

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH - I  
KOLKATA**

***C.P (IB) No. 121/KB/2021***

*An application 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:*

**Tikmani SteelTrading Company**, a partnership firm under the Provisions of the Partnership Act, 1932, with its registered office at Sagar Estate, Room No.17, 2<sup>nd</sup> Floor, 2 N.C. Dutta Sarani, Kolkata – 700 001.

*...Operational Creditor*

*Versus*

**Imperial Tubes Private Limited** [CIN - U19202WB1981PTC033712], Sagar Estate, 5<sup>th</sup>Floor, Room No-5&6 2, N.C.Dutta Sarani, Kolkata – 700001

*...Corporate Debtor*

**Date of Hearing: 25.07.2022**

**Date of pronouncing the order: 22.08.2022**

**Appearances (through Video Conferencing/physical hearing)**

***For the Operational Creditor*** : Mr. Shahrukh Raja, Advocate

***For the Corporate Debtor*** : Mr. VVV Sastry, Advocate

: Ms. Vidhi Sharma, Advocate

***Coram:***

***Rohit Kapoor*** : ***Member (Judicial)***

***Balraj Joshi*** : ***Member (Technical)***

**ORDER**

*Per Balraj Joshi, Member (Technical)*

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on behalf of **Tikmani Steel Trading Company** (*'Operational Creditor'*), by Mr. Abhishek Tikmani, duly authorised *vide* Power of Attorney, notarized on 01 February, 2021<sup>1</sup> for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against **Imperial Tubes Private Limited** (*'Corporate Debtor'*).
3. The present Petition was filed on **28 April, 2021** before this Adjudicating Authority. The total amount claimed in default is Rs.5,39,87,418/- (Rupees Five Crore Thirty-Ninelakh Eighty Seven Thousand Four Hundred Eighteen only), inclusive of interest calculated @18% per month from the date of default being ten days from the issuance of the last invoice. The first default occurred in **02 February, 2020**.
4. It is submitted in the Petition, Part – II that the authorised share capital of the Corporate Debtor is Rs.10,00,00,000/- (Rupees Ten Crore only) with paid up Capital as Rs.9,76,34,820/- (Rupees Nine Crore Seventy Six Lakh Thirty Four Thousand Eight Hundred Twenty only).
5. ***Submissions by the Ld. Advocate appearing on behalf of the Operational Creditor.***
  - 5.1 The Operational Creditor is engaged in the business of providing raw materials i.e., Hot Rolled Steel Coils' of different specification. On the basis of the verbal order issued by the Corporate Debtor, the Operational Creditor used to supply goods to the Corporate Debtor. After successful supply of good the Operational Creditor used to raise invoices.

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<sup>1</sup>Annexure – C, page 23 - 27 of the Petition.

- 5.2 Each order stipulated the price metric ton as mutually agreed between the parties along with the specific gauge. The charges for transportation of the goods were to the account of the Operational Creditor.
- 5.3 The Operational Creditor has effected sales of the goods for an amount of Rs.27,58,57,260.71/- (Rupees Twenty Seven Crore Fifty Eight Lakh Fifty Seven Thousand Two Hundred Sixty One and Seventy One Paisa only) for the Financial Year 2017-2018 for which the Corporate Debtor has paid a sum of Rs.22,81,74,671.71/- (Rupees Twenty Two Crore Eighty One Lakh Seventy Four Thousand Six Hundred Seventy One and Seventy One Paisa only). The closing balance for the Financial Year 2017-2018 for the sum yet to be paid by the Corporate Debtor is Rs.4,71,73,663/- (Rupees Four Crore Seventy One Lakh Seventy Three Thousand Six Hundred Sixty Three only).
- 5.4 Thereafter, further sales were conducted by and between the parties, where the outstanding balance for the Financial Year 2018 – 2019 was an amount of Rs.5,01,73,663/- (Rupees Five Crore One Lakh Seventy Three Thousand Six Hundred Sixty Three only).
- 5.5 Such outstanding balance for the Financial Year 2019-2020 is stated to be Rs.5,39,87,418/- (Rupees Five Crore Thirty Nine Lakh Eighty Seven Thousand Four Hundred Eighteen only).
- 5.6 In spite of various verbal reminders to repay the sum due, the Corporate Debtor failed to honor the same. The Operational Creditor issued a demand notice dated 18 June, 2020, under section 8 of the Code to the Corporate Debtor.
- 5.7 Pursuant to such demand notice, the Corporate Debtor issued a reply notice dated 01 July, 2020, wherein they denied the claim and made excuses with respect to the quality of the material supplied. However, no such issues were raised before the issuance of the notice under section 8 of the Code.
- 5.8 Thereafter, the Operational Creditor received an email dated 3<sup>rd</sup> July, 2020 at 6:38 PM stating that the Corporate Debtors had preferred to move an application subsequent to the receipt of the Notice of Demand dated 18 June,

2020, under the Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908, seeking temporary injunction over the Operational Creditor from not realizing their claim over the Corporate Debtor and alienating or encumbering a sum of Rs. 79,41,213.00/- in the bank accounts of the Operational Creditor alleged to be a counter claim of the Corporate Debtor on the Operational Creditor, before the Learned 7th Bench of the City Civil Court at Calcutta, in Title Suit No. 490 of 2020.

**6. Submissions by the Ld. Counsel on behalf of the Corporate Debtor**

- 6.1 The Operational Creditor has relied upon the invoices raised for the period raised between August, 2017 – February, 2020, however, no amount is due and payable under those invoices and moreover the alleged claim of the Operational Creditor under those invoices are barred by limitation.
- 6.2 During the year 2014 to 2020, supplies amounting to Rs.34.12 Crore were made by the Operational Creditor against which the Corporate Debtor paid a sum of Rs.28.72 Crore on account of such supplies. The nature of accounts between the parties was running and continuous. Goods worth Rs.27,56,62,090/- (Rupees Twenty Seven Crore Fifty Six Lakh Sixty Two Lakh Ninety only) for supply of 6873.058 MT of HR Coils were made during the period April, 2017 to February, 2020 for which the Corporate Debtor has made payments to the extent of Rs.22,16,74,672/- (Rupees Twenty Two Crore Sixteen Lakh Seventy Four Thousand Six Hundred Seventy Two only). However, in the interregnum, the Corporate Debtor found out that goods supplied against which the Corporate Debtor had made the payment did not meet the specification.
- 6.3 This was also made known to the Operational Creditor *vide* letters dated 15 December, 2017, 12 March, 2018 and 15 May, 2019.<sup>2</sup> Further, it was discovered that the goods worth Rs.79,41,273/- that were supplied during 01 April, 2017 to 31 March, 2020 were defective, and for that the Operational Creditor is not entitled to receive any payment.

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<sup>2</sup>Annexure – A of the Reply.

- 6.4 Further, it also transpired that the steel tubes manufactured using the raw materials supplied by the Operational Creditor turned out to be defective as it did not conform to the standard specifications and cracks developed in the tubes manufactured using such coils. The Corporate Debtor also received several complaints in this regard, which also resulted in great loss of credibility of the Corporate Debtor.
- 6.5 Despite the operational creditor being made aware of such fact, the operational creditor alleged that payments under the invoices were due and payable although the goods supplied were found to be defective. The corporate debtor carried out audits of its running and continuous account with the operational creditor and has found that an excess sum of Rs. 79,41,273/- has been paid in excess to the operational creditor. The goods supplied by the operational creditor during the said period of April 2017 to March 2020 was in total for a sum of Rs. 5 cr. approximately were all defective and contrary to the specifications agreed between the parties. The operational creditor after giving adjustments of all money receivable against all legitimate supplies made by the operational creditor have received a sum of Rs. 79,41,273/- towards excess payment. The corporate debtor is thus entitled to refund and claims Rs. 79,41,273/- which the operational creditor has received in breach of the implied negative covenant. The corporate debtor does not only have a bonafide defense but also has a counter claim against the operational creditor. No debt is due to the Operational Creditor and thus no question of default arises.
- 6.6 On the contrary, the Corporate Debtor states that the operational creditor is in fact in default of Rs.79,41,473/- on account of excessive payments made to the Operational Creditor in respect of the defective goods supplied in view of the breach of implied negative covenant. In the given circumstances, the corporate debtor filed a civil suit on 01 July 2020 before the Learned City Civil Court at Calcutta which has been registered as T.S. No. 490 of 2020

**7. Issue**

- 7.1 Is there any pre-existing dispute between the parties?

7.2 Is the application barred by limitation?

***Analysis and Findings***

8. Heard the Ld. Counsel for the Financial Creditor and the Ld. Counsel for the Corporate Debtor and perused the concerned documents annexed to the Petition.
9. In a section 9 application, the preliminary point that needs to be taken into consideration is the existence of the dispute and/or a suit or arbitration prior to the receipt of the demand notice under section 8 of the Code.<sup>3</sup> However, in this instant case with respect to the Pre-Existing Dispute, there are no documents on record to support any of the communication regarding sub-standard materials by the Operational Creditor. Further, letters dated 15 December, 2017<sup>4</sup>, 12 March, 2018<sup>5</sup> and 15 May, 2019<sup>6</sup> are the letters of dispute by some third party i.e., Ezone Strips Private Limited to the Corporate Debtor, the same has no nexus with the Operational Creditor.
10. Further, it is apparent that the demand notice under section 8 was issued on 28 June, 2020, whereas the Civil Suit was filed by the Corporate Debtor on 01 July, 2020, which clearly reflects that such suit was filed by the Corporate Debtor as a desperate measure and probably with an intention to mislead this Adjudicating Authority.
11. From the record it is apparent that the closing balance for the Financial Year 2017-2018 for the sum yet to be paid by the Corporate Debtor is Rs.4,71,73,663/- (Rupees Four Crore Seventy One Lakh Seventy Three Thousand Six Hundred Sixty Three only). Whereas, the outstanding balance for the Financial Year 2018 – 2019 was an amount of Rs.5,01,73,663/- (Rupees Five Crore One Lakh Seventy Three Thousand Six Hundred Sixty Three only). However, be that as it may, even if the closing balance for the

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<sup>3</sup>Mobilox Innovations (P) Limited v. Kirusa Software (P) Limited, (2018) 1 SCC 353

<sup>4</sup>Page 31 of the Reply

<sup>5</sup>Page 32 of the Reply

<sup>6</sup>Page 33 of the Reply

Financial Year 2017-2018 is not taken into consideration on the ground of limitation, then also , the outstanding balance for the Financial Year 2018 – 2019 is sufficient to establishes that the Application is well within limitation

**12.** In view of the above facts and circumstances, we are satisfied that the present petition made by the Operational Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.

**13.** It is, accordingly, hereby ordered as follows:-

- a) The application bearing **CP (IB) No. 121/KB/2021** filed by Tikmani Steel Trading Company, the Operational Creditor, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Imperial Tubes Private Limited, is **admitted**.
- b) There shall be a moratorium under section 14 of the IBC.
- c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e) **Mrs. Rachna Anchalia**, registration number **IBBI/IPA-001/IP-P-01572/2019 -2020/12602**, email: **ca.rachna1978@gmail.com**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of

a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the Code. 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 one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) The Operational Creditor shall deposit a sum of **Rs.4,00,000/- (Rupees Four 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).
- i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby 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.
- j) Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means 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.

14. *CP (IB) No. 121/KB/2021* to come up on **30.09.2022** for filing the periodical report.
15. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**Balraj Joshi**  
Member (Technical)

**Rohit Kapoor**  
Member (Judicial)

The order is pronounced on 22<sup>nd</sup> day of August, 2022

SA [LRA]