



**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH  
COURT- III**

**IB-262/ND/2020**

U/S. 9 of the IBC, 2016 and Rule 6 of the  
Insolvency and Bankruptcy (Application to  
Adjudicating Authority), Rule, 2016

**IN THE MATTER OF**

**M/s Swastik Pipe Limited**

**Registered office at:**

**4, Central Market,**

**Punjabi Bagh (W),**

**New Delhi-110026**

...Operational Creditor

**Versus**

**M/s Stolar Mounting Systems Private Limited**

**Regg. Office:**

**House No.175 & 176, 3<sup>rd</sup> Floor,**

**Pocket D-15, Sector-5, Rohini,**

**Near Ayodhya Chowk,**

**New Delhi-110085**

...Corporate Debtor

*Delivered on 07.09.2022*



**Coram:**

**Shri BACHU VENKAT BALARAM DAS**

Hon'ble Member (Judicial)

**Dr. BINOD KUMAR SINHA**

Hon'ble Member (Technical)

**Appearances:**

Operational Creditor: Mr. Sanjay Jain with Mr. Akash Srivastava  
Advocates

Corporate Debtor: Mr. Karan Batura, Advocates

**ORDER**

**Per: Dr. Binod Kumar Sinha, Hon'ble Member (Technical)**

1. Under consideration is an Application bearing IB-262/ND/2020 filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Applicant/ Operational Creditor, M/s Swastik Pipe Limited is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') of the Corporate Debtor viz., M/s Stolar Mounting Systems Private Limited, declare moratorium and appoint Interim Resolution Professional (hereinafter referred as 'IRP'). The Corporate Debtor is registered with RoC, NCT of Delhi and Haryana and therefore, is within the jurisdiction of this Adjudicating Authority



2. The Operational Creditor/Applicant has averred as follows: -

- a. That it is a Company engaged in the business of manufacturing and export of C.R. Sheets, Mild Steel/Sheet/Carbon Steel ERW Black and Galvanized Pipes/ Tubes, Module Mounting Structure etc. and that it supplied Module Mounting Structure to the Corporate Debtor during the period of 02.01.2018 to 15.01.2018 and accordingly raised invoices to the tune of Rs. 51,96,280/- against the same on the Corporate Debtor. The Corporate Debtor though made payment of some of these invoices upto 12.06.2018 but thereafter started defaulting to make payments against the said invoices.
- b. It is submitted that on 08.06.2019, the Operational Creditor sent Demand Notice dated 06.06.2019 under FORM 3 on the registered address and other address of the corporate Debtor, which were duly received by the Corporate Debtor on 11.06.2019.
- c. It is further submitted by the Operational Creditor that the corporate debtor has replied to the notice issued by them vide reply dated 21.06.2019 and raised frivolous objections. The Operational Creditor has further represented that the Corporate Debtor's reply is unsupported with evidence and holds no legal merit.
- d. It is also averred that despite the issuance of statutory notice, the operational debt remains unpaid. Hence, the Operational Creditor



deems itself entitled to initiate the Corporate Insolvency Resolution Process of the Corporate Debtor.

e. As per Part IV of the Form 5, the operational debt in default is claimed to be Rs. 34,27,620.60/- and the date of default as provided in column of Part IV is 01.03.2019.

3. The Corporate Debtor has filed its reply affidavit and submitted that the instant petition is not maintainable due to a pre-existing dispute between parties as there is an issue with respect to deficiency of services of operational creditor, which comes within the ambit of 'dispute'. The corporate debtor placed emphasis on emails dated 20.03.2017, 23.03.2017, 28.03.2017, 03.04.2017, 28.08.2017, 10.09.2017, 25.10.2017, 01.11.2017, 04.11.2017, 05.12.2017, 12.12.2017, 13.08.2018, 21.06.2019 in order to show that there is "pre-existing dispute" which required further inspection from proper authority. It is also submitted that the corporate debtor also raised an invoice dated 09.05.2019 against the Operational Creditor for the loss suffered by the corporate debtor due to defects in the goods supplied by the operational creditor. It is contended that since the proceeding before this Authority is of summary nature and this Adjudicating Authority cannot go into the depth of the issues raised, hence, the instant petition is liable to be dismissed in the light of 'pre-existing dispute'.
4. Pursuant to the reply filed by the Corporate Debtor, the Operational Creditor has filed a rejoinder and denied the submission regarding any pre-existing



dispute between the parties. It is further submitted that the emails do not reveal a pre-existing dispute but mere negotiations towards performance of the services that the parties contracted upon, therefore, the corporate debtor's plea of pre-existing dispute is false and illusory. It is averred that the said invoice dated 09.05.2019 is not based on any agreement between the parties and in fact the basis of this Invoice appears to be the alleged claims for damages in relation to just one of the several shipments transported by the Operational Creditor for and on behalf of the Corporate Debtor in the manner stated in the Application filed by the Operational Creditor. Thus, it is apparent that the unpaid invoices for services rendered by the Operational Creditor and received by the Corporate Debtor, which constitute the Operational Debt remain uncontroverted and undisputed. It is further argued that the operational debt of the Corporate Debtor still stands due to non-payment against the invoices furnished by the Operational Creditor.

5. The Corporate Debtor also submitted written submission and reiterated all the facts as stated in the reply affidavit, therefore, not repeated. In short, the corporate debtor raised objection regarding existence of pre-existing dispute in terms of section 5(6) of IBC, 2016 as the operational creditor withheld the consignment of goods, worth more than Rs.1 crore and same is evident from email exchanged between the parties. It is argued that the invoices of the two separate entities namely, Brompton Private Limited and Berkeley Beauty Brands Private Limited are included in computation of alleged claim by the

A handwritten signature in blue ink, appearing to be 'A. S. H.', located below the main text.



operational creditor. It is further stated that petition u/s 9 of IBC, 2016 is merely a tool for recovery. The corporate debtor further relied on the Hon'ble Supreme Court's judgment in the matter of Mobilox Innovations Private Limited v. Kirusa Software Private Limited (Civil Appeal No.9405/2017). The relevant extract of the said judgment is reproduced below:

*"It is clear, therefore, that once the Applicant has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the Applicant or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the Applicant the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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 eject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense 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*

A handwritten signature in green ink, appearing to be 'Arvind', located below the main text.



*not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”*

It is submitted that the corporate debtor raised the statutory demand notice on operational creditor on 18.09.2019 on the basis of invoice dated 09.05.2019 and the same was replied by the operational creditor vide email dated 28.09.2019, therefore, such dispute is well within the knowledge of operational creditor before the issuance of statutory demand notice dated 24.12.2019. Hence, the petition is not maintainable in the light of the judgment of Hon'ble Apex Court as quoted above.

6. We have heard the submissions made by the parties and perused the pleadings. Before going into the merits of the matter, it is pertinent to note that the Operational Creditor issued statutory demand notice dated 06.06.2019 on 08.06.2019 and corporate debtor replied to the said demand notice on 22.06.2019 and raised some objection which we will examine afterwards to analyse whether such objection falls within the ambit of pre-existing dispute. The corporate debtor has also sent demand notice to the operational creditor on the basis of invoice dated 09.05.2019 on 18.09.2019, which was replied by the operational creditor on 28.09.2019. We will also examine the nature of invoice dated 09.05.2019 raised by the Corporate Debtor. Furthermore, the corporate debtor has submitted that the Operational Creditor has issued the demand notice on 24.12.2019, however, on perusal of the pleadings, it is found that the operational creditor filed the



present application on the basis of demand notice dated 06.06.2019, which was duly served on and replied by the Corporate Debtor on 22.06.2019 and therefore, this contention raised above has no basis. It is an admitted fact that the applicant in the present petition has supplied the goods; therefore, the applicant falls within the definition of the Operational Creditor. The debt and default are also not denied by the Corporate Debtor. The only issue left before this Adjudicating Authority is whether there was any 'pre-existing dispute' raised by the corporate debtor before issuance of section 8 notice by the Operational Creditor. In the present matter demand notice u/s 8 of IBC, 2016 was sent on 06.06.2019 by the operational creditor and same was replied by the corporate debtor on 21.06.2019, wherein, the corporate debtor has raised objection with respect to deficiency in services, misrepresentation of facts and losses suffered by corporate debtor and also raised the objection with respect to format of demand notice u/s 8 of IBC, 2016. In order to establish that there is pre-existing dispute pending, the corporate debtor relied on the emails dated 20.03.2017, 23.03.2017, 28.03.2017, 03.04.2017, 28.08.2017, 10.09.2017, 25.10.2017, 01.11.2017, 04.11.2017, 05.12.2017, 12.12.2017, 13.08.2018. It is pertinent to discuss herein, that the corporate debtor has made payments of an amount of Rs.3,98,958/- on 08.02.2018, Rs.22,36,225/- on 15.02.2018 and Rs.10,00,000/- on 12.06.2018 i.e., even after raising dispute through emails as evident from ledger account annexed as Annexure A-2. Therefore, such conduct of the corporate debtor implies that



Operational Creditor was able to resolve the dispute raised by the corporate debtor till the last payment i.e., 12.06.2018. Furthermore, the invoice dated 09.05.2019 raised by the corporate debtor is of recovery nature as it is seeking liquidated damages which this adjudicating authority is not empowered to deal with. The position has also been settled by Hon'ble NCLAT in its judgment dated 24.07.2019 in the matter of Pedersen Consultants India Pvt. Ltd. Vs. Nitesh Estates Limited (Company Appeal (AT) (Insolvency) No.720 of 2018, wherein it was held that merely by showing a counter claim, the Corporate Debtor cannot claim pre-existence of dispute in respect of the debt as claimed by the Creditor. The relevant extract of the said judgment is as follows:

*"10. From the aforesaid findings, it is clear that the claim means a right to payment even if it is disputed. Therefore, merely because the 'corporate debtor' has disputed the claim by showing that there is certain counter claim, it cannot be held that there is pre-existence of dispute."*

Hence, in the light of above discussion, we believe that there is no pre-existing dispute pending on the date when the operational creditor sent the demand notice u/s 8 of IBC, 2016 and therefore the judgment of Hon'ble Supreme Court relied upon by the Corporate Debtor is not applicable in the present matter. Therefore, this Adjudicating Authority is inclined to initiate the CIR Proceeding of the Corporate Debtor in view of the above finding.



7. The Operational Creditor has not proposed any name of any Insolvency Professional to be appointed as the IRP, therefore, this Adjudicating Authority appoints Mr. Rahul Khanna having Regn. No.- IBBI/IPA-002/IP-N01095/2021-2022/13581) (Email ID: rk\_3398@rediff.com) as IRP from the list provided by IBBI. The IRP is directed to submit his consent and valid AoA with declaration that no disciplinary proceedings have been initiated against him forthwith. The IRP must take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.
8. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely:
- 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's assets or any legal right or beneficial interest therein;

A handwritten signature in green ink, appearing to be 'Rahul Khanna', located below the text of paragraph 8.



- 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
  - d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
  - e. 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, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.
9. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during moratorium

A handwritten signature in green ink, appearing to be 'Rajesh'.



- period. However, the provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.
10. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.
  11. The Operational Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., and make compliance with this order as per the provisions of IBC, 2016.
  12. The Operational Creditors are directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect.
  13. Further operational creditor shall provide initial finance to the tune of Rs. 2,00,000/- (Rupees Two Lakhs Only) to the aforesaid Interim Resolution Professional within a weeks' time from the date of this order as advance towards initial cost and expenses of CIRP process. The said advance of Rs. 2,00,000/- shall be adjustable as CIRP cost by the Committee of Creditors immediately on its constitution by the IRP.
  14. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.



15. The order is pronounced by this Adjudicating Authority in virtual Hearing.

-sd-

**(Binod Kumar Sinha)**  
Member (Technical)

-sd-

**(Bachu Venkat Balaram Das)**  
Member (Judicial)