

IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH

**TCP 143/I&BP/NCLT/MAH/2017**

Under Section 9 of I&B Code, 2016

In the matter of  
**SARKAR PACKS PRIVATE LIMITED**

.... Operational Creditor  
v/s.

**COBIT ENGINEERING PVT. LTD..**

.... Corporate Debtor

Order delivered on 6.10.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)  
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner: Mr. G.M. Joshi, Advocate for Petitioner

For the Respondent: Mr. Rafeeq Peermohideen, i/by Jeetendra Sachdev  
for Respondent

*Per B. S. V. Prakash Kumar, Member (Judicial)*

**ORDER**

***Oral order dictated in the open court on 5.10.2017***

It is a Company Petition filed by Petitioner/operational creditor u/s 9 of Insolvency & Bankruptcy Code, 2016 against Corporate Debtor stating that this Petitioner supplied wooden planks and boxes, for payment towards goods supplied, the petitioner raised invoices against the corporate debtor during the period in between 29.8.2012 to 16.5.2013

for an amount of ₹13,67,299.17, as the Corporate Debtor failed to make repayment against the invoices raised, the Petitioner on 8.1.2016 gave notice u/s 433 of Companies Act, 1956. Thereafter owing to jurisdictional transfer, this case has come before this Bench from Hon'ble High Court Bombay, in pursuance of the same, this Petitioner filed Form u/s 9 of I&B Code, 2016 for initiation of Insolvency Resolution process against the Corporate Debtor, hence this Petition.

2. The Petitioner, as stated above, this Petitioner initially filed Winding-up Petition given notice u/s.433 & 434 of Companies Act, 1956 on this matter having come up for hearing, the Corporate Debtor filed Reply-Affidavit to this Petition stating that the Corporate Debtor already made a payment of ₹3,34,750 in respect to this debt on 5.2.2016 by sending a cheque along with reply notice to the demand notice u/s.433 of Companies Act, 1956 for payment of ₹13,67,299.17 for the goods supplied to the corporate debtor. In the reply given by the corporate debtor, it has been categorically mentioned that payment of ₹3,34,750 through cheque is full and final payment towards the claim amount because the petitioner himself sent an email 9.11.2015 calling upon the debtor to pay only ₹3,34,750 as full and final payment towards the invoice amount of ₹13,67,790.17. On seeing such a reply come from the Corporate Debtor, this Petitioner filed a rejoinder before

this Bench coming out for the first time with all these facts which were not disclosed even at the time when the Form u/s.9 has been filed. In the Rejoinder, the petitioner tried to explain away the payment made by the debtor saying that at the relevant time as he was facing serious financial crunch and incurring various unanticipated expenses, such email was sent to the debtor somehow to get at least concessional payment, but when the Corporate Debtor having not responded immediately, the Petitioner filed this Company Petition u/s.433 and 434 of the Companies Act, 1956 on 11.2.2016.

3. The plausible defense taken out by the Petitioner side is since he received reply notice along with the cheque on 11.02.2016; he could not incorporate this fact of receiving cheque in his original Petition because he filed the Petition coincidentally on 11.2.2016 itself.

4. Now in this Company Petition, the Corporate Debtor Counsel has raised two defenses which are as follows:

(a) This claim was already paid by the Corporate Debtor on the demand made by the Petitioner for an amount of ₹3,34,750/- on 9.11.2015, he therefore says, it is a Petition filed on misconception to get entire claim amount to which he has not entitled to after receipt of the payment of ₹3,34,750 as full and final payment towards the claim mentioned.

(b) The debtor Counsel says the claim included invoices time barred by the time the Company Petition filed u/s.433 and 434 of Companies Act, 1956 because there are invoices from 29.8.2012 to January 2013 which are explicitly time barred as on date of filing this Company Petition. That apart, the counsel for corporate debtor stated that the petitioner in his winding up notice mentioned that this petitioner in the demand notice sent u/s.433 of the Companies Act, 1956 made claim for invoices raised from 4.3.2013 to 16.5.2013, but when it has come to petition, he included time barred debts from 29.8.2012 to January 2013 in the petition filed, for this petition itself not clear how much money the debtor owed to pay to the petitioner is also not clear, therefore, the debtor Counsel says this Petition is liable to be dismissed on the above mentioned grounds.

5. On hearing the submissions of either side, now it is an admitted fact that the Petitioner made called upon the debtor for payment of ₹3,34,750/- on 9.11.2015 as full and final payment against the claim of ₹13,67,790.17, when no payment come from the debtor, the petitioner says, he gave winding up notice, for the debtor having received winding up petition, this debtor on 5.2.2016 sent reply as well as

cheque for the amount of ₹3,34,750 stating that debtor sent the cheque as asked by the petitioner. The Petitioner Counsel has now raised a defense saying he made the demand on 9.11.2015 because he was in financial difficulty at that point of time, since that demand was not timely honored, he filed the winding petition, he says that demand dated 9.11.2015 should not be taken as hurdle for taking this Company Petition into consideration, and admit the petition with Moratorium.

6. On verification of the record, it has not appeared anywhere that this Corporate Debtor sent back this money to the debtor immediately after he received the cheque, indeed he encashed the cheque in the month of May 2016. This petitioner has also not given any notice to the debtor, that offer given on 9.11.2015 was taken back. He has not even mentioned in the demand notice sent u/s.433 of the Companies Act, 1956 stating that offer given on 9.11.2015 was rescinded. Therefore, it cannot be construed at this juncture that there is no dispute between the parties in respect to the claim made before this Bench. For the corporate debtor already paid as asked by the petitioner, whether the petitioner can file IB Petition ignoring the payment of ₹3,34,750 made by the debtor. Whether payment of ₹3,34,750 amounts full and final payment in respect to the alleged claim. Besides this, the Petitioner included time barred invoice claims in the claim; therefore that there is

THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH

TCP 143/I&BC/NCLT/MB/MAH/2017

clear pre-existing dispute in respect to liability and this dispute has been in existence as on the date of filing winding petition.

7. In view of these two infirmities patently appearing on the record, one – ₹3,34,750 was paid by the debtor, of course the petitioner says that could not be included by that time he already filed winding up petition, where as the debtor shows payment basing on email admittedly sent by the petitioner, two – admittedly time barred claims against invoices raised beyond three years as on date the petitioner filed winding up petition, at least the petitioner has not even shown the payment as accounted against the claim the petitioner made, in view of the same, this Company Petition is hereby dismissed with liberty to the Petitioner to proceed in accordance with the law.

Sd/-

V. NALLASENAPATHY  
Member (Technical)

Sd/-

B.S.V. PRAKASH KUMAR  
Member (Judicial)