

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-IV

IA 967/2023

IN

C.P. (IB) No. 931/MB/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

Melange Systems Private Limited

[CIN: U72200KA2000PTC027922]

...Operational Creditor/Applicant

V/s

PME Infratech Private Limited.

[CIN: U32100MH1987PTC045671]

...Corporate Debtor/Respondent

Order Dated:09.05.2023.

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

C.P. (IB) No. 931/MB/2020

For the Petitioner(s) : Mr. Shyam Kapadia, Ld. Counsel

For the Respondent(s) : Mr. Rohit Gupta, Ld. Counsel.

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For the Petitioner(s) : Ms. Namrata Sadhnani, Ld. Counsel

For the Respondent(s) : Mr. Shyam Kapadia, Ld. Counsel.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an Application being C.P. (IB) No. 931/MB/2022 filed on 11.07.2020 by Melange Systems Private Limited, the Operational Creditor/Applicant, under Section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in respect of PME Infratech Private Limited.
 - 1.1. The Applicant Operational Creditor has claimed that the Corporate Debtor is in default of a sum of Rs. 6,51,30,990/- (Rupees Six Crore, Fifty-One Lacs, Thirty Thousand, Nine Hundred & Ninety only), comprised of the principal outstanding of Rs. Rs. 5,38,47,605/- and interest amounting to Rs. 1,12,83,295/- @ 18% thereon till 21.07.2020, also interest till the date of payment. The date of default is stated in Part IV of the application as 'debt fell due on different dates commencing from 4 December, 2018' and a statement of account of unpaid invoices is annexed the petition. As per this statement, the invoices fell due between the period from 18.01.2019 to 19.05.2019.
2. The Operational Creditor is a wireless networking company offering low cost, low power wireless networking modules and complementary solutions for the next generation smart grid networks, smart cities and connected infrastructure. The Operational Creditor had supplied RF Modules to M/s Pal Mohan Electronics Pvt. Ltd. ("Pal Mohan") and the Corporate Debtor, herein since the year 2013. It is the case of the Operational Creditor that –

2.1. The Maharashtra State Electricity Distribution Co. Ltd., (“MSEDCL”) floated a Tender in the year 2011 for the supply of Energy Meter with RF Communication capability. Operational Creditor, having expertise in the field of wireless embedded services, provided RF Modules to various companies including Pal Mohan, L&T Ltd., etc., to submit their application along with the samples with RF Modules to MSEDCL for award of Tender. The RF Module was one of the main components in the meter for getting qualified for Award of Tender. The said Pal Mohan, having got qualified / awarded Tender by MSEDCL, raised several Purchase Orders on Operational Creditor for supply of RF Modules since year 2013. The said Pal Mohan, instructed Operational Creditor, vide its emails dated 02.08.2017, 31.10.2017 and 09.12.2017, to raise invoices and dispatch materials to the Corporate Debtor instead of Pal Mohan as it was one of its group companies. As such, all invoices / bills since December 2018 were raised in the name of the Corporate Debtor, against the amended Purchase Orders dated 25 December 2018 issued by the Corporate Debtor to Operational Creditor. The Directors of the Corporate Debtor are also Directors of Pal Mohan. It is claimed in the application that the liability of Pal Mohan and Corporate Debtor is joint and several in view of the instructions given by Pal Mohan.

2.2. Neither the Corporate Debtor nor the said Pal Mohan have made any payment against the invoices / bills, raised by the Operational Creditor which include the applicable taxes. There are 34 invoices / bills of various dates and varied amounts amounting to Rs. 5,38,47,605/-, due for payment from the Corporate Debtor.

- 2.3. The Operational Creditor has already paid Rs. 82,14,042/- towards the Goods and Services Tax ("GST"), on all outstanding invoices / bills pertaining to the Corporate Debtor. The Corporate Debtor would have taken input credit, against the said payment made by the Operational Creditor to the GST authorities. Further, the Operational Creditor is a Micro enterprise registered under the Micro, Small and Medium Enterprises Development Act, 2006 ("MSME Act") and that Corporate Debtor was aware of the same.
- 2.4. The Operational Creditor had therefore issued a Demand Notice to the Corporate Debtor on. 28 December 2019, demanding payment of the amount due Inclusive of interest thereon. The Corporate Debtor received the said Notice on 2 January 2020. The Corporate Debtor has neither made any payments nor has it replied to the said Demand Notice.
- 2.5. Even in August 2019, the Corporate Debtor continuously and repeatedly compelled it to supply RF Modules and raised another Purchase Order. However, it insisted for clearance of the outstanding dues before any fresh supplies being sought. There were no contemporaneous complaints or issues with its performance of the Purchase Order. The Corporate Debtor has not produced a single document, which even purport to show a semblance of a pre-existing dispute between the parties and there is clear admission of the liability, the defenses are spurious, illusory and an afterthought.
- 2.6. There is no material/document produced by the Corporate Debtor in support of these alleged deductions of Rs. 58,05,074/- (which includes claim of Rs. 36,58,254/- also, though it is claimed separately in the reply). Even assuming (whilst denying) that there are some deductions, there is no explanation as to

why Corporate Debtor has failed to and/ or neglected to make the balance payment.

2.7. The Hon'ble NCLAT, in iValue Advisors Pvt. Ltd. v. Srinagar Banilal Expressway Ltd. Company Appeal {AT} (Ins) No.1142/ 2019, decided on 13 January 2020, dealt with the same contention where the MSME/ Petitioner having moved the Council before issuing the Notice under Section 8 of Insolvency and Bankruptcy Code ("IBC") had been raised, the NCLAT held (@ paragraphs 9, 10 and 11) that Only because the MSME had moved the authority under the MSMED Act did not mean that there was a pre-existing dispute; Only because the MSME approached the authorities under the MSMED Act is no ground for the NCLT to reject the application under Section 9 of the IBC; and Even if conciliation proceedings were to start, if the Respondent did not raise dispute regarding supply or goods or quality of services, still it would be open for the NCLT to look into the question whether or not dispute as covered under IBC is attracted.

3. The Corporate debtor submits that –

3.1. Proceedings before Micro and Small Enterprises Facilitation Council, Bengaluru ("MSEFC") for recovery of amounts under the Micro, Small and Medium Enterprises Development Act, 2006 ("MSME Act")¹ dismissed with respect to the same claim therefore the present petition is not maintainable and has relied upon the decision in the case of Shrishti Electromech Pvt. Ltd. v. Vijay Home Appliances Pvt Ltd CP(IB) No.396/9/HDB/2018;

3.2. The Respondent started ordering RF Modules from Operational Creditor directly and as per an internal arrangement, a part of the meter assembly was completed at the Respondent's unit and semi-assembled meters were supplied to Palmohan.

3.3. The MSEDCL Orders received by Palmohan and the Operational Creditor PME specified the technical requirement of RF Modules by Melange. For each tender of MSEDCL in which Palmohan/PME has participated, the company name of the Petitioner and make of Module was declared and approved by MSEDCL. Therefore, there was a collaboration between the Petitioner and Respondent to supply energy meters to MSEDCL, which is unlike a typical sale-purchase agreement. Since Palmohan, Petitioner and Respondent were acting in a consortium to supply energy meters to MSEDCL, there was an understanding between them that payments would be made to the Petitioner for the RF Modules, as and when payments are received from MSEDCL. Such arrangement was also reflected in the escrow agreement dated 19.12.2018. Payment of over INR 6 Crore has already made since 2017.

3.4. Purchase Order issued by MSEDCL specifies that energy meters are guaranteed for period of 5.5 years from the date of supply. The maintenance of RF Modules is the responsibility of Operational Creditor until the expiry of the period of guarantee, which includes attending to field complaints throughout Maharashtra. The Respondent is entirely dependent on the Petitioner to supply energy meters to MSEDCL.

3.5. The Respondent has been suffering substantial penalties and losses as MSEDCL has cancelled purchase orders for energy meters due to delay in supply, caused due to non-availability of RF Modules; it has also invoked its right to recover penalty amounting to 10% (10 percent) value of the cancelled orders (Letters dated January 30, 2020 and June 29, 2020 by MSEDCL).

3.6. There have been substantial recurring technical defects in the RF Modules supplied by the Petitioner, which have been raised by Respondent vide several emails dated July 15, 2019, June 21, 2019 and August 1, 2019. The readings of the Modules supplied by the Petitioner were also faulty and was highlighted to the Petitioner for immediate redressal. The issue regarding the BCS reading was raised vide Respondent's emails dated June 3, 2019, June 6, 2019 and June 10, 2019. The Respondent cannot be made to suffer or pay for losses, caused solely due to non-supply of RF Modules by the Petitioner.

3.7. The claim on account of unpaid invoices are not due and payable, thus no default can be said to have arisen. The summary of amount claimed and due is as follows, which shows that no debt is due and payable as on the date -

Division of claim amount	Amount as per Petitioner	As per the Respondent
Principal Outstanding Amount based on Invoices (Including GST Paid)	5,38,47,605/-	Not due and payable basis our submissions
Interest	1,12,83,295/-	NIL Basis our submissions
Total	6,51,30,900/-	NIL

3.8. Interest under Section 16 of the MSME Act can be claimed before the MSME Council in terms of Section 18 of the MSME Act and not before the NCLT as

an outstanding debt. The claim of interest on operational debt at the rate of interest according to Section 16 of the MSME Act, when no interest is stipulated in the invoices, is not sustainable (Vitson Steel Corp Private Limited vs Capacite Infraprojects Limited 1579/MB/C-IV/2019, order dated April 28, 2020; Krishna Enterprises v. Gammon India Ltd, 2018 SCC OnLine NCLAT. The order of the Hon'ble National Company Law Appellate Tribunal in the case of iValue Advisors Pvt. Ltd. v. Srinagar Banihal Expressway Ltd. (Company Appeal (AT) (Ins) No.1142 of 2019) dated January 13, 2020, as relied upon by the Petitioner, is clearly distinguishable on facts and thus not applicable to the present case.

- 3.9. The Petitioner did not disclose to this Hon'ble Tribunal the existence of such an MSME Application filed before MSEFC for recovery of amounts. In fact, even the Respondent became aware of the existence of such a case against itself, pending before the MSEFC, only on June 29, 2021. If a proceeding is initiated, but it is abandoned or withdrawn, then such plaintiff is barred to initiate fresh proceedings for the same subject-matter / claim, unless such liberty is explicitly granted by the relevant court.
4. This Bench heard both the Counsel(s) and perused the material available on record.
- 4.1. It is not in dispute that the Operational Creditor had supplied the material and a sum of Rs. 5,38,47,605/- is outstanding as payable in the books of the Operational Creditor. It is the case of the Corporate Debtor that this sum is not due, as the payment was to be made by it after receipt of corresponding payment from MSEDCL. However, the Corporate Debtor has not produced any evidence to substantiate this plea, except one unsigned and unexecuted

Escrow account agreement, amongst the Bank, Operational Creditor and Pal Mohan, which authorizes the bank to receive collections from MSEDCL on their behalf and allocate between the two. It is not on record whether this agreement was acted upon or not? In the absence of the evidences to this effect and the in light of terms stated in the purchase order, 'Against LC' and this is further confirmed from the what's app communication placed with petition also, this bench does not find any substance in the plea that the amount claimed by the Operational Creditor has not fallen due.

4.2. Further, the Corporate Debtor claims Rs. 58,05,074/-, as deductions, besides contends that it has potential risk of recovery of penalty amounting to 10% value of the cancelled orders by MSEDCL 10%, and obligation to provide after sales services and support as the product supplied by the Operational Creditor has warranty of 5.5 years. However, the Corporate Debtor has not placed on record any evidence of levy of penalty, except contract termination letter issued by MSEDCL, which records the failure of the Operational Creditor to supply the ordered goods in time.

4.3. As regards existence of dispute this bench finds from the perusal of the e-mail's communications pointing to alleged dispute as well as para 27 of convenience compilation/written submissions dated 28.01.2022 filed by the Operational Creditor has no substance, and this is not a plausible contention which requires further investigation and that the "dispute" raised by the Corporate Debtor is a patently feeble legal argument and an assertion of fact unsupported by evidence. Accordingly, the plea of pre-existing dispute deserved to be rejected being a spurious defense which is mere bluster.

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- 4.4. This bench is of the view, that the proceeding before MSMEFC can be filed for realization of undisputed dues and it is not merely a conciliation forum to resolve the disputes pertaining to claims of a MSME entity.
- 4.5. There exist an Operational Debt of Rs. 5,38,47,605/- and the same had fallen due for payment and has not been paid; it is clear that Operational Debt amounting to more than Rs.1,00,00,000/- (Rupees One Crore Only) is due and payable by the Corporate Debtor to the Applicant. There is default by the Corporate Debtor in payment of debt amount. Therefore, we find that it is a fit case for initiation of CIRP against the Corporate Debtor, and that the petition is filed within the limitation period. This Tribunal has jurisdiction to adjudicate the Company Petition filed by the Operational Creditor and that there is a Debt due & payable by the Corporate Debtor. Since, the debt and default exist and no pre-existing dispute has been brought to our notice, it is a fit case for admission u/9 of IBC,2016.
- 4.6. In view of the above discussion and findings this bench is of considered view that this application deserves to be admitted.
5. IA 967/2023 filed by the Corporate Debtor to place on record additional documents is allowed, as the adjudicating authority is duty bound to consider the submissions/evidences placed before it before pronouncement of the order.

ORDER

6. The petition bearing C.P. (IB) No. 931/MB/2020 filed by Melange Systems Private Limited (“the Operational Creditor”), under section 9 of the IBC read with rule 4(1)

of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against PME Infratech Private Limited, (“the Corporate Debtor”) is **Admitted**.

- I. That this Bench as a result of this prohibits:
 - 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 Operational 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 provisions of sub-section (1) of Section 14 of I&B Code shall not apply to

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- a. such transactions as may be notified by the Central Government in consultation with any Operational sector regulator;
- b. a surety in a contract of guarantee to a Corporate Debtor.
- IV. That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section 33 of I&B Code, as the case may be.
- V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of I&B Code.
- VI. The bench hereby appoints Mr. Lalit Kumar Dangi, an Insolvency Professional registered with Indian Institute of Insolvency Professionals of ICAI having registration number IBBI/IPA-001/IP-P01821/2019-2020/12859 and email Id lalitkumardangi@gmail.com . He is appointed as IRP for conducting CIRP of the Corporate Debtor and to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.
- VII. During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. 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.

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- VIII. The Operational Creditor shall deposit a sum of Rs.5,00,000/- (Rupees five lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- IX. The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- X. A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
09.05.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)