IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – II, CHENNAI

CP(IB)/18(CHE)/2021

(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

In the matter of ***M/s. Ferrosco Industries Private Limited***

Dhatu International PTE Limited
144 Robinson Rad, 17-01,
Robinson Square,
Singapore 068908

...Applicant/Operational Creditor

-Vs-

M/s. Ferrosco Industries Private Limited
SF No.191/3A,B, Kurichi (VGE)
New Town, LIC Colony, SIDCO (PO)
Coimbatore, Tamil Nadu - 641021

...Respondent/Corporate Debtor

Order pronounced on 02nd May 2022

CORAM:

Justice (Retd.) S.RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor: Arun Karthik Mohan, Advocate
Suhrith Parthasarathy, Advocate

For Corporate Debtor: S. Siva Sankar, Advocate
M.B. Elakkumanan, Advocate

ORDER

***Per:* Justice (Retd.) S.RAMATHILAGAM, MEMBER (JUDICIAL)**

Under Adjudication is an Application that has been filed by **M/s. Dhatu International PTE Limited** (hereinafter referred to as *'Operational Creditor"*) under Section 9 of the Insolvency & Bankruptcy Code 2016 (in short, 'IBC,2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority)

Rules, 2016 against **M/s. Ferrosco Industries Private Limited** (hereinafter referred to as *'Corporate Debtor'*), to initiate the Corporate Insolvency Resolution Process against the Corporate Debtor, declare moratorium and appoint Interim Resolution Professional.

2. Part-I of the Application sets out about the Operational Creditor from which, it is evident that the Operational Creditor is a company registered in Singapore having Registration No:200502960R . Part-II of the Application gives all the particulars of the Corporate Debtor from which it is evident that the Corporate Debtor is a Private Limited Company with CIN: U37100TZ2017PTC028360 which was incorporated on 11.01.2017 and the Registered Office of the Corporate Debtor as per the Application is stated to be situated at SF No.191/3A,B, Kurichi (VGE) New Town, LIC Colony, SIDCO (PO) Coimbatore, Tamil Nadu - 641021. From Part III of the application, it is seen that the Operational Creditor has not proposed the name of the "Interim Resolution Professional" and left it to the discretion of this Tribunal to appoint the same.

3. From Part-IV of the Application, it is seen that a sum of Rs.1,01,62,118.50/- (Rupees One Crore One Lakh Sixty Two Thousand One Hundred Eighteen only) including interest, is being claimed by the Operational Creditor as the Operational debt. The

debt stated to have fallen due on the dates when the Corporate Debtor failed to make payments in terms of seller's contract dated 006.06.2019. Part – V of the Application discloses about the details of the documents which have been filed by the Operational Creditor in order to prove the 'Operational debt', which are as follows;

1. Seller's Contract dt. 06.06.2019
2. Commercial Invoices dt. 19.06.2019 and 06.07.2019 raised by the Operational Creditor.
3. Invoice dt. 25.06.2020 evincing the payment of detention and demurrage charges by the Operational Creditor.
4. Copy of Demand Notice in Form 3 along with the proof of delivery
5. Reply dt. 23.10.2020 issued by the Corporate Debtor to the demand notice.
6. Working for computation of default.
7. Copy of email sent by APL Ltd, the shipping company to the Corporate Debtor.
8. Copy of Bank Statement for the period 19.06.2019 to 31.10.2020 of the Operational Creditor.
9. Affidavit of the Operational Creditor through its authorised director stating that the Operational Creditor has not received any notice of dispute of the unpaid debt in terms of section 9(3)(b) of the IBC, 2016.

4. The Learned Counsel for the Operational Creditor submitted that the Operational Creditor is engaged in trading scrap and semi-finished metal products. It was submitted that in the course of its business, the Operational Creditor and Corporate Debtor entered into a seller's contract dated 06.06.2019 ("Contract"). Under the terms of the said contract, the Corporate Debtor was to pay 10% of the value of the shipment within 5 days of entering into the said contract and the balance 90% was to be paid immediately upon arrival of container at the final destination, i.e., Tuticorin. Further,

the Corporate Debtor was liable to pay Detention and Demurrage charges if the balance payment was not received by the Operational Creditor within 14 days of the arrival of the container at Tuticorin. A copy of the Seller's Contract dated June 6, 2019 is enclosed as Annexure II (1) along with the application.

5. Ld. Counsel for the Operational Creditor further submitted that heavy melting scrap was shipped to the Corporate Debtor in terms of the said contract and the consignment duly reached Tuticorin. Thereafter, Operational Creditor raised two Commercial Invoices dated June 19, 2019 and July 3, 2019 for an amount of USD 15,036.50 (Rs. 11,21,873.26/-) and USD 88,132.80 (Rs. 65,75,588.20/-) respectively on the Corporate Debtor. Copy of the Commercial Invoices raised by the Operational Creditor on the Corporate Debtor is enclosed as Annexure II (2).

6. It is further averred in the application that the Corporate Debtor failed to clear the goods shipped by the Operational Creditor. On account of this, APL Limited, the shipping company, wrote several emails to the Corporate Debtor requesting them to clear the goods at the earliest. APL Limited also raised demands for detention and demurrage charges due to the delay in clearing the goods. However, the Corporate Debtor failed to clear the goods and pay the detention and demurrage charges.

7. Despite numerous requests from APL Limited, the Corporate Debtor failed to clear the goods for nearly a year and the detention and demurrage charges kept mounting. In order to avoid any further escalation of the detention and demurrage charges, the Operational Creditor entered into negotiations with APL Limited and paid an amount of USD 20,000 (Rs. 14,92,200/-) towards Detention and Demurrage charges to APL Limited on 30th June, 2020. The said amount is liable to be recovered in full from the Corporate Debtor in terms of the said contract. A copy of the Invoice dated June 25, 2020 evidencing the payment of Detention and Demurrage charges by the Operational Creditor is enclosed herewith as Annexure – II (4).

8. It is averred in the application that the Operational Creditor has been continuously following up with the Corporate Debtor demanding the outstanding payment through numerous emails and calls. However, the Operational Creditor has neither received payment nor any response from the Corporate Debtor with regard to the outstanding amount. Thereafter, the Operational Creditor had issued a Demand Notice as stipulated under Section 8 of IBC, 2016 to the Corporate Debtor on 16.09.2020.

9. It is further averred in the application that in response to the demand notice the Corporate Debtor had sent a reply on 23.10.2020 which is placed as annexure II (6) along with the

application. It submitted that there is neither a pre-existing dispute nor paid the outstanding amount to the Operational Creditor and hence it was submitted that the Operational Creditor has moved the present Application before this Tribunal seeking initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

10. The Corporate Debtor has filed counter, written submissions and also submitted additional documents. The Learned Counsel for the Corporate Debtor submitted that the applicant is not an "Operational Creditor" as defined under Section 5 (20) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code"), as the alleged debt is not an "Operational Debt" in view of the fact that the Invoices dated 19.06.2019 and 03.07.2019 relied upon by the applicant were not accepted by the Corporate Debtor. The invoices are raised in violation of main Seller's Contract dated 06.06.2019.

11. The Learned Counsel further submitted that the Seller's Contract provides that the shipment ought to have been dispatched only on receipt of the advance payment of 10% of the invoice amount. Hence the shipment sent in violation of the Seller's Contract cannot confer any right of claim upon the Applicant.

12. Further, it is averred in the counter that by taking advantage of all the communications between the Corporate Debtor and the

shipper, the Applicant presumes existence of a contract on the said two invoices and hence contended that the present application is liable to be dismissed.

13. To this, the Applicant filed a rejoinder and denied all the allegations raised by the Corporate Debtor in the counter.

14. Heard the submissions made by the Ld. Counsel for the parties. From the submissions made by both the parties, it is seen that the following issues are required to be decided by this Tribunal;

i. Whether the applicant is an Operational Creditor and the debt is Operational Debt;

ii. Whether there exists any dispute between the parties prior to the issuance of the Demand Notice;

15. As regards to issue No. (i), it is important to refer to Section 5(20) and 5(21) of the Code which defines an Operational Creditor and Operational Debt as follows:-

> ***"5. Definitions-***
>
> *(20) "Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;*
>
> *(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"*

16. Further, the Hon'ble Supreme Court while interpreting the above definitions in the case of Swiss Ribbons Pvt. Ltd. & anr. v. Union of India (Writ Petition (Civil) No. 99 of 2018, dated 25.01.2019 has held that "Operational Creditors are relatable to supply of goods and services in the operation of business". Thus, it is manifestly clear that the Applicant had supplied goods to the Corporate Debtor in terms of the Seller's Contract and therefore, the Applicant is an Operational Creditor and the debt owed to it is an Operational Debt.

17. As regards issue No. (ii) is concerned, on perusal of the counter filed by the Corporate Debtor, it is seen that the Corporate Debtor, throughout the averments made in the counter, seems to have only alleged that there exists a dispute between the parties. Further as per the contention of the Corporate Debtor, if the shipment was dispatched by the Applicant in violation to the seller's contract, the Corporate Debtor ought to have atleast raised the objection at the point in time when the shipping company had sent a mail to the Corporate Debtor to clear the consignment. However, no documentary evidence or proof has been filed by the Corporate Debtor to show that it had objected to the shipment. Further, from the various mail's exchanged between the shipping company the Corporate Debtor as filed along with the application one such mail is reproduced below:

From: Accounts Department <accounts@ferrosco.com>
Sent: Wednesday, December 11, 2019 3:29 PM
To: INDIA IDLE <india.idle@apl.com>
Cc: Dhatu International Pte Ltd <dhatuintl@gmail.com>; Rajesh Babel <sait_rajesh@yahoo.com>; larasu67 <larasu67@gmail.com>; Suneel Mootha <suneel@pointcircle.sg>; UKIE DELINQUENCY <ukie.delinquency@apl.com>; IMPDOCTUT <impdoctut@apl.com>; PUZHAKKADAVATHU Udayan <pk.udayan@apl.com>; RODRIGUEZ Janet Annie <janet.annie.rodriguez@apl.com>; SUDALAIMUTHU Thirumurugan <s.thirumurugan@apl.com>; KUMAR Ajay <k.ajaykumar@apl.com>
Subject: RE: -Letters of Demand- : Cargo Lying Un-cleared . Dest. Tuticorin B/ls: AKV0111387, AKV0111157B Cnee: Ferrosco Industries Pvt Ltd , Commodity : HEAVY MELTING SCRAP

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Mr. Prithviraj Nanda,

We would like to thank everyone for the support and understanding in the delay of taking delivery of the above mentioned containers.

While we certainly understand that the detention is increasing, the situation we are facing is due to the poor market performance and economic slump which has lead us to a severe liquidity crunch. As in, we are ready to pay **($18500)** which in itself is a stretch given the current economic condition and the market price scenario.

We would like to commit you that we will take delivery of the material and return the empty's ASAP (within 15 days) from the date of acceptance of our proposal. your support is highly appreciated. Assure you that this crisis is all just a matter of time and your support will be impactful for us and will be paid back with a reflection of our business over future course of time.

Thanks & Regards

for Ferrosco Industries P. Ltd

M.G. Ravi
Director

18. It is evident from the above mail sent by the Corporate Debtor that it had agreed to take delivery of the materials which makes it clear that the Corporate Debtor has accepted the shipment itself and all the allegations seem to be only a moonshine defence raised by the Corporate Debtor in order to defeat the claim of the Operational Creditor. Further, the Operational Creditor has also filed an Affidavit under Section 9(3)(b) of IBC, 2016 wherein it has been stated that the Demand Notice has been served. Further in relation to the 'Pecuniary Jurisdiction' the total amount claimed to be defaulted exceeds Rs. 1 crore and as such this Tribunal has

the 'Pecuniary Jurisdiction' to entertain this Petition, as filed by the Operational Creditor.

19. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition, as filed by the Operational Creditor, is required to be admitted under Section 9(5) of the IBC, 2016. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period between January 2022 – June 2022 appoints **Ms. Chitra Perinkulam Ragavan, *Reg. No. IBBI/IPA-002/IP-N00720/2019-2020/12558*** *(email id:- chitraprc@yahoo.com)* as the "Interim Resolution Professional" subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a

consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

20. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent in respect of its property including any action under the Securitization and Reconstruction of Financial 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 the possession of the respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

21. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central

Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

22. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

(4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

23. The Operational Creditor is directed to pay a sum of **Rs.1,00,000/-***(Rupees One Lakh Only)* to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

24. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

-Sd-
B. ANIL KUMAR
MEMBER (TECHNICAL)

-Sd-
Justice (Retd.) S. RAMATHILAGAM
MEMBER (JUDICIAL)

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