.e., on 27.01.2020, 03.11.2023 and by email on 18.12.2019. Additionally, the Registry was directed to serve the notice which was duly served on the Corporate Debtor on 21.08.2023 and 30.10.2023. Despite proper service of notices, the Corporate Debtor remained absent.
- 3.2 The Corporate Debtor failed to provide a written reply during the proceedings and did not appear either personally or through an authorised representative to make oral or written submissions. The Corporate Debtor did not make any representation on subsequent occasions, resulting in its being set *ex-parte vide* order dated 05.01.2024.
- 3.3 In the absence of any pleadings or reply by the Corporate Debtor, the Application is disposed of based on the pleadings of the Operational Creditor.

4. ANALYSIS AND FINDINGS

Upon due consideration of the pleadings along with the materials available on record and hearing the Ld. Counsel for the Operational Creditor, our findings in the matter are as under:-

- 4.1 As stated above, despite numerous opportunities granted by this Adjudicating Authority to the Corporate Debtor to appear and present its case, the Corporate Debtor failed to take any steps to furnish its reply or present any defence. Consequently, the Corporate Debtor was set *ex-parte* on 05.01.2024 and the matter was heard based on the pleadings in the Application and arguments presented by the Ld. Counsel for the Operational Creditor.
- 4.2 It is observed that the Operational Creditor supplied goods to the Corporate Debtor based on various Purchase Orders and several invoices were issued accordingly from time to time. As per Part-IV of the Application, the principal amount of operational debt claimed to be in default is Rs.13,84,255/- which represents the value of goods worth Rs.13,44,810/- supplied to the Corporate Debtor during the financial year 2015-16 and the amount of Rs.39,445/- being the sales tax difference demanded by the Sales Tax Department from the Operational Creditor on sales made to the Corporate Debtor in earlier years. It is noticed that the Operational Creditor has placed on record copies of the relevant purchase orders, sales invoices, debit notes and transportation receipts in respect of goods supplied to the Corporate Debtor for which payment has not been received till date. The Operational Creditor has submitted emails dated 26.03.2015 and 27.03.2015 received from the Corporate Debtor providing VAT and CST TIN details and attaching its billing

address respectively. Hence, it is evident that the Operational Creditor had supplied goods to the Corporate Debtor.

4.3 The Operational Creditor has also furnished copy of Ledger Account of the Corporate Debtor from the financial years 2015-16 to 2018-19 showing outstanding dues of Rs.13,84,255/- as on 31.03.2019. The Operational Creditor has also provided copies of email correspondences exchanged and legal notices, including the statutory Demand Notice issued to the Corporate Debtor seeking payment of outstanding dues against invoices raised. Thus, it is held that the said amount of Rs.13,84,255/- due and payable to the Operational Creditor against supply of goods and materials to the Corporate Debtor clearly represents an 'operational debt' within the meaning of Section 5(21) of the Code.

4.4 It is also seen from the record that there was no provision for charging of interest under the purchase orders of the Corporate Debtor as well as sales invoices raised by the Operational Creditor. It is well-established that interest cannot be claimed as a matter of right when there is no agreement between the parties for the same. Therefore, in the absence of mutual agreement between the parties, the Operational Creditor's claim for interest @ 18% P.A. is found to be unsustainable.

4.5 After ascertaining the existence of operational debt, the next point for determination in an application under Section 9 of the Code is the factum of default. The Operational Creditor has claimed the principal amount of operational debt in default at Rs.13,84,255/- in Part-IV of the Application. The Operational Creditor has furnished supporting evidences in this regard. The

Operational Creditor has placed on record copy of certificate dated 04.09.2019 under Section 9(3)(c) of the Code issued by the Axis Bank Limited, Sector 16, Noida Branch confirming that the last payment received on 03.10.2018 from the Corporate Debtor was of Rs.1,00,000/-. The Bank further confirms that no payment has been received from the Corporate Debtor in the account of the Operational Creditor from 03.10.2018 to 28.08.2019. As stated above, the Operational Creditor had issued Legal Notices dated 19.08.2016, 29.08.2018 and 18.12.2018 demanding payment of the outstanding amount but the Corporate Debtor failed to clear the outstanding dues of the Operational Creditor. It is thus observed from the record that the operational debt of Rs.13,84,255/- owed by the Corporate Debtor to the Operational Creditor continues to be in default till date.

- 4.6 It is observed from the record that the date of default has not been mentioned explicitly either in Part-IV of the Application or in the Demand Notice dated 20.05.2019. However, it is now settled that the non-mentioning of the Date of Default does not affect the merits of an Application filed by the Operational Creditor under Section 9 of the Code so long as such date of default can be gathered from the pleadings and materials available on record. The total amount of debt due as well as the amount claimed to be in default in the instant case are shown in Part-IV of the Application as due from dates of various unpaid invoices. Date of default can be calculated only when the invoice becomes due and payable. On perusal of terms of the purchase orders, it is observed that the Operational Creditor was to submit the bills within 15 days along with signed delivery challan subject to payment within 90 days of actual delivery. Therefore, the date of each bill cannot be treated as the due date on

which such bill was to be paid. Rather, a period of 105 (15+90) days will have to be added to the date of each invoice so as to ascertain the due date of its payment by the Corporate Debtor. It is also observed that the Operational Creditor has maintained a running account of the Corporate Debtor in its books of account. Therefore, after considering the details of the invoices annexed to the Application, the date of default is determined as 25.12.2015 reckoning 105 days from the date of the last invoice remaining unpaid i.e. 10.09.2015.

4.7 Having determined the date of default at 25.12.2015, the next point for consideration is whether the present Application filed on 07.10.2019 is within limitation. In this connection, it is noticed from the record that the Corporate Debtor had made part payments of Rs.13,50,000/-, Rs.4,00,000/- and Rs.1,00,000/- on 15.06.2016, 12.06.2017 and 03.10.2018 respectively which give rise to a fresh period of limitation within the meaning of Section 19 of the Limitation Act, 1963. Besides, the Operational Creditor has furnished copies of e-mails dated 29.07.2016 and 29.09.2017 received from the Corporate Debtor acknowledging its liability and seeking time to clear the dues of the Operational Creditor. Considering this, it is observed that the present Application filed by the Operational Creditor on 07.10.2019 is well within the period of limitation under Section 238A of the Code read with Sections 18 and 19 and Article 137 of the Limitation Act, 1963.

4.8 It is also noticed from the record that the amount of operational debt in default in the instant case is undisputed by the Corporate Debtor. Although the Demand Notice dated 20.05.2019 was delivered to the Corporate Debtor on 22.05.2019, the Corporate Debtor neither responded to the said Demand Notice nor raised any dispute regarding the unpaid operational debt. Further,

the Operational Creditor has filed an affidavit under Section 9(3)(b) of the Code affirming that the Corporate Debtor had not given notice of dispute or raised any dispute regarding the unpaid operational debt. In view of absence of pre-existing dispute between the parties, the Operational Creditor is found to have made out a case for admission of the present Application.

- 4.9 From the above discussions, it is evident that there was a default on the part of the Corporate Debtor in the payment of undisputed operational debt to the Operational Creditor exceeding Rs.1,00,000/- (One Lakh Rupees), being the threshold monetary limit under Section 4 of the Code prevailing on the date of filing of the present Application. Therefore, this Application under Section 9 of the Code, initiated by the Operational Creditor, is found to be maintainable. The Application is complete and has been filed in the prescribed format. As of now, the outstanding operational debt remains unpaid. The Demand Notice has been duly delivered by the Operational Creditor to the Corporate Debtor, and no notice of dispute has been received by the Operational Creditor. The Operational Creditor has proposed the name of **Mr. Dhanshyam Kantilal Patel** to act as the Interim Resolution Professional (IRP) who has certified in his written communication in Form-2 that there are no disciplinary proceedings pending against him. It is, therefore, concluded that all necessary conditions required to trigger CIRP in respect of the Corporate Debtor are satisfied and the matter is fit for admission under Section 9(5)(i) of the Code.

ORDER

This Application bearing C.P.(IB) No.3968/MB/2019 filed under Section 9 of the Code by M/s. Caryaire Equipments India Private Limited, the Operational

Creditor, for initiating CIRP in respect of M/s. Kelvolt (India) Private Limited, the Corporate Debtor is **admitted**.

We further declare moratorium under Section 14 of Code with consequential directions as follows:

- I. We prohibit-
 - 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 of 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 Securitisation 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 possession of the Corporate Debtor.
- II. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period.
- III. That the order of moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the Code or passes an order

for the liquidation of the Corporate Debtor under section 33 of the Code, as the case may be.

- IV. That the public announcement of the CIRP shall be made immediately in accordance with Section 13 of the Code and the relevant Rules and Regulations made thereunder.
- V. That this Bench hereby appoints **Mr. Dhanshyam Kantilal Patel**, a registered Insolvency Professional having Registration Number **IBBI/IPA-001/IP-P01373/2018-2019/12155** and Email ID dpatel@ckpatel.com as the Interim Resolution Professional (IRP) to carry out the functions under the Code. The fee payable to IRP/RP shall be in accordance with the Regulations/Circulars issued by the IBBI.
- VI. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of Sections 17 and 25 of the Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- VII. In exercise of the powers under Rule 11 of the NCLT Rules, 2016, we order the Operational Creditor to deposit a sum of Rs.5,00,000/- (Five Lakh Rupees) with the IRP to meet the initial CIRP cost, if demanded by the IRP to fund initial expenses on issuing public notice and inviting claims, etc. The amount so deposited shall be interim finance and paid back to the Operational Creditor on priority upon funds from the Committee of Creditors (CoC) becoming available with IRP/RP. The expenses, incurred by IRP out of this fund, are subject to approval by the CoC.

- VIII. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai for updating the Master Data of the Corporate Debtor.
- IX. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the IRP including by way of email and WhatsApp.
- X. Besides, a copy of this order shall also be forwarded by the Registry of this Tribunal to the IBBI for their record.
- XI. Compliance report of the order by Designated Registrar is to be submitted today.**

**Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)**

**Sd/-
K. R. SAJI KUMAR
MEMBER(JUDICIAL)**

Deepa/JNK