

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH V
Company Petition (IB)No.1135/ND/2019

In the matter of :

Panoli Intermediates (India) Pvt. Ltd.
Corporate office
Sara Niwas, 20/21
Harinagar Co. Op. Housing Society,
Gotri Road, Vadodra - 390007

..... *Operational Creditor*

VERSUS

VMA Enterprises Pvt. Ltd.
Registered Office:
50, Samrat Apartment Vasundhara Enclave
Delhi - 110096

..... *Corporate Debtor*

SECTION: 9 of IBC, 2016

ORDER DELIVERED ON: 29.05.2020

CORAM :

Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)
Sh. Kapal Kumar Vohra, Hon'ble Member (Technical)

For the Applicant/ Operational Creditor: Mr. Sanjay Maria, Mr.
Anant Maria

For the Respondent/ Corporate Debtor: Mr. Prabhat Kr. & Ms.
Rashika Raina

ORDER

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER, JUDICIAL

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the Applicant/ operational creditor, i.e. "***Panoli Intermediates (India) Pvt.***



Ltd.” for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company “**VMA Enterprises Pvt. Ltd.**”.

2. The Applicant used to supply goods/normal paraffin, waksol and AHD to Corporate Debtor on the basis of order placed by Corporate Debtor from time to time since around year 2014. The Corporate Debtor used to make on account payment to Operational Creditor on running account basis from time to time.
3. As per the averment made by the Applicant, in the month of January 2017, the corporate debtor started default in making payment of outstanding invoices and failed to make payment for the goods supplied and invoices raised by Operational Creditor.
4. Further stated that the Corporate debtor handed over two cheques of Rs. 44,06,687/- and Rs. 20,00,000/- respectively to the Operational creditor on 05.06.2018 towards part payment of outstanding debt. However, both cheques were presented by the Operational Creditor in Bank and the same were bounced and returned by the bank on 07.06.2018.
5. Demand Notice dated 01.10.2018 was issued by the operational creditor in Form 3 and 4 for Rs. 68,13,945/- to the Corporate Debtor.
6. The Applicant further stated that the Corporate Debtor neither made payment of unpaid operational debt nor existence of any dispute was brought to the notice of Operational Creditor within a period of ten days of the receipt of said Demand notice dated 01.10.2018.
7. The Corporate Debtor handed over three cheque of Rs. 5,00,000/-, Rs. 2,12,250/- and Rs. 9,000/- towards part payment of outstanding debt.
8. The amount claimed to be default is Rs. 60,92,695/-. The date on which the default occurred is 07.06.2018.



9. The Applicant has filed the Certificate dated 22.06.2019 from courier services for delivery of Demand Notice dated 01.10.2018 stating that the consignment/document no. (351200040742) from Panoli Intermediates (India) Pvt. Ltd. on 06.10.2018 to be delivered to VMA Enterprise Pvt. Ltd. and the said consignment/document has been duly delivered to the addressee on 08.10.201.
10. The Corporate debtor contended the following in its reply dated 06.06.2019:
- i. The present petition is not maintainable under section 9 of the Insolvency and Bankruptcy Code, 2016 as the demand notice has not been delivered to the Corporate Debtor in terms of section 8 of IBC, 2016 read with the Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
 - ii. The outstandings were settled between the parties and as per oral agreement, the respondent handed over three cheques of Rs. 5,00,000/-, Rs. 2,12,250/- and Rs. 9,000/-.
 - iii. It is an admitted fact that all the above said cheques were realised and it was agreed that the respondent will clear the liability with monthly instalments/ payments, the petitioner despite agreed and receiving the payment in terms of the oral agreement had filed the present petition in violation of the oral understanding between the parties.
 - iv. The present petition is time barred and dismissed on this ground alone.
 - v. The goods namely normal Chlorinated Paraffin Wax and HCL were of the inferior quality. Due to the quality issue the corporate debtor did not receive the outstanding payment from the parties above mentioned and suffered huge losses due to act and conduct of the petitioner.



11. We have heard the Ld. Counsel for the applicant and perused the averments made in the application, reply and the documents enclosed along with the application. Ld. Counsel for applicant submitted that the demand notice was duly delivered upon the Corporate Debtor/respondent which would be evident from the "Supplementary Certificate" issued by Maruti Courier Service Pvt. Ltd. enclosed at page 8 of the additional documents filed on 05.09.2019 and he further submitted that the contention of the Ld. Counsel for Corporate Debtor/respondent is that the demand notice was not delivered is not correct. He further submitted that by filing reply the Corporate Debtor/respondent admitted that there is outstanding dues, which were settled between the parties and as per oral agreement, the respondent handed over the three cheques of Rs. 5,00,000/-, Rs. 2,12,250/- & Rs. 9,000/- respectively. Therefore, Corporate debtor admit the dues and he further submitted that the contention of the Corporate Debtor that application is barred by limitation is not liable to be accepted because the Corporate Debtor admit that the present application was filed on 01.05.2019 whereas the last invoice was raised on 22.02.2018.
12. He further submitted that he also mentioned the name of the IRP and he further submitted that the respondent has not sent the reply to the demand notice.
13. On the other hand, Ld. Counsel for respondent submitted that he has not received the demand notice, therefore, the present application is premature in view of Section 8(1) of the IBC. He further submitted that the applicant produced the delivery report after the filing of this application and the same is not liable to be accepted. He further submitted that the present application is barred by limitation. He further submitted that as per oral agreement, the Corporate Debtor has made payment, which is shown in para 4 page 3 of the reply and he has already paid Rs. 12,51,250/- and the last payment was made on 14.05.2019. So, the present application is liable to be rejected.



14. In the light of the submissions made on behalf of the parties, we have gone through the averments made in the application, reply and documents enclosed with the application and we find that the demand notice was delivered on 08.10.2018 sent through Maruti Courier Service Pvt. Ltd. on 06.10.2018 and the Operational Creditor has enclosed the delivery report mentioned at page 19 of the application. Thereafter, in order to make it clear, whether the demand notice was duly delivered or not, the operational Creditor again filed additional documents enclosing the "Supplementary Certificate" issued by Maruti Courier Service Pvt. Ltd. enclosed at page 8 of the additional documents filed on 05.09.2019, which shows that the demand notice was duly delivered to the Corporate Debtor on 08.10.2018. Therefore, on the basis of that documents, we are of the considered view that the demand notice was duly delivered upon the respondent and we further find that at page 76-77, the applicant has enclosed the affidavit of Section 9(3)(b) and state that there is no notice given by the Corporate Debtor to a dispute of the unpaid operational debt.
15. At this juncture, we would like to refer the reply filed on behalf of the respondent and we find that no where the respondent claimed that he sent the reply to the demand notice rather in para 2 of the reply, he claimed that he has not received the demand notice and this contention of the respondent in our opinion, is not liable to be accepted because "Supplementary Certificate" issued by Maruti Courier Service Pvt. Ltd. enclosed at page 8 of the additional documents filed on 05.09.2019 shows that the said consignment was duly delivered upon the respondent. Therefore, we are of the considered view that in view of Section 8(2) of IBC, 2016 the Corporate Debtor is required to reply within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor. We further find the respondent also failed to show any documents that unpaid operational debt has been paid of course in para 4 of the reply mentioned that he has paid Rs. 12,51,250/- and undertakes to clear the



liability with monthly instalments/payments and in support he also enclosed the ledger account which is at page 18 of the application but respondent fails to convince us that the entire defaulted amount has been paid which is more than 1 lakh has been paid by the Corporate Debtor to the Operational Creditor as we have stated in aforementioned paras. The respondent also fails to convince us that he has sent the reply to the demand notice.

16. At this juncture we would like to refer the decision in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC OnLine SC 353***, in which the Apex Court analysed the meaning of “dispute” with respect to Operational Creditors and observed:

“24. 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 – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.”



“25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(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.”

17. In order to trigger the Section 9 of IBC the Adjudicating Authority is required to consider the following facts:-

- (a) the application made under sub-section (2) is complete;
- (b) there is no payment of the unpaid operational debt;
- (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
- (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and



(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

18. In the light of the submissions made on behalf of the parties when we shall consider the case in hand then we find that the respondent has failed to raise the dispute or failed to produce the documents to show that the unpaid operational debt has already been paid by the Corporate Debtor to the Operational Creditor. we further find that application filed on behalf of the Operational Creditor is complete and applicant also proposed the name of the IRP and consent of the IRP is also enclosed at page 78-81 and there is no disciplinary proceeding is pending against him and the defaulted amount is more than Rs. 1,00,000/- is being the minimum threshold limit fixed under IBC, 2016. Under such circumstances this Adjudicating Authority is inclined to admit this petition and initiate CIRP against the respondent. Accordingly, this petition is ADMITTED. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

(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 debt or 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 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;

(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.

Further:

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(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.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(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.

19. Since, name of IRP is proposed, hence we appoint, Mr. Bimal Ashok Desai, an Insolvency Professional, registration no. IBBI/IPA-001/IP-P00748/2017-2018/11281, and IRP is directed to follow the rules and regulations as per Section 15, 16, 17 & 18 of IBC.

20. Operational Creditor is directed to deposit the fee of Rs. 2,00,000/- to meet the immediate expenses of the IRP within two weeks. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

21. Registry is directed to communicate the order with the IRP as well both the parties.

Sdl -

K. K. Vohra

(Member Technical)

Sdl -

Abni Ranjan Kumar Sinha

(Member Judicial)