

**IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 407/Chd/Chd/2018

**Under Section 9 of Insolvency and
Bankruptcy Code, 2016**

In the matter of :

IPRO Sugar Engineering Private Limited

having its registered office at
House No. 651, Top Floor,
Sector 8-B, Chandigarh-160008
Through Shri Harjeet Singh Bola

...Petitioner/Operational Creditor

Versus

Spray Engineering Devices Limited

having its registered office at
Plot No. 25, Industrial Area,
Phase II, Chandigarh-160002

...Respondent/Corporate Debtor

Judgement delivered on: 3.09.2019

**Coram: Hon'ble Mr. Ajay Kumar Vatsavayi, Member (Judicial)
Hon'ble Mr. Pradeep R. Sethi, Member (Technical)**

For the petitioner-operational creditor : Mr. Yash Pal Gupta, Advocate

For the respondent-corporate debtor : 1). Deepak Agrawal, Advocate
2). Shivam Bhardwaj, Advocate

Per: Pradeep R. Sethi, Member (Technical)

JUDGEMENT

This petition is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **Code**) read with Rule 6 of

the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (**Rules**) by M/s. IPRO Sugar Engineering Private Limited (**Operational Creditor**) for initiating the Corporate Insolvency Resolution Process (**CIRP**) in the case of Spray Engineering Devices Limited (**Corporate Debtor**). As per master data at page 26 of the petition, the registered office of the Corporate Debtor is at Plot No. 25, Industrial Area, Phase II, Chandigarh-160002. Therefore, the jurisdiction lies with this Bench of the Tribunal.

2. It is stated that the operational creditor issued various invoices from 29.02.2008 to 01.10.2009 and the debt is due from the date of first invoice i.e. 29.02.2008 on account of Consulting Engineers Services. In Part 4 of Form 5 the total amount of debt is stated to be ₹53,40,453/- which includes principal amount of ₹23,86,605/- and interest amount of ₹29,53,830/- @10 per cent p.a on the delayed part .

3. A demand notice in Form No. 3 and Form No.4 is stated to be issued on 28.09.2018 (Annexure A-7 (colly) of the petition).The demand notices were accompanied by the duly issued invoices in the name of corporate debtor alongwith debit notes certified by Chartered Accountants, copies of ledger in the books of the operational creditor and copies of contracts. The demand notice in Form No. 3 and Form No.4 is stated to be served by speed post on the corporate debtor on 01.10.2018 and 05.10.2018 (Page No.52 to 55 of this petition).

4. The petition is signed by Shri Harjeet Singh Bola, Director cum authorised signatory of the Operational Creditor and Shri Harjeet Singh Bola has also filed an affidavit dated 07.12.2018 verifying the contents of Form No. 5.He has also filed an affidavit dated 07.12.2018 (Page 225-227) stating

that the petitioner has not received any reply/letter indicating existence of a dispute from the Corporate Debtor except reply dated 08.10.2018 and has also stated that there is no existing dispute as on date and there is no suit or arbitration proceedings pending.

5. In Part III of Form 5, the operational creditor has proposed Mr. Sudhir Kumar Jain, bearing Registration No.IBBI/IPA-003/IP-N000131/2017-2018/11457 as the Interim Resolution Professional. The consent of the proposed IRP is furnished in Form No. 2 at Page No. 228 to 228A in which he has stated that there are no disciplinary proceedings pending against him with the Board of Insolvency Professionals Agency of Cost of Accountants of India.

6. Notice of the petition was directed to be issued to the corporate debtor to show cause as to why the petition be not admitted on 11.03.2019. Further, the petitioner was directed file copy of the civil suit filed before the Civil Court and the copy of the order passed referring the matter for arbitration.

7. The petitioner filed compliance affidavit dated 24.01.2019 (Diary No.422 dated 28.01.2019) alongwith copy of Plaint of the Civil Suit No.104 of 2013 filed before the Civil Court alongwith its order and copy of order of Civil Suit No.12281 of 2013, both attached as Annexure A15 & 16 respectively.

8. The Corporate Debtor filed reply dated 09.04.2019 vide Diary No.1889 dated 11.04.2019. It is stated in the reply that the Petitioner-Operational Creditor has breached the condition given in clause 8 of the co-operation agreement dated 14.06.2016 as IPRO Industrieprojekt GmbH incorporated a company namely IPRO India Private Limited on 09.10.2013

with the same objective for which the petitioner Company was incorporated. Further, it is stated that the Petitioner instead of going into Arbitration as per Hon'ble Punjab and Haryana High Court order dated 19.07.2018 in CR No.548/2016 and 6163/2015, filed the present petition under Section 9, IBC, thus committing contempt of the said order. It is stated that the Corporate Debtor has filed a petition under Section 262 of the Companies Act, 2013 for winding up of the petitioner company and is entitled to receive surplus and contribute deficit on the winding up of the company. Further, the petitioner Company has sent reply dated 01.11.2018 to the demand notice of the petitioner which is at page No. 211-212.

9. In response to the reply filed by the respondent corporate debtor, the authorised representative of the Petitioner filed rejoinder dated 13.06.2019 (Diary No.3012 dated 13.06.2019) stating therein that the respondent company has wrongly interpreted the order of the Hon'ble Punjab and Haryana High Court passed in civil revision No.548/2016 as it is upto the petitioner to choose an appropriate forum under peculiar circumstances. Further it is stated that 50% shares of the company does not give any right to the respondent to wind up a solvent company and without paying royalty to the petitioner, the respondent is using the drawings, layouts and engineering know-how of the technology belonging to the German shareholder. Also reliance is placed on the decision in the case of M/s. DF Deutsche Forfait AG and Anr. Vs. M/s. Uttam Galva Steel Ltd. that in case of delayed payments, interest can be claimed as an operational debt as well.

10. We have carefully considered the submissions of the learned counsel for the operational creditor and corporate debtor and have also perused the records.

11. The present petition is filed by the operational creditor since payment for invoices issued for consulting engineers services have not been paid by the corporate debtor. The total amount of debt is stated to be principal amount of ₹23,86,605/- and interest amount of ₹29,53,830/- calculated at 10% per annum on the delayed part. Along with the petition, the operational creditor has filed copy of balance sheet of the corporate debtor as on 31.03.2018 in which amount due to the operational creditor has been shown at ₹19,88,726/-. Further, in Paragraph No.13 of its reply, the corporate debtor has accepted that there are trade receivables amounting to ₹23,56,015/- of the operational creditor, for which the operational creditor is harassing the corporate debtor since, 2013. Therefore, the principal amount of debt due is almost accepted. However, the corporate debtor has sought to plead that interest was never credited by the operational creditor in its books of account and therefore, the claim for interest in the present proceedings is not proper. In the rejoinder, the operational creditor has referred to the decision of the National Company Law Tribunal, Mumbai Bench, in *M/s DF Deutsche Forfait AG and Anr. V. M/s. Uttam Galva Steel Ltd. (C.P. No. 45/I&B/NCLT/MAH/2017)*, dt: 10-04-2017, holding that in case of delayed payments, interest can be claimed on operational debt as well. Therefore, the objection of the corporate debtor that the interest amount is not credited in the books of the operational creditor, becomes irrelevant. In any case, the

extent of the claim will fall for consideration by the Interim Resolution Professional.

12. The learned counsel for the corporate debtor has argued that the corporate debtor is the contributory shareholder of the operational creditor, holding 50% shares and since the preamble of the Code specifically speaks of interest of all the stake holders, being the paramount objective of the Code, no action can be taken against the interests of the shareholder, holding 50% shareholding of the operational creditor. The present application is by an operational creditor. Section 5(20) of the Code defines an operational creditor to mean a person to whom an operational debt is owed. Section 5(21) of the Code, defines operational debt to *inter alia* mean a claim in respect of the provision of goods or services. As discussed above, the debt due by the corporate debtor to the operational creditor arises out of provisions of services. The application for initiation of CIRP by the operational creditor under Section 9 of the Code can be made where the operational creditor does not receive payment from the corporate debtor of the operational debt. The issue whether there is any relationship between the operational creditor and the corporate debtor is therefore, not relevant. The objection is not accepted.

13. The learned counsel for the corporate debtor has argued that a suit for declaration and a suit for recovery was filed by the operational creditor against the corporate debtor seeking the recovery of ₹37,45,586/-. It is submitted that the respondent-corporate debtor appeared in both the cases and prayed to refer the matter to arbitration in view of Clause 17 and also Deed of Adherence (Annexure 4) of Cooperation Agreement dated

14.06.2006 and ultimately Hon'ble Punjab and Haryana High Court vide its judgment dated 19.07.2018 passed in CR NO.548 of 2016 and CR No.6163 of 2015 held that the matter be referred to the Arbitrator. It is pleaded that instead of going to the Arbitrator as per the orders of the Hon'ble Punjab and Haryana High Court, the operational creditor with mala fide intention came up with the present petition under Section 9 of the Code and the present petition has been filed in contempt of Hon'ble Punjab and Haryana High Court. It is stated that the objective of the operational creditor is not to recover the dues but to unduly harass the corporate debtor, which is a going concern, having more than 400 employees and profit making. On the other hand, it is stated that the operational creditor is not a going concern and has not undertaken any business since last more than 5 years.

14. We find that the operational creditor filed a suit for recovery for an amount of ₹37,45,856/- i.e. ₹23,56,015/- as principal component and ₹13,89,841/- as interest component. The Civil Suit No.104/2013 was filed against the corporate debtor and its Directors (Pg.26 of Diary No.422 dated 28.01.2019). It appears that in the Civil Suit, the corporate debtor filed application under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the matter to the arbitrator under Clause 17 of Cooperation Agreement executed between the parties on 14.06.2016. The Hon'ble Punjab and Haryana High Court, vide order dated 19.07.2018 in Civil Revision No.548 of 2016 and Civil Revision No.6163 of 2015 held that the matter be referred to the Arbitrator in terms of the Agreement dated 14.06.2006. Therefore, the directions for reference to arbitration were in the suit for recovery filed by the operational creditor. The operational creditor

choosing not to avail the option would not disentitle him from filing an application under Section 9 of the Code. The learned counsel for the corporate debtor has not been able to show any provision under the Code which disentitles a company from filing a petition under Section 9 of the Code, if it is not a going concern and has not undertaken any business since last more than 5 years. Further, the petition under Section 9 of the Code is to be decided with reference to the default of the corporate debtor vis a vis the operational debt of the operational creditor. Therefore, the financial position of the corporate debtor is not relevant. We may add here that the plea of the learned counsel for the corporate debtor that arbitration proceedings are pending, cannot be accepted.

15. The learned counsel for the corporate debtor has stated that a petition for winding up of the operational creditor has been filed by the corporate debtor under Section 272 of the Companies Act, 2013. It has been requested that this petition be decided before any decision is taken on the petition under Section 9 of the Code. The learned counsel for the corporate debtor has not been able to show any provision under which the plea raised can be accepted. The two proceedings are independent of each other.

16. In view of the above discussion, the contention raised by the corporate debtor in its reply to the demand notice as well as to the reply filed during the present proceedings are not accepted.

17. The provisions of Section 9(5)(i) of the Code are as follows:-

“(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under subsection (2), by an order—

- (i) *admit the application and communicate such decision to the operational creditor and the corporate debtor if,—*
 - (a) *the application made under sub-section (2) is complete;*
 - (b) *there is no payment of the unpaid operational debt;*
 - (c) *the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*
 - (d) *no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*
 - (e) *there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.”*

18. No objections are being raised to the completeness of the application filed under Section 9(2) of the Code. As discussed above, the operational debt remains unpaid, the demand notice was delivered to the corporate debtor and the reply has been examined above and found to be not acceptable. As discussed above, the proposed Resolution Professional Shri Sudhir Kumar Jain, has filed Form No.2 in which he has stated that there are no disciplinary proceedings pending against him with the Board of Insolvency Professionals Agency of Cost Accountants of India.

19. In view of the satisfaction of the conditions provided for in Section 9(5)(i) of the Code, we admit the petition for initiation of the CIRP process in the case of the Corporate Debtor M/s Spray Engineering Devices Limited and direct moratorium and appointment of Interim Resolution Professional as below.

20. We declare the Moratorium in terms of sub-section (1) of Section 14 of the code as under:-

(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.

21. It is further directed that 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. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

22. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

23. The Law Research Associate of this Tribunal has checked the credentials of Mr. Sudhir Kumar Jain and there is nothing adverse against him. In view of the above, we appoint Mr. Sudhir Kumar Jain, Registration No. IBBI/IPA-003/IP-N000131/2017-2018/11457, Mobile No.9888200222, 7009012001, e-mail id: skjaineibl@gmail.com the Interim Resolution Professional, with the following directions:-

- i) The term of appointment of Mr. Sudhir Kumar Jain shall be in accordance with the provisions of Section 16(5) of the Code;
- ii) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership

rights recorded in the balance sheet of the Corporate Debtor etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the Corporate Debtor;

- iii) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the Code of Conduct' governing his profession and as an Insolvency Professional with high standards of ethics and moral;
- iv) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;
- v) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;

- vi) The Interim Resolution Professional shall after collation of all the claims received against the corporate debtor and the determination of the financial position of the corporate debtor constitute a committee of creditors and shall file a report, certifying constitution of the committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the committee within seven days of filing the report of constitution of the committee; and
- vii) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.

A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send copy of this order to the Interim Resolution Professional at his email address forthwith.

Sd/-
(Ajay Kumar Vatsavayi)
Member (Judicial)

Sd/-
(Pradeep R. Sethi)
Member (Technical)

September 3, 2019
Yashpal

Pronounced in open court Sd/- 3.9.2019