IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V, NEW DELHI

CP IB NO. 2680/(ND)/2019

An Application 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:

METENERE LIMITED

A-1, Ghazipur, Near Patparganj Container Depot,

New Delhi-110096 **...Operational Creditor**

Versus

BADDI FOILS PRIVATE LIMITED

S-86, Okhla Industrial Area, Phase-II,

New Delhi-110020 **...Corporate Debtor**

Order Delivered on: 08.01.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant: Mr. Kunal Godhwani, Adv.
For the Respondent: Ms. Shalini Kapoor, Ms. Divyanshi Saxena

O R D E R

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This is a Company Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 **('the Code')** read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **M/s Metenere Limited ('Operational Creditor')** duly authorized for initiation of Corporate Insolvency Resolution Process **('CIRP')** against **M/s Baddi Foils Private Limited ('Corporate Debtor')**.
2. **M/s Metenere Limited** (Operational Creditor) is a company registered under the Companies Act, 1956 [CIN- U27107DL1997PLC084906, having its registered office at A-1, Ghazipur, Near Patparganj Container Depot, Delhi-110096. **M/s Baddi Foils Private Limited** (Corporate Debtor) is a company registered under the Companies Act, 1956 [CIN-U27203DL2005PTC132573], having its registered office at S-86, Okhla Industrial Area, Phase-II, New Delhi-110020. The Corporate Debtor has Authorized Share Capital of Rs. 1,47,00,000 (Rupees One crore Forty-Seven lacs) and Paid-Up Share Capital of Rs. 64,04,000 (Rupees Sixty-Four Lacs Fourt Thousand).
3. The present Petition was filed on 17.10.2019 before this Adjudicating Authority by the Operational Creditor, duly authorized to initiate Corporate Insolvency Resolution Process (**"CIRP**") proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**"Code'**). The total amount claimed to be in default is Rs. 91,68,400 (Ninety-One Lacs Sixty-Eight Thousand Four Hundred) calculated till 15.10.2019 along with interest. The date of default is not expressly mentioned in the demand notice. However, there were multiple invoices raised by the Operational Creditor from 17.12.2015 to 02.06.2017, therefore, there are multiple date of defaults. The latest date of default being 02.06.2017.
4. As recorded in the order dated 20.10.2021, the CIRP was also initiated against the Operational Creditor on 03.10.2020 and by the said order, the

IRP/RP was directed to take appropriate steps. The order for admitting CIRP of the Operational Creditor was taken on record by this Adjudicating Authority on 14.07.2023. Furthermore, initially, the Operational Creditor had not filed an affidavit in compliance of Section 9(3)(c). Therefore, this Adjudicating Authority vide its order dated 05.02.2020 directed the Operational Creditor to file an affidavit under Section 9(3)(c) of the Code. The Operational Creditor, in compliance of the order dated 05.02.2020, filed an affidavit dated 17.03.2020 in compliance of Section 9(3)(c) of the Code.

5. **Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor**

a) The Operational Creditor is undergoing CIRP in Company Petition bearing No. IB/639/2018 vide order dated 03.10.2020 passed by the Hon'ble Principal Bench, NCLT, New Delhi admitting the petition under Section 7 of the Code. Therefore, the present proceedings are continued by the Resolution Professional of the Operational Creditor.

b) The Operational Creditor is engaged in the production of non-ferrous metal especially Aluminum, Lead, Copper, Zinc & Tin and minorly Silver & Gold.

c) The Corporate Debtor approached the Operational Creditor for supply of "Aluminum Pharma bare STK AA". Based on the representations of the Corporate Debtor, the Operational Creditor supplied goods to the Corporate Debtor and thereby, raised invoices i.e., Invoice No. 1385 dated 17.12.2015, Invoice No. 1497 dated 31.12.2015, Invoice No. 43 dated 27.04.2017, Invoice No. 59 dated 29.04.2017 and Invoice No. 180 dated 02.06.2017.

d) The Corporate Debtor failed to clear the payment towards the goods supplied by the Operational Creditor. The Operational Creditor issued a Legal Notice dated 11.02.2019 to the Corporate Debtor which is replied by the Corporate Debtor. However, the Corporate Debtor failed to clear the outstanding payment.

e) The Operational Creditor got issued Demand Notices dated 07.05.2019 and 13.06.2019 under Section of the Code, which were duly served upon and replied by the Corporate Debtor.

f) In reply to the Legal Notice dated 11.02.2019 and Demand Notices dated 07.05.2019 and 13.06.2019, the Corporate Debtor has neither raised any dispute qua quality of goods nor made any payment to the Operational Creditor. However, the Corporate Debtor contended that the payment against the said invoices has already been made by the Corporate Debtor.

g) As per the ledger account filed by the Operational Creditor, the Corporate Debtor has not made the entire payment and an amount of Rs. 76,89,306 is outstanding. That the Corporate Debtor has failed to produce any document establishing the payment of all the invoices of the Operational Creditor.

h) The Corporate Debtor contended that it is the Corporate Debtor who has to receive money from the Operational Creditor. However, the Corporate Debtor never filed its claim during the CIRP of the Operational Creditor.

6. **Submission by the Learned Counsel appearing on behalf of the Corporate Debtor**

a) The Corporate Debtor is a leading manufacturer of Aluminum Foil and is engaged in the business of primary packaging of material concerning Aluminum for Pharmaceutical Industry.

b) The Operational Creditor sent a demand notice dated 07.05.2019 in respect of unpaid operational debt with respect to Invoice No. 781 dated 28.03.2017, Invoice No. 070 dated 30.04.2017, Invoice No. 093 dated 02.05.2017 and Invoice No. 097 dated 03.05.2017. However, the Operational Creditor has concealed the fact that the payment with respect to Invoices No. 781, 070 and 093 has been made by the Corporate Debtor. Further, the Invoice No. 097 is fabricated.

c) The Operational Creditor sent another demand notice dated 13.06.2019 with respect to different set of Invoices bearing No. 1385, 1497, 0043, 0059 and 0180, the payment in respect of which has already been made and no amount is due from the Corporate Debtor. On the contrary, it is the Operational Creditor who is liable to pay Rs. 3,79,463 to the Corporate Debtor.

d) The Corporate Debtor further claims that the Invoice No. 1385 dated 17.12.2015 and Invoice No. 1497 dated 31.12.2015 raised by the Operational creditor are time barred.

e) The Corporate Debtor has enclosed the statement of accounts in respect of the payments being made to the Operational Creditor.

Analysis & Findings

7. We have heard the Learned Counsels for the Operational Creditor and the Corporate Debtor, and further perused the averments made in the petition, reply filed by the Corporate Debtor, rejoinder filed by the Operational Creditor and written submissions presented by both the Operational Creditor and the Corporate Debtor. Since the registered office of the respondent Corporate Debtor is in Delhi, this Tribunal is having territorial jurisdiction as the Adjudicating Authority in relation to prayer for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 9 of The Insolvency and Bankruptcy Code, 2016, against the Corporate Debtor.

8. On the perusal of the application filed by the Operational Creditor, it is observed that the Operational Creditor has issued several invoices dated 17.12.2015, 31.12.2015, 27.04.2017, 29.04.2017 and 02.06.2017 to the Corporate Debtor. The present petition is filed on 17.10.2019, therefore, the Invoices dated 27.04.2017, 29.04.2017 and 02.06.2017 fall under the period of limitation. It is the contention of the Corporate Debtor that the Invoices dated 17.12.2015 and 31.12.2015 fall outside the period of limitation, however, even if this contention of the Corporate Debtor is taken into

consideration and the invoices dated 17.12.2015 and 31.12.2015 are not taken into account, the outstanding amount payable by the Corporate Debtor to the Operational Creditor is still above the pecuniary threshold limit of Rs. 1 Lakh as stipulated under Section 4 of the Code prior to the Amendment dated 24.03.2020 came into force. Further, the Corporate Debtor maintains a running account the details of which is discussed in the subsequent paras of this order. Hence, the present petition is filed within the period of limitation.

9. It is to be noted that the 'Operational Creditor' had sent demand notice dated 13.06.2019 to the 'Corporate Debtor' under Section 8 of The Insolvency and Bankruptcy Code, 2016 for payment of outstanding dues worth Rs. 87,50,504 (Rupees Eighty-Seven Lacs Fifty Thousand Five Hundred Four). Therefore, the present petition meets the threshold limit of Rs. 1 Lakh (as it was before the Amendment dated 24.03.2020 came into operation), as required by Section 4 of the Code.

10. In order to determine the admissibility of petition for initiating CIRP under Section 9 of the Code, the judgment of the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353** is to be taken into consideration. The said judgment makes it clear that in order to initiate CIRP proceedings under Section 9 of the Code, the Adjudicating Authority has to determine:

    a) Whether there is an 'Operational Debt' exceeding Rs. 1 Lakh (1 Crore, in case the petition is filed after 24.03.2020) as defined under Section 4 of the IBC?

    b) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid?

    c) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

11. In the first instance, to determine that whether the said amount claimed by the Operational Creditor would fall under the ambit of 'Operational 'Debt', it is pertinent to analyze the definition of 'Operational Debt' as mentioned under Section 5(21) of The Insolvency and Bankruptcy Code, 2016. Under said Section, the 'Operational Debt' is defined as: *"A claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority"*.

    While analyzing the present facts in the light of said Section 5(21), the Operational Creditor and the Corporate Debtor started trading in the business of Non-Ferrous metals especially Aluminium, Lead, Copper, Zinc & Tin and minorly in Silver & Gold, whereby, the Operational Creditor used to supply "Aluminium Pharma bare STK" to the Corporate Debtor. The Operational Creditor supplied the goods as per the order placed and further raised invoices on the basis of goods supplied. It was asserted that the Corporate Debtor defaulted in making the payment to the Operational Creditor with respect to the Invoices bearing Invoice No. 1385 dated 17.12.2015, Invoice No. 1497 dated 31.12.2015, Invoice No. 43 dated 27.04.2017, Invoice No. 59 dated 29.04.2017 and Invoice No. 180 dated 02.06.2017, for which an action is preferred by the Operational Creditor before this Adjudicating Authority. The Operational Creditor claims the outstanding amount worth Rs. 91,68,400 (Ninety-One Lacs Sixty-Eight Thousand Four Hundred) calculated till 15.10.2019 along with interest from the Corporate Debtor.

    On the appreciation of the transactional invoices and the bank statements of the Operational Creditor's account, as annexed by the Operational Creditor, and placed before us, we are of the view that there had been a transaction between the Operational Creditor and the Corporate Debtor and that the Operational Creditor has supplied goods to the Corporate Debtor for which the Corporate Debtor has allegedly defaulted in making the payment. Further, the Corporate Debtor had not disputed the contention of the Operational Creditor regarding the supply of goods to the Corporate Debtor. Hence, the debt claimed by the petitioner comes within the purview of 'Operational Debt' within the meaning of Section 5(21) of the Code.

12. It is observed that as per the requirement of Section 8(2)(a) of the Code, the Corporate Debtor is required to bring into notice of the Operational Creditor, the existence of any dispute within 10 days of the receipt of the demand notice. In the present case, the Corporate Debtor has replied to the demand notice dated 07.05.2019 vide its reply dated 17.05.2019 and also filed reply to the demand notice dated 13.06.2019 vide its reply dated 26.06.2019 along with bank certificate and statement of accounts. However, the Corporate Debtor has not raised any dispute as to the quality or quantity of goods.

13. It is observed that the Corporate Debtor in its reply dated 13.11.2019 to the present Section 9 petition has stated that the Corporate Debtor has made payment in respect of the invoices raised by the Operational Creditor. As per the term of payment as agreed between the Operational Creditor and the Corporate Debtor, the invoices become due on the date of its issue. It is observed that the Corporate Debtor has remitted multiple payments in favor of the Operational Creditor, however, it is uncertain that such payments made by the Corporate Debtor pertains to the particular invoices i.e., Invoice No. 1385, 1497, 043, 059 and 180 claimed by the Operational Creditor. As per the bank statements and the ledger account of the Operational Creditor and the Corporate Debtor, it is clear that there have been multiple transactions between the Operational Creditor and the Corporate Debtor, however, the fact as to the payment of the particular invoices claimed by the Operational Creditor remains disputed since the

Corporate Debtor maintains a running account and the amount mentioned in the invoice raised by the Operational Creditor and the payment details specified by the Corporate Debtor does not match. It is observed that the Corporate Debtor paid an amount greater than the invoice amount and further claims that certain adjustments have been made by the Operational Creditor. However, it is not for us to decide that what particular adjustments has been made in respect of the outstanding amount. The payment made by the Corporate Debtor to the Operational Creditor shall explicitly mention the invoice in respect of which the payment is being made. Further, even after the adjustments made by the Operational Creditor in favor of the Corporate Debtor is taken into consideration, the ledger account of the Operational Creditor and the Corporate Debtor makes it clear that the account of the Operational Creditor has not been settled completely by the Corporate Debtor and the Corporate Debtor is still liable to pay outstanding amount to the Operational Creditor which is above the pecuniary threshold limit of Rs. 1 Lakh (prior to amendment dated 24.03.2020) as required by Section 4 of the Code. Therefore, we are of the view that the Corporate Debtor has defaulted in making payment to the Operational Creditor.

14. On the perusal of records placed before us, it is observed that the Corporate Debtor has not raised any dispute as to the quality or quantity of goods. The only defence of the Corporate Debtor lies on the ground that the Corporate Debtor has remitted certain payments in favor of the Operational Creditor. Further, the Corporate Debtor claims that the Corporate Debtor has to receive Rs. 3,79,463 from the Operational Creditor, however, it is observed that the Corporate Debtor has failed to raise its claim before the Resolution Professional during the CIR Process of the Operational Creditor and raising it for the first time in reply to the demand notice issued by the Operational Creditor. Further, the Corporate Debtor has not annexed any document in support of its claim. Therefore, averment in the absence of

substantiating document is a mere contention and hence, cannot be acted upon.

15. At this juncture, it is pertinent here to refer to the decision of Hon'ble Supreme Court in **Re. Mobilox Innovations Private Ltd vs Kirusa Software Private Ltd (2018) 1 SCC 353,** wherein**,** the Hon'ble Supreme Court has held that *"an application under Section 9 of the Code is not maintainable and ought to be rejected on there being a "pre-existing dispute"*. The Hon'ble Apex Court was pleased to hold, inter alia, as follows:

> *"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

Therefore, the contention of the Corporate Debtor in this regard does not stand substantiated. Hence, the defence of the Corporate Debtor appears to be moonshine and does not substantiate any plausible ground as to the existence of pre-existing dispute. Therefore, it would be safe to conclude that there does not exist any 'Pre-existing dispute' in the present case.

16. Therefore, in view of the transactional invoices accompanied with bank statements of the Operational Creditor's bank accounts, we are satisfied that there exists an 'Operational Debt' and that the Corporate Debtor has

defaulted in the payment of such debt. Hence, we are of the view that there is a *debt due and payable* and that there has been *default* on the part of the Corporate Debtor.

17. In view of the above facts and circumstances, we are satisfied that the present petition filed by the Operational Creditor fulfils the criteria laid down under the provisions of the Insolvency and Bankruptcy, Code. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time. In the light of the above facts and circumstances, it is, hereby ordered as follows: -

    a) The application bearing **CP (IB) No. 2680/ND/2019** filed by **M/s Metenere Limited,** the Operational Creditor, under Section 9 of the Code read with rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **M/s Baddi Foils Private Limited** (Corporate Debtor)**,** the Corporate Debtor, stands **admitted**.

    b) The Applicant has proposed the name of Mr. Rajesh Kumar Parakh, IBBI Registration Number IBBI/IPA-001/IP-P00272/2017-2018/10516, Email: parakh.rajesh@gmail.com to act as the IRP of the Corporate Debtor in Part-III of the Application. Therefore, Mr. Rajesh Kumar Parakh, IBBI Registration Number IBBI/IPA-001/IP-P00272/2017-2018/10516, Email: parakh.rajesh@gmail.com is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code. The proposed Interim Resolution Professional is directed to give his written consent in Form-2 as required under Rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 along with a copy of Registration certificate as well as a valid AFA within 5 days of receipt of this order.

c) We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Rajesh Kumar Parakh, to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount, however, be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.

d) We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

> *"(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."*

(e)The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period."

e) It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

f) The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'.

g) In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

h) A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Let copy of the order be served to the parties.

Sd/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)