

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

CP 619/IBC/NCLT/MAH/2018

Under Section 9 of the I&B Code, 2016

In the matter of

Nico Extrusions Limited

....Operational Creditor

v/s

Nicomet Industries Limited

.... Corporate Debtor

Coram: Hon'ble Mr. V. P. Singh, Member (Judicial)
Hon'ble Mr. Ravikumar Duraisamy, Member (Technical)

For the Petitioner: Mr. Rahul Totala

For the Respondent: Ms. Sheetal Parkosh i/b Jayesh Desai & Associates

Per V. P. Singh, Member (Judicial)

ORDER

1. It is a Company Petition filed u/s 9 of Insolvency & Bankruptcy Code, 2016 by Operational Creditor, namely Nico Extrusions Limited against Corporate Debtor, namely Nicomet Industries Limited stating that the Corporate Debtor failed to make payment of Rs. 31,70,404/- comprising of principal amount of Rs. 20,58,704/- and interest of Rs. 11,11,700/-. The Company Petition is to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.
2. The background of the case is that the Operational Creditor has sold 8 licenses to the Corporate Debtor for an amount of Rs. 51,28,704/-. The Section 8 notice of the IBC was sent by the Operational Creditor to the Corporate Debtor on 9.3.2017 by Registered Post Acknowledgment Due annexing the invoice and ledger calling upon the Corporate Debtor to make payment of unpaid amount of Rs. 20,58,704/- in addition to interest as applicable. The invoice annexed to the notice states a total of Rs. 51,28,704/- and the ledger account states that a payment of Rs. 30,70,000/- has been paid and an amount of Rs. 20,58,704/- is pending. The Operational Creditor has stated that the notice dated 9.3.2017 was received by the Corporate Debtor on 20.3.2017.

3. The Corporate Debtor has replied to the abovementioned Section 8 demand notice by a letter dated 20.3.2017. The reply states that the notice sent is not tenable and the amount of Rs. 20,58,704/- is not owed by the Corporate Debtor. The reply further states that a sum of Rs. 1,00,000/- is owed and a cheque, bearing cheque number 952160 issued by State Bank of India for that amount was enclosed therewith to settle the account. The reply further stated that in case the cheque is encashed it will be considered as closure of the account between the parties and in case the Operational Creditor disagrees, a meeting could be scheduled to go over accounts and correct any discrepancies in books of either party. Thereafter, letter dated 21.3.2017 was sent via Registered Post Acknowledgment Due, stating that the aforestated reply could not be delivered by hand delivery on 20.3.2017 as the premises were found to be locked, therefore the reply is being sent through Registered Post Acknowledgment Due.
4. The Operational Creditor sent a letter dated 31.3.2017 to the reply of Corporate Debtor dated 20.3.2017. The letter dated 31.3.2017, *inter-alia*, refused to accept the cheque of Rs. 1,00,000/- as final payment against the receivables and called upon the Corporate Debtor to explain how the computation of Rs. 1,00,000/- was arrived at as against the balance of Rs. 20,58,704/-.
5. An affidavit-in-reply has been filed on 16.10.2018 by the Corporate Debtor and raised, *inter-alia*, following defences:
 - a) The claim of the Operational Creditor is incorrect as it includes a rate of interest which was never contracted for by the parties. There is no document on record to show that interest is chargeable at any rate.
 - b) The particulars of claim itself do not state any rate of interest, number of days of default or the computation of claim. The amount of Rs. 11,11,700/- stated in the particulars of claim is not mentioned in the demand notice. Therefore, the notice itself is vague, void and defective and a petition based on such notice is liable to be dismissed.
 - c) The petition is not maintainable for want of certificate from the creditor's financial institution.

- d) There are discrepancies between the unpaid amount mentioned in S. 8 notice (Rs. 20,58,704), Petition (Rs. 31,70,404/-) and the invoices annexed (Rs. 51,28,704/-).
- e) According to the accounts of the Corporate Debtor, it is liable to pay only Rs. 1,00,000/- to the Operational Creditor. And the Corporate Debtor enclosed a cheque for the same amount to the reply of demand notice sent by the Operational Creditor.
- f) The Corporate debtor purchased certain materials from a group concern of the Operational Creditor called Metec Asia Ltd. The goods were further supplied to one Jaico Enterprises LLP. The quality of the goods being of poor standard, the said Jaico Enterprises raised debit note for Rs. 19,97,563/-. The Corporate Debtor in turn telephonically informed the Operational Creditor of the poor quality of the goods and raised a debit note to the Operational Creditor for the same amount of Rs. 19,97,563/-. After adjusting the available credit of Rs. 38,858.07/-, a debit of an amount of Rs. 19,58,704/- was raised in the account of Corporate Debtor by crediting Metec Asia Ltd.
- g) That raising debit notes which get adjusted against the invoices has been an ongoing practice between the parties and their group concerns since many years. The said debit of Rs. 19,58,704/- is clearly reflected in Statement of Accounts of the debtor. The Corporate Debtor has annexed its Confirmation of Accounts
- (i) dated 1.4.2017 for the period 1.4.2016 to 31.3.2017 showing a payment of Rs. 19,58,704/- to Metec Asia Ltd.
 - (ii) dated 1.4.2018 for the period 1.4.2017 to 31.3.2018 showing a balance of Rs. 1,00,000/- to the Operational Creditor.
- h) It is contended that from the statement for the year ending 2017 as well as 2018 that now only an amount of Rs. 1,00,000/- is due and payable to the Operational Creditor, which was sent by way of cheque.
- i) To determine the exact amount of dues, if any, the books of accounts of the Corporate Debtor, the Operational Creditor and Metec Asia Ltd. need to be inspected. This is a triable issue which is beyond the scope and jurisdiction of the Tribunal.

- j) It is well established that when the claim is disputed by the Corporate Debtor, the question of default does not arise.
- k) The Operational Creditor has not annexed the statement for the financial year ending 31.3.2018 which shows outstanding of Rs. 1,00,000/-.
6. In its Affidavit-in-Reply, the Corporate Debtor has further stated the Corporate Debtor is willing to pay as per its books for which the Corporate Debtor requested for a joint meeting with the Operational Creditor.
7. The Operational Creditor has filed an Affidavit-in-Rejoinder dated 5.11.2018 stating, *inter-alia*, that:
- a) It is correct that the invoice is showing the figure of Rs. 51,28,704/- out of that the Corporate Debtor has already paid Rs. 25,70,000/- and Rs. 5,00,000/- respectively and thus the balance outstanding amount which is defaulted is Rs. 20,58,704/-. After adding the interest of Rs. 11,11,700/- on the principal amount, the present petition is filed for the total outstanding amount of Rs. 31,70,404/-.
- b) With regards to dues being of only Rs. 1,00,000/-, the Operational Creditor has stated that it is a manufactured story. Confirmation of accounts as on 31.3.2016 issued by the Corporate Debtor themselves on 30.9.2016 clearly shows that the balance payable and confirmed by them was Rs. 20,58,704/- being the principal amount claimed in the petition.
- c) The Operational Creditor denied that the customary practice was to have most transactions telephonically and stated that the Operational Creditor follows a practice of serving contractual documents/ confirmations/ correspondence by letters or emails with every customer.
- d) The Operational Creditor stated that there is no concern of Metec Asia Limited to the present dispute. The Operational Creditor is not aware as to what and when the goods were supplied to one Jaico Enterprises LLP. The Operational Creditor is not aware of the fictitious debit note which is neither annexed to the present reply nor been received by the Operational Creditor. Further, the Operational Creditor has specifically denied that the Corporate Debtor has telephonically

informed the Operational Creditor of the poor quality of goods and raised a debit note for an amount of Rs. 19,97,563/-.

- e) The said debit note is not annexed to the reply (being reply dated 20.3.2017) to the Section 8 demand notice. Further, no proof to show that such debit note was issued to the Operational Creditor.
8. With respect to the discrepancies in the amounts in demand notice, petition and invoice, the Operational Creditor stated that the same is covered by the decision of Hon'ble NCLAT and the Insolvency Resolution Professional has to look at it.
9. The Operational Creditor has annexed the Section 8 demand notice sent to Corporate Debtor, reply of the Corporate Debtor to the demand notice and further communication by the Operational Creditor to the Corporate Debtor. The Operational Creditor has also annexed Confirmation of accounts dated 30.9.2016 for the period between 1.4.2015 to 31.3.2016 sent by the Corporate Debtor to the Operational Creditor disclosing a closing balance of Rs. 20,58,704/- as on 31.3.2016. The Operational Creditor has also annexed an affidavit to the effect that no notice has been given by the Corporate Debtor relating to the dispute of the unpaid debt.
10. The Hon'ble Supreme Court in the case of '*Mobilox Innovations (P) Ltd. v Kirusa Software (P) Ltd.*¹' noted,

"It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)[ii](d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor 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 reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence 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 not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

11. The dispute raised by the Corporate Debtor is spurious defence. Most of the disputes raised by the Corporate Debtor during the hearing of the petition were not raised by the Corporate Debtor in the reply to S. 8 demand notice served before filing of the petition and have been raised belatedly at the time of hearing. Further,

¹ Civil Appeal No. 9405 of 2017.

the Corporate Debtor has stated its willingness to settle the accounts in case of discrepancies of accounts. Also, no documents have been provided regarding the debit note raised upon the Operational Creditor for adjustment of Rs. 19,97,563/-.

12. The fact that bank certificate is not annexed in compliance of Section 9 (3)(c) of IBC has been held to be directory by the Hon'ble Supreme Court in the matter of *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.*² Therefore, this defence does not survive.
13. For the petition fulfilling the requirements of Section 9, this petition deserves to be admitted.
14. This Bench hereby admits this petition filed under Section 9 of IBC, 2016, declaring moratorium with consequential directions as mentioned below:
 - I. That this Bench hereby prohibits
 - 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 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 Securitization 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.
 - II. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
 - III. That the provisions of sub-section (1) of Section 14 of IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - IV. That the order of moratorium shall have effect from 14.12.2018 till the completion of the corporate insolvency resolution process or until this

² Civil Appeal No. 15135 of 2017.

Bench approves the resolution plan under sub-section (1) of section 31 of IBC or passes an order for liquidation of corporate debtor under section 33 of IBC, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of IBC.

VI. That this Bench hereby appoints Mr. Devang Sampat having registration number IBBI/IPA-001/IP-P00224/2017-18/10423 as Interim Resolution Professional to carry out the functions as mentioned under IBC.

15. Accordingly, this Petition is admitted.

16. The Registry is hereby directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional by speed post and email.

Sd/-

RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-

V. P. Singh
Member (Judicial)

DT. 14.12.2018