



IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-III

Item No.02
IB-1140/ND/2020

IN THE MATTER OF

Abdulhadi Almaillem Company Operational Creditor/Applicant

Versus

Jay Ace Technology Ltd. Corporate Debtor/Respondent

SECTION

U/s 9 IBC code 2016

Order pronounced on: 31.07.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open court vide separate sheets.

IB-1140/ND/2020 stands ***admitted.***

SD/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

SD/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**



THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

COURT- III

IB-1140/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:

ABDULHADI ALMAILEM TRADING COMPANY W.L.L

Registered Office: -

PO Box - 4692

Safat Kuwait - 13047

.....Operational Creditor

Versus

JAY ACE TECHNOLOGIES LIMITED

Registered Office: -

GI-48, GT Karnal Road, Industrial Area

New Delhi – 110030

..... Corporate Debtor

Delivered on: 31.07.2023

Coram:

Shri Bachu Venkat Balaram Das

Hon'ble Member (Judicial)

Shri Atul Chaturvedi

Hon'ble Member (Technical)

**Appearances:**

Operational Creditor : Mrs. Ritu Goyal, Advocate

Corporate Debtor : Mr. Kaushal Gautam, Advocate

ORDER

Per: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The instant application bearing IB-1140/ND/2020 has been 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 Operational Creditor, Abdhulhadi Almailem Trading Company is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s Jay Ace Technologies Limited, to declare moratorium and to appoint Interim Resolution Professional (hereinafter referred as 'IRP'). The Corporate debtor is registered with ROC, NCT of Delhi & Haryana and is therefore, within the jurisdiction of this Adjudicating Authority.

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

a) It is submitted that, the Applicant is a Kuwait based company engaged in the business of trading in automotive parts, lead acid Batteries including automotive and inverter batteries. The Corporate Debtor is an India based company engaged in manufacturing of various kinds of automotive batteries.

b) It is further submitted that, a distribution agreement was executed between the parties and Operational Creditor on 1st February 2018, was appointed as exclusive distributor of the Corporate Debtor goods for a period of 60 months for the specified territory.



c) It is averred that, it was further agreed under Clause 2.3.3 of the Distribution Agreement, that in case of quality failure above 5%, Corporate Debtor shall replace all mode wise defective batteries. In pursuance of the Agreement, 33 transactions were made between the Corporate Debtor and the Operational Creditor through the proper invoices. However, over a period of time Batteries sold to Operational Creditor were returned from market being defective. Thereafter, representatives of both parties held a meeting and Corporate Debtor agreed that batteries were defective and shall be replaced and a Minutes of Meeting got executed and duly signed on 3rd September 2019 by both the parties.

d) It is further averred that, despite several reminders, Corporate Debtor failed to replace the batteries agreed to be replaced at MOM. Thereafter, over a period of time, entire stock of batteries was returned as defective. The Operational Creditor sent many reminders for replacement of defective batteries; however, Corporate Debtor did not respond. As per provisions of, Distribution Agreement, Corporate Debtor was under obligation to replace the defective batteries. However, despite several reminders, Corporate Debtor has failed to replace the defective batteries worth Rs. 303,320,671/- (Thirty Crore Thirty Three lakhs Twenty Thousand Six Hundred Seventy one only) and now the amount is outstanding against Corporate Debtor for payment.

e) It is submitted that, on 06.03.2020 the Operational Creditor issued a Demand Notice for Rs. 303,320,671/- (Thirty Crore Thirty Three lakhs Twenty Thousand Six Hundred Seventy one only) to the Corporate Debtor under the provisions of Section 8 of the Insolvency and Bankruptcy Code, 2016, which was delivered to Corporate Debtor as well as its Directors. The Corporate Debtor vide letter dated 18.03.2020 replied to the Demand Notice and raised following contentions: -

3. The Corporate Debtor submitted that, the claim against the corporate Debtor is illegal and whimsical and without any basis and hence falls under the definition of 'Pre - existing Dispute' within the as the Operational Creditor



itself agreed while signing the MOM on 03.09.2019 that there are no more than 15200 (10000 units of DIN Batteries and 5200 units of JIS batteries) units of batteries, which may have defect. The claim of entire payment for the batteries supplied as stated in the instant petition is totally misplaced and denied. Moreover, the Corporate Debtor raised a counter claim upon the Operational Creditor and submitted that Operational Creditor is liable to pay outstanding amount towards the unpaid invoices Nos. JATL/EXP/19-20/013, JATL/EXP/19-20/014, JATL/EXP/19-20/015 and JATL/EXP/19-20/016 to the Corporate Debtor along with 18% penal interest thereby attracting the provisions of the code defining 'Pre-existing Dispute'.

4. We have heard the arguments advanced by the Ld. Counsel appearing for the Operational Creditor as well as for the Corporate Debtor and also perused the records.

5. The Operational Creditor's claim is based on the facts that as per the distribution agreement was executed between the parties. The Applicant was appointed as exclusive Distributor of Corporate Debtor for a period of 60 months. In pursuance of the Distribution Agreement total a 33 transactions were made between the parties and proper invoices were raised by the Applicant upon the Corporate Debtor. It was agreed under clause 2.3.3 of the Distribution Agreement that in case of quality failure above 5%, Corporate Debtor shall replace all model wise defective batteries. However, as on date, the payments towards the remaining invoices stands due. It is stated by the Applicant that since the Corporate Debtor did not make the due payment of the Operational Debt, the Applicant had issued Demand Notice dated 06.03.2020 under section – 8 of IBC, 2016 and served at the registered office of the Corporate Debtor. The Corporate Debtor vide letter dated 18.03.2020 replied to the Demand Notice and submitted that the amount of Rs. 28,32,26,420/- along with interest Rs. 20,094,251/- totaling to Rs. 30,33,20,671/- (Thirty crore thirty three lakh twenty thousand six hundred



seventy one only) as a claim against the Corporate Debtor is unlawful and irrational and hence falls under the definition of 'Pre - existing Dispute' within the meaning of the IBC, 2016.

6. The Corporate Debtor raised the issue of 'Pre - existing Dispute' as its main defence and submitted that the Operational Creditor itself agreed while signing the Minutes Of Meeting on 03.09.2019 that there are no more than 15200 (10000 units of DIN Batteries and 5200 units of JIS batteries) units of batteries and also raised a counter claim on Operational Creditor for unpaid invoices. It is pertinent at this stage to refer to the Minutes of Meeting dated 03.09.2019, relevant extracts are reproduced below for reference: -

1. Almailem claims all the DIN types supplied by JATL have leakage problem and cannot be sold in the market.

To verify the claims Mr. Tripathi, Mr. Sen & Mr. Manas representing JATL visited Almailem from 31st August 2019 to 3rd September 2019.

1) Inspection was carried out by Mr. Sen, Mr. Tripathi and it was found that the entire quantity of DIN series have leakage problem and cannot be sold to customers. Stock of DIN types as on date 10000 in no's.

2) JATL will replace entire quantity if DIN batteries with new batteries. Before dispatching, JATL will do all the necessary testing's to ensure that the same problems will not get repeated. Dispatch date will be communicated by Mr. Sen on or before 15th September 2019.

3) This 10 % (5200 no's) will be replaced by JATL in two lots starting Oct-19. Other than this, post fitment leaked batteries will be replaced by JATL on one to one basis.



4) Upon receipt of the first lot of new batteries from JATL, Almailem will transfer part of the payment after inspecting and observing performance of the rectified product.

5) JATL will take back all the defective batteries to India on their own risk and through their own channel. Almailem will not get involved in this process as law of the country does not allow shipments of defective batteries to any other country. JATL should take back all the batteries by 25th September after that the batteries will be put in dump yard.

7. We have perused the Minutes of the Meeting very minutely thus, it is clear from the Meeting held between the parties that all DIN series batteries have leakage problem and cannot be sold to customers, so this fact is undeniably admitted by the Corporate Debtor itself. The Ld. Counsel appearing for the Corporate Debtor has vehemently argued that, as per the minutes of meetings dated 03.09.2019, it was mutually agreed between representatives of Corporate Debtor and Operational Creditor that Corporate Debtor will replace the entire 10,000 JIS type of batteries and Corporate Debtor shall replace 10% of DIN type of batteries out of total number of DIN batteries, i.e. 52000 units. Therefore, total numbers of batteries which are to be replaced were 15,200 units, consisting 10,000 units JIS type and 5200 units DIN type of batteries but we are not convinced by this argument as it was found in inspection that all DIN batteries have leakage and Clause no. 2 of the Minutes of the Meeting very specifically mentions that JATL (Corporate Debtor) will replace entire quantity of DIN batteries. Further, Clause no. 3 mentions that 10 % (5200 no's) will be replaced by JATL in two lots and other batteries will be replaced on one to one basis. The argument made by the Ld. Counsel also raised an important question: when all the DIN batteries have leakage problem, there is no reason as to why would the Operational Creditor want a small lot of batteries to be replaced? It was also mutually agreed between the parties that JATL will take back all the defective batteries to India but it failed to lift the defective batteries. It was also mutually agreed between the parties that the



Operational Creditor would only transfer the part payment after inspecting and observing the performance of the rectified product, but no evidence was placed on record by the Corporate Debtor about the delivery of the rectified product.

8. The Ld. Counsel appearing for the Operational Creditor submitted that the Corporate Debtor has categorically failed to produce even a single document to substantiate that there was any 'Pre-existing Dispute'. We have perused the record available on record, and we are of the considered view that the Corporate Debtor has failed to prove the existence of a dispute before the section – 8 notice as the Corporate Debtor has only raised the issue of a pre-existing Dispute' for the first time in the reply to Section – 8 notice. The argument made by the Corporate Debtor that there was a pre-existing Dispute' between the parties is nothing but a feeble argument, as no document is placed on record to prove that there was any dispute before the issuance of Section 8 notice.

9. It is pertinent at this stage to refer the decision of Hon'ble Supreme Court given in ***M/S Innovative Industries Ltd Vs ICICI Bank Civil Appeal 8337 of 2017***. The relevant extract is reproduced below for reference: -

"The Corporate debtor must bring to the notice of the creditor the existence of a dispute or the record of the pendency of the suit which is pre-existing i.e. before such notice or invoice was received by the corporate debtor."

Also Apex Court in ***Mobilox Innovations Pvt Ltd Vs Kirusa Software Pvt Ltd. SC 4532/2017*** held that: -

"What is important is that the dispute must be pre-Existing under section 8 and 9 i.e., it must be before the receipt of the notice." In the present case the Corporate Debtor never raised any dispute, before receiving demand notice from Operational Creditor.



10. In the light of findings of the present petition, when we consider the submissions of the Operational Creditor for the claims towards the goods supplied to the Corporate debtor it appears to us that the same shall also fall within the ambit of the definition of operational debt and the applicant will qualify as an Operational Creditor in terms of section 5(20) of the Code. The averments of the applicant stating that there is a 'debt' which the corporate debtor was liable to pay but failed to do so have not been rebutted by the Corporate Debtor by placing suitable evidence. Therefore, this Adjudicating Authority admit the Corporate Debtor into CIRP under the provisions of the Code.

11. The Operational Creditor has proposed the name of the IRP, therefore this Adjudicating Authority hereby appoints Mr. Nazim Khan having Regn. No. IBBI/IPA-002/IP-N00076/2017-18/10207 as IRP. Consent and valid AoA of the IRP must be filed within three days of passing this order. The said IRP is directed to 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.

12. 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;



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. The explanation below section - 14 (1) also stipulates “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, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period”.

13. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during moratorium 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.

14. 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.



15. 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., with respect to said project and make compliance with this order as per the provisions of IBC, 2016.

16. The Operational Creditor is directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect. Further, Operational creditor shall provide initial finance to the tune of Rs. 2,00,000/- 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 after its constitution by the IRP.

17. 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.

18. The application bearing IB – 1140/(ND)/2020 is *admitted*.

SD/-

**ATUL CHATURVEDI
MEMBER (TECHNICAL)**

SD/-

**BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)**