

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 792/MB-IV/2022

Under Section 9 of the I&B Code, 2016

In the matter of:

FUSO GLASS INDIA PVT.LTD.

...Operational Creditor/Applicant

V/s

ALCOB INDIA PVT. LTD.

...Corporate Debtor/Respondent

Order Dated:25.08.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances:

For the Applicant(s) : Mr. K. Gaurav Kumar, Ld. Counsel

For the Corporate Debtor(s) : Mr. Avinash R. Khanolkar, Ld. Counsel

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by M/s. Fuso Glass India Private Limited ("the Operational Creditor"), seeking initiation of Corporate Insolvency

Resolution Process (CIRP) in the matter of M/s. Alcob India Private Limited., the Corporate Debtor.

- 1.1. The Company Petition is filed on 23/05/2022 claiming an amount of Rs. 3,18,79,093/- in default (the principal amount of Rs. 2,17,69,078 and Rs. 1,01,10,015/- is an interest amount at the rate of 24% p.a. calculated from the date of each invoice. Interest would continue until the actual date of payment in full from the corporate debtor). The date of default is not specified in Part IV of the petition (payment is due from the invoice No. HY1920101965 dated 18.01.2020).
2. The M/s. Alcob India Private Limited i.e. Corporate Debtor placed order for the supply of Glass from M/s. Fuso Glass India i.e. the Operational Creditor. As agreed, the Operational Creditor had prepared and sent invoices to the Corporate Debtor at each stage based on the completion of the said supplies.
 - 2.1. A Demand Notice dated 11.03.2022 ("Demand Notice") was issued by the Operational Creditor to the Corporate Debtor and came to be delivered on 19.03.2022, to call upon the Corporate Debtor to make payments of the amounts due. Till date, the Corporate Debtor has not responded to the said Emails or the Demand Notice or raised any dispute.
3. The Corporate Debtor vide its affidavit in reply dated 24.11.2022 states that this Petition is not maintainable as there is no specific date of default neither in Part-IV of the Petition nor anywhere else on which the alleged default has been occurred by the Corporate Debtor. The Operational Creditor has mentioned that the alleged debt fell due from 18.01.2020 which expressly shows that there are various dates of defaults; the

present Petition is Hit by the Provisions of S. 10 A of the Code, the alleged debt has fell due from 18.01.2020 till date of last invoice raised by the Petitioner viz. 06.08.2021. In this period there are various Invoices which were raised during the period of Mar. 2020 till Mar. 2021, in the present Petition there are 17 Invoices which were raised during the period from 08.06.2020 till 11.03.2021 for a total amount of Rs.35,99,413/-; there is existence of dispute in which there are various instances wherein the Corporate Debtor has raised complaints about the supplied goods by the Operational Creditor. The Corporate Debtor has sent various e-mails for the damaged goods supplied and asked the Operational Creditor to rectify the defects. since the defects were not rectified the Corporate Debtor raised a debit notes over the Operational Creditor for the work carried out by the Corporate Debtor from time to time.

4. The Operational Creditor vide its affidavit in Rejoinder dated 23.01.2023 stated that the date of default is vividly stated in row 2 PART IV FORM 5 as “*payment is due from the invoice No. HY1920101965 dated 18.01.2020*”, and it can be derived therefrom date of default is 18.01.2020. Further, the default enumerated in the present application is a continuous default which began from 18.01.2020 persisted till the date of filing the present Insolvency Application, and even if the 17 invoices falling due within 10A period amounting to Rs. 35,99,413/- are excluded from the total claim amount, the resultant amount came to be in default is in still in excess of threshold limit. Further, the terms and condition of the invoices raised by the applicant clearly suggest that once the goods ordered by the respondent are out of the factory of the petitioner, the applicant shall not be responsible for the same and once such goods are sold, the same shall not be taken back. Accordingly, the Corporate Debtor is impliedly impeded from raising a dispute regarding

the quality of the goods supplied, thereby vitiating any possibility of a 'pre-existing dispute'. Further, none of the emails expressly relates to the goods and its respective invoices for which the payment is pending till date. Meaning the dispute raised by the respondent patently fails to relate to the amount claimed in the application. The respondent has not annexed a single document to prove that the alleged debit notes were ever served to the applicant in order to bring the same to the attention of the Operational Creditor accordingly, the contention of dispute is nothing but a moonshine defence.

Findings

5. This bench has perused the documents and pleadings available on record and considered the arguments of both the sides.
 - 5.1. On perusal of the pleadings and the records we find that the applicant has filed this petition claiming a sum of Rs.2,17,69,078/- in default on account of principal outstanding against the supply of goods together with interest of Rs.1,01,10,015/-. The applicant has raised 17 invoices aggregating to Rs. 35,99,413/- , which fell due for payment during the period which fell due u/s 10A. This bench is of considered view that that the date of default in relation to each invoice is to be determined independently, and the invoices falling within limitation period running from the date of default as well as invoices not falling due for payment within 10A period are eligible for determination of the debt due and in default for purpose of Section 4 of the Code. Accordingly, the claim against these 17 invoices is barred u/s 10A. However, even if that amount is excluded the principal outstanding is more than 1 Crore.
 - 5.2. We find merit in the contention of the Operational Creditor that the defence of dispute is merely to deny the rightful claim and the

Corporate Debtor has failed to bring on record any evidence to prove his claim haven't raised as the invoices dated 12.04.2022, 01.03.2022, 07.03.2022 returning the goods. However, this bench finds that these invoices are tax invoices under GST law stating GST NO of the Operational Creditor. The Operational Creditor has not denied that these invoices were not reflecting in there GSTR 2A (Invoice wise details of invoice supplied made available by the GST portal to the recipient of goods to facilitate the claim of input credit). The debit note dated 13.01.2022 pertains to the rate difference and the email communications suggest the existence of dispute to this extent in some of the cases, However, this bench does not have sufficient material to arrive at a finding whether the Corporate Debtor was liable to make payment for defective or broken goods as narrated in various emails placed on record by the Corporate Debtor. Further, on perusal of invoice it is found that some of the invoices, not all, contemplate levy of interest @24 % if the payment is not made within due date whereas the applicant has claimed interest on all the invoices claimed to be in default.

5.3. In view of aforesaid findings this bench is of the considered view that there exists disputes in relation to quantification of the total debt claimed to be in default and the applicant has failed to bring on record the correct amount of undisputed debt in default.

1.1. It is trite law that an Application under Section 9 of the Code cannot be admitted in relation to disputed debt as held by the Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* held that, in the event there is a pre-existing dispute between the parties, an Application under Section 9 of the Code would have to be rejected.

1.2. In view of the above, we find that the present case is fit for dismissal under Section 9(5)(ii)(d) read with Section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties, which requires adjudication which is beyond the powers vested in this Bench in proceedings arising from an application filed under sec. 9 of the code and deserves to be **Dismissed**.

ORDER

2. The petition bearing C.P. (IB) No. 792/MB/C-IV/2022 by M/s. Fuso Glass India Private Limited (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of M/s. Alcob India Private Limited., the Corporate Debtor is **dismissed**.
3. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
25.08.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)