

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-248/(ND)/2020

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

Power2SME Private Limited

Registered office at:
AD-13, Basement (LGF),
Tagore Garden, New Delhi - 110027

...Applicant/Operational Creditor

Versus

PSR Aqua and Engineers Private Limited

Registered Office at:
1589, Madarsa Road, Kashmiri Gate,
Delhi- 110006

...Respondent/Corporate Debtor

Coram:

SHRI. P.S.N. PRASAD, Hon'ble Member (Judicial)
DR. V.K. SUBBURAJ, Hon'ble Member (Technical)

Counsel for Applicant: Mr. Pankaj Bhagat and Mr. Harikesh Anirudhan Advocates.

Counsel for Respondent: Ms. Minakshi Jyoti and Mr. Dharamveer Singh, Advocates.

IB-248/ND/2020

Power2SME Private Limited vs M/s PSR Aqua and Engineers Private Limited

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ORDER

Per SH. P.S.N. PRASAD, MEMBER (JUDICIAL)

Date: 03.03.2021

1. This is an application filed by the Applicant Power2SME Private Limited through its Authorized Representative Mr. Munender Chauhan seeking to initiate corporate insolvency resolution process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") of the Respondent PSR Aqua and Engineers Private Limited for the alleged default on the part of the Respondent in clearing the debt of Rs. 32,08,640/- (Rupees Thirty-Two Lakh Eight Thousand Six Hundred Forty only) i.e., Principal amount of Rs. 22,75,120/- and Interest of Rs. 9,33,520, as alleged by the applicant, towards the material supplied by the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- i. The applicant submits that an oral agreement was executed between both the parties, wherein it was held that the CR Sheets, HRPO Sheets, HRPO slitted coils, HR Sheets, etc., was to be supplied by the applicant to the respondent Company. The applicant

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further submits that it was mutually agreed between the parties that the respondent shall be making payment towards the Invoices raised as per the due date mentioned on Invoices.

- ii. The applicant submits that the material was supplied in accordance and conformity with purchase order dated 25.10.2017 placed by the Respondent.
- iii. The applicant states that the goods were supplied as demanded and Respondent raised invoice and debit notes from time to time. The applicant further submits that the Respondent issued a cheque for an amount of Rs 15,00,000/- to the applicant bearing cheque No. 886620 of Canara Bank dated 24.10.2018.
- iv. That the said Canara Bank cheque bearing Cheque No. 886620 when presented was returned bid return memo dated 15.01.2019 given with reason "Payment Stopped by Drawer". That further, the applicant lodged a criminal case against respondent for its failure to honor the said cheque.



- v. That applicant submits that a statutory Demand notice under section 8 of IBC, 2016 vide dated 18.06.2019 was delivered to the Respondent. It was further submitted by the applicant that in pursuance to the demand notice no notice of pre-existing dispute was given by the Respondent relating to unpaid operational debt.

2. Consequent to the notice issued by this Tribunal, the Counsel for the Respondent filed its reply Affidavit on behalf of the Respondent stating that:

- i. The Respondent started its business by purchasing materials from "Allied Strips Limited" (ASL). however, the Allied Strips Limited started supplying material to its customers through Power2SME Private Limited.
- ii. The Respondent submits that the Entire correspondence for purchase and supply of materials were done by the Respondent with Mr. Rajeev Rawat and Mr. Vikas Dhaiya who were employees of Allied Strips Limited.



- iii. That the Respondent through Allied Strips limited placed an order for 84 tons of material through different purchase orders and a series of emails were exchanged between the employees of Allied Strips Limited and Respondent regarding the supply of the material.
- iv. The Respondent submits that the applicant failed to supply the complete material against the Purchase orders placed by the respondent for 84 tons of materials, due to which the Respondent had to purchase material from secondary market at an increased rate which caused extra cost to the Respondent. The Respondent further submits that due to delay in supply the Respondent also suffered loss on account of line stoppage.
- v. That a meeting vide dated 16.02.2018 was called upon between Allied Strips Limited and respondent in order to address the issues related to delay in supply.
- vi. The Respondent states that debit notes were raised for an amount of Rs. 12.5 Lakhs to be adjusted



against the total Invoiced amount of Rs. 22,75,120/-
for nine invoices referred in the application

- vii. The Respondent in its reply states that a series of emails were exchanged between the applicant and the respondent, wherein the applicant categorically accepted the failure to supply material and also denied the debit notes raised by the Respondent.
- viii. That the cheque bearing cheque No. 886620 was lost since January, 2018 and an FIR bearing No. 70406 was also lodged by the respondent regarding missing of cheque.

3. The Counsel for the Applicant has filed its written submissions in respect to the submissions made in the application:

- That no reply to the statutory demand notice has been received till date, thus no dispute was ever raised by except by way of counter to the present petition.
- That the Respondent admitted all the invoices so raised by the Applicant and also admits the invoiced

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amount of Rs. 22.75,120 /-. The Applicant also states that the Respondent prepared 02 cheques dated 03.07.2018 for Rs. 10,25,119.75 /- for payment and adjusted the debit note of Rs. 12.5 lakhs Thus, the Respondent admitted the entire liability and showed no protest against the invoices raised, the material supplied and also admitted that it intended to pay Rs. 10,25,119.75/-.

- The applicant submits that the Minutes of Meeting dated 16.02.2018 is incomplete as it contains signatures of third party only as applicant never participated in that meeting.

4. The counsel for the Respondent has filed its written submissions relying upon the following judgements in respect to the submissions made in the reply:

- That the Supreme Court in ***Mobilox Innovations Private Limited VS. Kirusa Software Private Limited [PARA 35 AND 40]***. In Para 35 and 40 the Hon'ble apex court held that:



35. We have already noticed that in the first Insolvency and Bankruptcy Bill, 2015 that was annexed to the Bankruptcy Law Reforms Committee Report, Section 5(4) defined “dispute” as meaning a “bona fide suit or arbitration proceedings...”. In its present avatar, Section 5(6) excludes the expression “bona fide” which is of significance. Therefore, it is difficult to import the expression “bona fide” into Section 8(2)(a) in order to judge whether a dispute exists or not.

40. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

- That in **Par 48 [Neeraj Jain, Director of Mis Flipkart India Private Limited vs. Cloudwalker Streaming and Anr. Company Appeal (AT) (Insolvency) No. 1354 of 2019 decided on 24th FEBRUARY, 2020**, It was made clear that for filing application u/s 9 of Insolvency and Bankruptcy Code 2016 in case the demand notice is delivered in Form 3 of Insolvency and Bankruptcy (Application to



Adjudicating Authority) Rules 2016 then the submission of a copy of the invoice along with the application in Form 5 is not a mandatory requirement, provided the documents to prove the existence of operational debt and the amount in default is attached with the application.

5. We have heard the Ld. Counsels for the Operational Creditor and Corporate debtor and perused the averments made in the application as well as the documents enclosed with the application.
6. On perusal of Application as well as the documents enclosed, the E-mail communications between the operational creditor and the Corporate Debtor clearly establishes the fact that there was pre-existing dispute between both the parties. The E-mail communication trail starting from date 28.02.2018, 03.07.2018, 05.07.2018 till 26.09.2018 between the Operational creditor and corporate debtor substantiate the fact that there was delay in supply of material to the Corporate Debtor due to which the Corporate Debtor was forced to purchase the goods at a higher price from the other sellers. The fact that a meeting

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was called upon on dated 16.02.2018 to address the issues relating to delay in supply and debit notes being issued by the corporate debtor substantiate the fact that there was a pre-existing dispute between the parties prior to the issuance of demand notice.

7. The Hon'ble Supreme Court In "***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC On Line SC 353***", analyzed 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 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 –

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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.”

8. From the aforesaid decision, it is clear that the dispute must exist before the receipt of demand notice. 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. The E-mail communication trail starting from date 28.02.2018, 03.07.2018, 05.07.2018 till 26.09.2018 between the Operational creditor and corporate debtor substantiate the

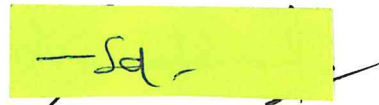


fact that there was delay in supply of material, the same was duly acknowledged by the Operational Creditor in the Email communications.

9. The operational creditor regarding the issue of dishonoring of cheque has the option to file Criminal proceedings under section 138 of Negotiable Instruments Act, 1881, before the appropriate forum for the recovery of the same.
10. For the reasons discussed above, since there is a pre-existing dispute between the parties, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC, 2016.
11. Accordingly, we hereby **dismiss** the present application.



(DR. V.K. SUBBURAJ)
MEMBER (TECHNICAL)



(SH. P.S.N. PRASAD)
MEMBER (JUDICIAL)

RDS