IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)
Company Petition No. IB-42/ND/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:
INTERNATIONAL BUSINESS PRODUCTS LIMITED

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

EMD SCAFFOLDING PRIVATE LIMITED

...RESPONDENT/ CORPORATE DEBTOR

ORDER DELIVERED ON: 03.02.2021

CORAM:
DR. DEEPTI MUKESH
HON'BLE MEMBER (JUDICIAL)
MS. SUMITA PURKAYASTHA
HON'BLE MEMBER (TECHNICAL)

For the Applicant : Mr. Prasad Batavia, Adv.
Mr. Shubham Kulshreshtha, Adv
For the Respondent : None

MEMO OF PARTIES

INTERNATIONAL BUSINESS PRODUCTS LIMITED
Having its registered office at:
6, Newfield Court, West Hougton,
Bolton, BL53SA, England

...APPLICANT/OPERATIONAL CREDITOR

Sd/-

VERSUS

EMD SCAFFOLDING INDIA PRIVATE LIMITED
Having its registered office at:
A-230/2, Shaheen Bagh,
Gali No. 7 Jamia Nagar, Okhla
New Delhi 110025

...RESPONDENT/ CORPORATE DEBTOR

ORDER
AS PER SUMITA PURKAYASTHA (MEMBER TECHNICAL)

1. The Present Application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by International Business Products Limited (for brevity 'Applicant') through Mr. Andrew Ratcliff (authorized vide board resolution dated 25.07.2018) with a prayer to initiate the Corporate Insolvency process against EMD Scaffolding India Private Limited (for brevity 'Corporate Debtor').

2. The applicant *International Business Products Limited,* claimed to be the operational creditor, is a Company having its registered office at 6, Newfield Court, West Houghton, Bolton, BL5 3SA England and is involved in the business of import and product distribution.

3. The Respondent *EMD Scaffolding India Private Limited* is a company incorporated on 21.08.2007 under the Companies Act, 1956 having its

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registered office at A-230/2, Shaheen Bagh, Gali No. 7, Jamia Nagar, Okhla, New Delhi 110025 and CIN U27310DL2007PTC167262 is inolved in Casting of metals includes casting finished or semi-finished products producing a variety of goods, all characteristic of other activity classes.

4. It is the case of the Applicant that during the course of business the Applicant issued a purchase order upon the Corporate Debtor bearing number 491 dated 05.09.2017. As per the averments made by the Applicant, the Corporate Debtor agreed to the terms of the purchase order wherein it was stated that the Corporate Debtor shall provide the Applicant with 5500 pieces of galvanized scaffolding tube manufactured to the specification of the Applicant at an agreed price of Euros 12.60 per piece however, the quantity were reduced from 5500 to 5000 piece. The Corporate Debtor shall deliver the goods as soon as possible on or before 25 days from the date of payment of the deposit/advance amount paid by the Operational Creditor. Further the Corporate Debtor shall be held liable to pay Operational Creditor an amount of Euros 200 per day for the delay in delivery of the goods.

5. As per the averments made by the Applicant in the application, Corporate Debtor issued a Foreign Performa invoice dated 06.09.2017 bearing reference no. EMD-478\6092017 for the order of 5000 pieces of galvanized scaffolding tube at the agreed price of Euros 12.60 per piece amounting to a total of Euros 63,000. The Corporate Debtor agreed vide this Foreign performa that the goods shall be delivered within 25 days from the receipt of advance of 50% of the total cost to be paid by the

Applicant. Further in compliance of the Foreign performa invoice the Applicant transferred an amount of Euros 31,500 on 08.09.2017 in the bank account of the Corporate Debtor through HSBC international Bank transfer. The copy evincing the remittance of the advance has been placed on record.

6. It is stated by the Applicant that on Corporate Debtor`s request, a revised purchase order bearing number 491A dated 09.10.2017 was issued wherein it was mentioned that the Corporate Debtor has received the Advance amount and has delayed in delivering the goods by 02.10.2017 as agreed under the Purchase Order and the foreign performa invoice. As per the averments mentioned in the application the Corporate Debtor informed the Applicant in third week of October 2017 that the goods can no longer be supplied at the price agreed under the foreign performa invoice/purchase order/revised purchase order, stating the reason that the cost of the raw material had increased. Further the Applicant cancelled the revised purchase order vide letter dated 20.11.2017 and another letter dated 20.11.2017 was sent, explaining the reason for cancellation. The Applicant further requested for a refund of the Advance amount vide its letter dated 20.11.2017.

7. The Applicant vide an email dated 21.11.2017 requested for an update on the refund of the advance amount paid. The Corporate Debtor vide it email dated 22.11.2017 stated that assured that it shall be done and also mentioned that he did not refuse to supply the goods and the Applicant was well informed about the steel increase cost and he has stock of more

than 40,000 Euros, so if they could consider these facts for the deal. Another email dated 24.11.2017 was sent by the Applicant to the Corporate Debtor requesting an update on the status of the refund to which the Corporate Debtor replied vide its email dated 27.11.2017 that the he has forwarded the documents to his Chartered Accountant and the refund shall be initiated soon.

8. The Applicant on 08.02.2018 sent a Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 read with Rule 5 of the Insolvency and Bankruptcy (Applications to Adjudicating Authority) Rules, 2016 for the refund of the advance amount and payment of penalty for delay in delivery of goods along with interest thereon to the Corporate Debtor and no reply has been sent by the Corporate Debtor. The Applicant has sent another Demand Notice dated 28.07.2018 to the Corporate Debtor for the refund of the advance amount and payment of penalty for delay in delivery of goods along with interest thereon to the Corporate Debtor and a reply dated 07.09.2018 wherein the Corporate Debtor accepted that an amount of Euros 31500/- had been transferred However, the Corporate Debtor has refused its liability and has disputed the amount of Euros 50,849 /- which has been demanded, although had suggested he is still ready to deliver the goods but according to Indian Standard Price.

9. The Applicant has therefore filed this petition as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate their claim of Euros

50,849/- including interest. Notice was issued to the Corporate Debtor on 04.01.2019 by the Adjudicating Authority.

10. The reply dated 07.05.2019 was filed by the Corporate Debtor wherein stated that the Purchase Order No. 491 dated 05.09.2017 was unilaterally sent by the Operational Creditor and the Corporate Debtor had never agreed to the terms of the Purchase Order. The representative of the Corporate Debtor Company, Mr. Mohammad Yusuf had informed the Operational Creditor that the prices of steel were likely to increase and that the rates would be much higher. In response the Operational Creditor assured the Corporate Debtor that it would compensate towards the increase in the steel price and that the prices would be revised accordingly by way of a revised order. Furthermore, the Operational Creditor asked the Corporate Debtor to send a Performa Invoice quoting the rate mentioned in the Purchase Order of 05.09.2017 in order to enable the Operational Creditor to release an amount of Euros 31,500/-.

11. The Corporate Debtor states that a Performa Invoice dated 06.09.2019 had been issued and the Operational Creditor remitted an amount of Euros 31,500/-. The Corporate Debtor had informed the Operational Creditor vide email dated 21.09.2017 and 25.09.2017 that the original prices which had been quoted were no longer tenable in view of the increase in the price and that it would be even far below the cost of the raw material and it would be impossible to supply the goods at such prices. The Corporate Debtor had requested to amend the Purchase order as per new costing provided in the said email. The Corporate Debtor has

annexed the corresponding emails for the same as Annexure R-1 and R-2. The Corporate Debtor further states that the revised purchased order dated 09.10.2017 issued by the Operational Creditor did not mention the revised rates as requested by the Corporate Debtor and also penalty clauses were added which were never agreed by the Corporate Debtor.

12. The Corporate Debtor states that the Operational Creditor instead of issuing a revised Purchase Order sent three letters dated 20.11.2017 to cancel the order and falsely accused the Corporate Debtor of refusing to honor the agreed price. Further the Corporate debtor submits that it has suffered a loss of Euros 40,000/- on account of the failure of the Operational Creditor to revise the price and cancellation of the deal. However, to settle the matter, it was agreed between the parties that out of the amount of Euros 29,000/- towards the loss and damage which had been suffered by the Corporate Debtor and would remit the balance amount of Euros 2,500/- to the Operational Creditor in terms of the settlement.

13. The Operational Creditor had filed a rejoinder dated 10.07.2019 and stated that the Corporate Debtor vide his email dated 21.09.2017 informed the Operational Creditor that the prices of steel had increased and the Corporate Debtor could not supply the goods to the Operational Creditor at the price agreed under the Purchase Order and the Foreign Performa Invoice. The Operational Creditor had informed Mr. Mohammad Yusuf, the representative of the Corporate Debtor Company that they were obligated to supply the goods as per the terms and conditions of the

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Purchase Order and that the increase in price of the goods post payment of the Advance amount was not acceptable. The Corporate Debtor vide the email dated 27.11.2017 sent to the Operational Creditor acknowledged its liability. On 08.02.2018 the Operational Creditor issued a demand notice upon the Corporate Debtor to refund the advance amount and pay the penalty for delay in delivery of goods along with the interest payable thereon. In response to the demand notice dated 08.02.2018, the Corporate Debtor vide its email dated 25.02.2018 acknowledged its liability and agreed to pay the Advance amount to the Operational Creditor in 6(six) monthly installments and that the first installment would be of Euros 5100/-. The corresponding email have been annexed as Annexure RJ2. In furtherance to which the Corporate Debtor made a part payment of Euro 2500/- into the Operational Creditors HSBC UK plc account. The Corporate Debtor did not deny the payment of the Advance amount even after the second demand notice dated 28.07.2018.

14. In "***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited– 2017 1 SCC OnLine SC 353***", the Hon'ble Supreme Court analysed the meaning of dispute with respect to Operational Creditors and observed:

> *"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy*

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of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. ...."

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine: ......

(iii) 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?"

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit *or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."*

15. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice or invoice. Be that as it may, on appraisal of the arguments advanced by the Ld. Counsels, it emerges that there were disputes existing prior to the issuance of the Demand Notice. We find the e-mails dated 21.09.2017 and 25.09.2017 on record corroborate the Corporate Debtor's defence that a dispute had been raised in respect of the prices of the goods which had been quoted. That the original price were no longer tenable in view of the increase in the price of steel. The Corporate Debtor had requested to amend the Purchase order as per new costing provided in the said email. Therefore, the dispute existed even prior to the issuance of the demand notice. A pre-existing dispute does not entitle the Operational Creditor to seek Insolvency Resolution of the Corporate Debtor. Whether the Operational Creditor is entitled to seek recovery of the Advance amount of Euro 31500/- or is justified for the Corporate Debtor to set off the Advance amount with amount of loss of Euro 40,000/- incurred by them, is not for the consideration of this Bench. However, the Applicant has the option to file a Civil suit before the appropriate forum, for the recovery of the same.

16. In view of the above, this Bench is of the view that the prayer for initiating Corporate Insolvency Resolution process against the Corporate Debtor is not sustainable.

17. Petition is therefore rejected.

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Sumita Purkayastha

Member (T)

SD/-

Dr. Deepti Mukesh

Member (J)