



**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 811/MB-IV/2022

Under Section 9 of the I&B Code, 2016

In the matter of:

Unistar Metals Private Limited

[CIN: U13203WB2007PTC118655]

...Operational Creditor/Applicant

V/s

GE Power India Limited

[CIN: L74140MH1992PLC068379]

...Corporate Debtor/Respondent

Order Dated: 17.03.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Debdatta Saha, Proxy
Advocate.

For the Respondent(s) : Mr. Akshay Sapre a/w
Mr. Abhijeet Swaroop and
Ms. Phalguni Nigam, Advocates.

Per: Kishore Vemulapalli (Member Judicial)

1. This is an Application being C.P. (IB) No. 811/MB/C-IV/2022 filed on 03.06.2022 by Mr. Gaurav Jhavar, Director of Unistar Metals Private



Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against GE Power India Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

- 1.1. The Operational Creditor has filed Board Resolution dated 20.04.2022 in support of authorization in favour of signatory of this Application authorising him to file the present company application on behalf of the Operational Creditor.
- 1.2. The total amount claimed by the Operational Creditor in the Part 4 of the company petition is Rs.3,51,34,141/- inclusive of interest; and the Operational Creditor has attached the working of the computation of the outstanding debt in default as Annexure D. The date of default as per Part 4 of the Company Petition is shown to be 07.06.2021, i.e. the date on which the rejection notice was served on the Operational Creditor.
2. The Operational Creditor is in the business of manufacture and supply of cold roof materials and allied works. The Corporate Debtor on 25.03.2019 vide a Purchase Order No. 410178215 engaged the Operational Creditor for supply of cold roof. The Applicant submits that the Purchase order stipulated an interest component of 18% on delayed payment and included the components of procurement of raw material, fabrication, inspection, surface preparation & painting. The work order was to be facilitated from the work site of the Operational Creditor at Howrah. The said Purchase order was acted upon by the Operational Creditor and the Corporate Debtor provided engineering drawings in pursuance of the said Purchase order, however, the same varied from the quantity indicated in the Purchase Order.



- 2.1. Further in the course of carrying out the work agreed upon, various peripheral costs were incurred, which are alleged to not have been paid by the Corporate Debtor. Various emails were exchanged between the parties in furtherance of the changes in material and work asked to be carried out by the Corporate Debtor to the Operational Creditor.
- 2.2. The Operational Creditor started the fabrication work on 05.01.2020; completed it on 17.02.2020 and requested the Corporate Debtor to take inspection of project site for 61959.07 kgs for which the approval was granted on 02.03.2020 vide email.
- 2.3. The Operational Creditor sent an email to the Corporate Debtor on 14.04.2020 conveying the closure of office activities due to Government notification to restrain the spread of Covid-19 pandemic. Works suspension order was received from the Corporate Debtor on 19.05.2020 and a revised Purchase order No. 4101798215/1 was thereafter issued by the Corporate Debtor through which the delivery period was extended till 30.11.2020.
- 2.4. The Corporate Debtor on 10.12.2020 inspected the materials in assembled condition and required an inspection to be made by the end consumer, M/s. Doosan Power System (India) Private Limited (Ultimate Beneficiary) which was made after a delay of one month on 11.01.2021. Thereafter, a revised Purchase Order 4101798215/2 was issued by the Corporate Debtor extending the delivery period till 31.03.2021. The Operational Creditor received a mail on 01.04.2021 from the Corporate Debtor to complete the supply by April, 2021. On 09.04.2021, the Operational Creditor received final painting procedure from the Corporate Debtor and it called upon the Corporate Debtor to inspect the first lot of painting on 05.05.2021, however, the Corporate Debtor didn't carry out the same.



- 2.5. On 07.06.2021, a Rejection Notice was sent by the Corporate Debtor to the Operational Creditor in terms of Clause 8 of GE Power Terms of Purchase whereby the Corporate Debtor rejected the additional painting and required to replace the materials. On 05.08.2021, the Corporate Debtor sent the final termination notice to the Operational Creditor informing the rejection of goods by the EPC Contractor which was conveyed to the Corporate Debtor by them on 26.07.2021 vide email.
- 2.6. The Operational Creditor issued a Legal Notice dated 15.12.2021 demanding inter-alia Rs. 1,88,21,000/- alongwith interest at 18% p.a. towards such goods. The Corporate Debtor responded to such legal notice vide its reply dated 25.12.2021 rejecting all the allegations of the Operational Creditor and called upon the Operational Creditor to pay an amount of Rs. 46,60,642/- to the corporate debtor, which it had to incur on awarding the balance part of the PO to another supplier consequent to rejection of the sub-standard good supplied by the Operational Creditor.
- 2.7. The Operational Creditor then issued a Demand notice dated 28.02.2022 under Section 8 of the Insolvency and Bankruptcy Code, 2016 calling upon the Corporate Debtor to pay a total sum of Rs. 2,55,48,654/- as unpaid operational debt. The Corporate Debtor replied to the demand notice on 08.03.2022 and once again disputed the amount claimed.
3. The Corporate Debtor in its reply to the present petition dated 10.10.2022 has denied all allegations and the amount claimed in Part-4 of Form 5 filed by the Operational Creditor. It has raised objections on the ground of a) Maintainability of petition on the ground of pre-existing dispute, b) Existence of Operational Debt c) Demand notice not in proper form and



defective d) Pre-existing dispute in relation to the amount claimed by the Operational Creditor.

3.1. The Corporate Debtor has submitted that it had rejected the goods in accordance of the clauses of the PO and such rejection was followed by consequent termination of the PO. Both of these events took place before receipt of the demand notice u/s 8 of the Code. Hence, there exists a dispute with respect to existence of debt between the parties. The Corporate Debtor has also disputed the exponentially rising amount claimed by the Operational Creditor in the Legal Notice, Demand Notice and the present petition.

4. We have carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

4.1. We find that the Corporate Debtor served a Rejection Notice upon the Operational Creditor for the sub-standard goods supplied by the Corporate Debtor. This action is stated to have been taken in terms of the P.O. and terms stated therein. The fact whether the goods were liable to be rejected or not requires adjudication of the dispute in relation thereto. Accordingly, there exists a dispute between the parties which was communicated by the Corporate Debtor to the Operational Creditor in response to its legal notice. This was prior to the Demand notice issued by the Operational Creditor u/s 8 of the code.

4.2. The Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs. Kirusa Software Private Limited* held that, in the event there is a pre-existing dispute between the parties, an Application under Section 9 of the Code would have to be rejected.



4.3. The Corporate Debtor in its reply has relied upon Para 33 and 34 of the said judgement to support its contention. The said para(s) read as under –

“33. This being the case, is it not open to the adjudicating authority to then go into whether a dispute does or does not exist?”

34. It is important to notice that Section 255 read with the Eleventh Schedule of the Code has amended Section 271 of the Companies Act, 2013 so that a company being unable to pay its debts is no longer a ground for winding up a company. The old law contained in Madhusudan (supra) has, therefore, disappeared with the disappearance of this ground in Section 271 of the Companies Act.”

4.4. In view of the above, we find that the present case is fit for dismissal under Section 9(5)(ii)(d) read with Section 8(2)(a) and Section 5(6) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties with respect to the purported claims in view of rejection of goods, supplied by the applicant, giving rise to the claimed amount. The present case requires adjudication which is beyond the powers vested in this Bench in proceedings arising from an application filed under sec. 9 of the code and deserves to be dismissed.

ORDER

1. This Application, being C.P. (IB) No. 811/NCLT/MB/C-IV/2022 filed under Section 9 of I&B Code, 2016, filed by Unistar Metals Private Limited, Operational Creditor/ Applicant against GE Power India Limited, Corporate Debtor for initiating Corporate Insolvency Resolution Process is **Dismissed**.



2. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
/LRA Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)