

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. 1)
KOLKATA**

C.P (IB) No. 27/KB/2019

An application under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:

Simplex Castings Limited [CIN L27320MH1980PLC067459], a company incorporate under the Companies Act, 1913, having its registered office at 601/602A, Fairlink Centre Off Andheri Link Road, Andheri (West) Mumbai 400053.

...Operational Creditor

Versus

Titagarh Wagons Limited [CIN L27320WB1997PLC084819], a company incorporate under the Companies Act, 1956, having its registered office at 756, Anandapur, E M Bypass, Kolkata - 700107.

...Corporate Debtor

Date of Hearing: 13.09.2022

Date of pronouncing the order: 01.11.2022

Coram:

Shri Rohit Kapoor : **Member (Judicial)**
Shri Balraj Joshi : **Member (Technical)**

Appearances (through Video Conferencing/physical hearing)

For the Operational Creditor: Ms. Sonal Shah, Adv.
Ms. Kushagra Shah, Adv.
Mr. Aniket Chaudhury, Adv.

For the Corporate Debtor: Mr. Jishnu Saha, Sr. adv.
Mr. Sayantan Bose, Adv.
Ms. Madhurima Das, Adv.
Mr. Shounak Mukhopadhyay, Adv.

ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*‘the Code’*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Mohan Lal Tiwari, Sr. General Manager (Commercial), Simplex Castings Limited (*‘Operational Creditor’*), duly authorised *vide* Board Resolution dated 25 October 2018¹ for initiation of Corporate Insolvency Resolution Process(*‘CIRP’*) against Titagarh Wagons Limited(*‘Corporate Debtor’*).
3. The present Petition was filed on **07 January, 2019** before this Adjudicating Authority. The total amount claimed in default is Rs.91,01,400/- (Rupees Ninety One Lakh One Thousand Four Hundred only)along with interest @18% per annum on and from 14 April, 2018 till date. The date of default is stated to be as on 14 April, 2018.
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.3,85,10,00,000/- (Rupees Three Hundred Eighty Five Crore Ten Lakh only) with subscribed share capital of Rs.23,91,42,178/- (Rupees Twenty Three Crore Ninety One Lakh Forty Two Thousand One Hundred Seventy Eight only).
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Corporate Debtor approached the Operational Creditor for effecting supply of CS Bogie as per drawing no. WD – 07067 – S/01 by placing purchase order upon the Operational Creditor. In pursuance of such purchase order dated 25 September, 2017, purchase order no. CIMM/17-18/000568 [*at page 15 of the Petition*]and Research Designs and Standards

¹Annexure – A of the Petition.

Organization (**'RDSO'**) approved inspection request form, the Operational Creditor manufactured the said goods and delivered them through a transporter appointed by the Corporate Debtor.

- 5.2 After the supply, the invoices would be raised and payments were to be made. It is pertinent to mention that, a particular purchase order was placed for supplying 270 nos. of Bogie as per drawing no. WD – 07067 – S/01 and accordingly, two Inspection Request Form were issued. Upon the issuance of the Inspection Request Form, the Operational Creditor started manufacturing the said goods.
- 5.3 As per the contract / purchase order, the payment for supplies was supposed to be made through Letter of Credit (**'LoC'**). For the supply of 270 bogies, three different LoC were opened being;
- i. No.00061LC00D87318 of ICICI Bank
 - ii. CLC0015180011110 of IndusInd Bank; and
 - iii. ILC050/2018 of Syndicate Bank
- 5.4 Supplies of goods were divided into three lots; with respect to the first two lots the payments were received and there was no issue of the LoC (ICICI Bank and Syndicate Bank). However, in case of third lots, it was made in two tranches. Delivery of the *first tranche* of 90 bogies was made to the Corporate Debtor, and against such supply a sum of Rs.98,32,716/- (Rupees Ninety Eight Lakh Thirty Two Thousand Seven Hundred Sixteen only).
- 5.5 Further, on the delivery of *second tranche* of 44 bogies, and on the demand of the Corporate Debtor for a sum of Rs.94,05,206/- (Rupees Ninety Four Lakh Five Thousand Two Hundred Six only), the Operational Creditor's Bank intimated that the Corporate Debtor's Bank refused to honor the LoC because of some discrepancies in the LoC.
- 5.6 The Corporate Debtor's Banker's refusal to honor the LoC was soon followed by a demand letter by the Corporate Debtor against the delayed cancellation of

two separate and unconnected purchase orders being nos. CIMM/17-18/001617 and CIMM/17-18/001618 for a purported sum of Rs.8,31,01,335/- (Rupees Eight Crore Thirty One Lakh One Thousand Three Hundred Thirty Five only).

- 5.7 The said Purchase orders were cancelled because no inspection request form was issued by the Corporate Debtor upon issuing the Purchase Order, secondly there was a huge escalation in the price of raw material because of which the supplies could be much delayed. As such the Corporate Debtor has cancelled the Purchase order which was accepted by the Operational Creditor without any financial implications.
- 5.8 On non payment of the Corporate Debtor for supplies of 44 bogies in the *second tranche*, the Operational Creditor issued a notice dated 31 October, 2018 seeking for payment of a sum of Rs. 94,05,206 along with the interest @ 18% per annum[Pages 98 – 103 of the Petition].
- 5.9 The Corporate Debtor had, after the issuance of the said notice dated 31 October, 2018 replied to the same by reiterating its claim for the cancelled orders[Reply letter dated 09 November, 2018, at pages 104 – 107].By its letter dated 13 November, 2018 the Operational Creditor had requested the Banker of the Corporate Debtor to honor the said LoC which the Bankers did not accede to. It was also intimated by IndusInd bank that the Corporate Debtor has instructed them on such non acceptance of the Letter of Credit[Page 108 of the Petition].
- 6. Submissions by the Ld. Counsel appearing on behalf of the Corporate Debtor.**
- 6.1 This proceeding is a counterblast to a proceeding initiated by the Corporate Debtor against the Operational Creditor under section 9 of the Code, which is pending before the coordinate Mumbai Bench of NCLT (being C.P. 4786 of 2018).There exist a serious dispute between the Corporate Debtor and

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Operational Creditor pertaining to the transaction in question and adjudication on the alleged claim of the Operational Creditor.

- 6.2 The Corporate Debtor not only has a bona fide defence, but also a larger claim against the Operational Creditor arising out of separate transactions. The existence of such larger counterclaim is forming a part of the claim in the proceeding before the NCLT, Mumbai Bench.
- 6.3 The Corporate Debtor is entitled to adjustment of any alleged dues of the Operational Creditor in the instant proceeding by way of a legal and equitable set off of its claim before the Mumbai Bench. In this context it may be noted that the Corporate Debtor had issued two further purchase orders, being Purchase Orders No. CIMM/17-18/001617 and CIMM/17-18/001618, both dated 16 February, 2018 on the Operational Creditor for supply of 280 and 270 C.S. Bogies respectively as per specifications contained therein. The total value of the said purchase orders was Rs.12,27,18,750/-.
- 6.4 Against a proforma invoice bearing No. 18-19/2740 for a sum of Rs.89,25,000/- the Corporate Debtor had made payment of a sum of Rs.69,42,600/- after deducting a sum of Rs. 19,82,400/- paid by it to one Mini Iron on behalf of the Operational Creditor. The fact of such payment having been made against the said proforma invoice was also intimated to the Operational Creditor by an email dated 30th June, 2018.
- 6.5 The proforma invoice mentioned above was raised against the Purchase Order No. CIMM/17-18/001618. The Operational Creditor, however, failed to supply any wagons under the said purchase order. So far as purchase order No.CIMM/17-18/001617 is concerned, only 40 wagons were supplied beyond the prescribed time. The Corporate Debtor, therefore, became entitled to a liquidated sum equivalent to 5% of the value of the said purchase orders towards liquidated damages in terms thereof.
- 6.6 The claim of the Corporate Debtor being for an ascertained sum of money legally recoverable by it from the Operational Creditor in respect of the same

set of transactions, which the Corporate Debtor is entitled to set off against the claim of the Operational Creditor, there can be no question any debt being due or owing by it to the Operational Creditor.

- 6.7 It may be noted in this regard that the claim of the Corporate Debtor on account of refund of advance and liquidated damages is far in excess of the alleged claim of the Operational Creditor. In fact, in the instant petition the Operational Creditor has admitted that the Corporate Debtor has raised a claim against it on account, inter alia, of Refund of Advance and Liquidated Damages by its letter dated 09 October, 2018 [Pages 87-89 of the Petition]. The Corporate Debtor had raised such claim prior to issuance of the notice under section 8 of the Code.
- 6.8 The Hon'ble Supreme Court of India has in the judgment reported in *Union of India v. Karam Chand Thapar & Bros. (Coal Sales) Ltd. & Ors.* [(2004) 3 SCC 504] [para 18] held that the principles of legal set off embodied in Order VIII rule 6 of the Code of Civil Procedure, 1908 can be applied in relation to enforcement of money claims even in writ proceedings in absence of specific provision of law.
- 6.9 As the Insolvency and Bankruptcy Code, 2016 also does not provide for any rule of procedure to deal with a claim in the nature of a legal set off made by a Corporate Debtor contending that a debt alleged to be due by an Operational Creditor is not actually due or payable or enforceable, the principles of legal set off embodied in Order VIII rule 6 of the Code of Civil Procedure, 1908 must similarly apply to petitions under section 9 of the Code.

7. Issues

- 7.1 Is there any Pre-existing dispute?

Analysis & Findings

8. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.
9. Upon perusal of the purchase order dated 25 September, 2017, purchase order no. CIMM/17-18/000568 [at page 15 of the Petition] it emanates that various part supplies made there under. The instant claim of the Operational Creditor was covered by a Letter of Credit opened by the Corporate debtor through Indusind Bank being LC No. for a sum of Rs. 1,86,16,500/- for supply of 90 bogies, out of which a sum of Rs. 98,32,716 /- against supply of 45 bogies has been paid to the Operational Creditor and the price for the remaining supply of bogies is what remains due and payable.
10. Whereas, the application before the NCLT, Mumbai Bench is pertaining to the non - supplies of Bogies which is not even covered under ambit of Operational Debt and moreover, the same is against different Purchase order nos. CIMM/17-17/001617 and CIMM/17-18/001618, which is nowhere connected to these transactions and form a separate contract altogether. Further, the same was accepted by the Corporate Debtor in their reply, where in they have categorically stated that '*The Corporate Debtor not only has a bona fide defence, but also a larger claim against the Operational Creditor arising out of separate transactions[at page 4 of the Reply at para 7].*'
11. Further, the Ld. Sr. Counsel appearing for the Corporate Debtor relied on the Judgment by the Hon'ble Supreme Court in *Union of India -us-Karam Chand Thapar & Bros. (Coal Sales) Ltd. & Ors.* [(2004) 3 SCC 504] [para 18], wherein it was held '*that the principles of legal set off embodied in Order VIII rule 6 of the Code of Civil Procedure, 1908 can be applied in relation to enforcement of money claims even in writ proceedings in absence of specific provision of law or settled rule of procedure governing decision of such dispute.*' Reference in this regard has also been made to the decision of the

Hon'ble Supreme Court in the case of *Jitendra Kumar Khan & Ors. Versus Peerless General Finance and Investment Company Limited & Ors.* reported in [(2013) 8 SCC 769] [paras 11 and 16].'

12. Nevertheless, it is pertinent to mention that in *Union of India -us-Karam Chand Thapar & Bros. (Coal Sales) Ltd. & Ors. (Supra)*, the Hon'ble Supreme Court has made it comprehensible that;

“18. What the rule deals with is legal set-off. The claim sought to be set-off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set-off or adjusted. Apart from the rule enacted in Rule 6 abovesaid there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, **must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the Court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own.** When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the Court to entertain and allow such plea or not to do so.

19. In *Bhupendra Narain Singha Bahadur Vs. Bahadur Singh and Ors.* [AIR 1952 SC 201], this Court ruled that a plea in **the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction.** A wrong-doer who has wrongfully withheld monies belonging to another cannot invoke any principle of equity in his favour and seek to deduct therefrom the amounts which may have fallen due to him. There would be nothing improper or unjust in telling the wrong-doer to undo his wrong and not to take advantage of it.”

(emphasis implied)

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- 13.** In this matter, separate purchase orders were issued which gave rise to separate cause of actions. Hence, it is clear that the Purchase order being CIMM/17-18/0000568 is a separate contract for which independent proceedings has been initiated before this Adjudicating Authority, and against which nodispute whatsoever has been ever raised by the Corporate Debtor. As such it is construed that there is no pre-existing dispute.
- 14.** In view of the above facts and circumstances, we are satisfied that the present petition made by the Operational Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time. Further, as envisaged under section 9(3)(b) of the Code, an affidavit has also been filed by the Operational Creditor.
- 15.** It is, accordingly, hereby ordered as follows:-
- a) The application bearing **CP (IB) No. 27/KB/2019** filed by Simplex Castings Limited, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Titagarh Wagons Limited, is **admitted**.
 - b) There shall be a moratorium under section 14 of the IBC.
 - c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
 - d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

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- e) **Mr. Sri Ram Mittal** registration number **IBBI/IPA-001/IP-P-02276/2021-2022/13677**, email; ***srirammittal.ey@gmail.com***, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) The Operational Creditor shall deposit a sum of **Rs.3,00,000/- (Rupees Three Lakh only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

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- j) Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- 16. CP (IB) No. 27/KB/2019** to come up on **30.12.2022** for filing the periodical report.
- 17.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 01st day of November, 2022

SA [LRA]