

**IN THE NATIONAL COMPANY LAW TRIBUNAL
“CHANDIGARH BENCH, CHANDIGARH”**

CP(IB) No. 64/Chd/Hry/2018

**Under Section 9 of the
Insolvency and Bankruptcy
Code, 2016.**

In the matter of:

M/s. Durga Enterprises,
having its registered office at 301,
3rd Floor, 920/1, Naiwala,
Desh Bandhu Gupta Road,
Karol Bagh, New Delhi-110005.

...Applicant-Operational Creditor

Vs.

SRS Meditech Limited,
having its registered office at
Plot No. 8, Sector 5,
Main Mathura Road, Ballabgarh,
Haryana-121004

...Respondent-Corporate Debtor

Judgement delivered on : 02.11.2018

**Coram: Hon'ble Mr. Justice R.P. Nagrath, Member(Judicial).
 Hon'ble Mr. Pradeep R. Sethi, Member(Technical)**

For the petitioner : Mr. Krishan Vrind Jain, Practising Chartered Accountant.
For the respondent : Mr. Harvinder Singh Johal, Advocate.

JUDGEMENT (Oral)

The instant petition has been filed by Durga Enterprises, a sole proprietorship concern through its proprietor Mr. Mahender Kumar Gupta under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the Code) in form No. 5 as prescribed under Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for short, the Rules). At Annexure 'C' are the certificates of Delhi VAT and GST in the name of the petitioner-operational creditor in which Mr. Mahender Kumar Gupta is entered as the sole proprietor.

2. The respondent-corporate debtor was incorporated on 28.06.2010 under the Companies Act, 1956 with authorised share capital of ₹ 30,00,000/- and paid up share capital ₹27,92,730/-. The registered office of the respondent-corporate debtor is located at Ballabgarh in the State of Haryana and therefore, the matter falls within the territorial jurisdiction of this Tribunal.

3. It is stated that the petitioner-operational creditor supplied Printed Mono Cartons to the respondent-corporate debtor as per agreed terms and conditions and issued bills from 07.12.2016 to 13.05.2017 for a total sum of ₹ 20,57,626/- but no payment was made by the corporate debtor for this period. The copies of invoices are from Annexure-F to Annexure-O. It is further stated that the corporate debtor has failed to clear the outstanding amount despite repeated demands and they had been seeking time to clear the outstanding dues.

4. The petitioner served demand notice dated 26.10.2017 in form 3 (Annexure-Q) under Section 8 of the Code as prescribed in Rule 5 of the Rules by attaching purchase orders issued by the respondent-corporate debtor. The invoices in respect of the transactions in question; Form 38 issued by the respondent-corporate debtor for entry of transporter carriage vehicle in Noida; Form C under the Central Sales Tax and copy of notice dated 05.09.2018 were sent along with the demand notice. The demand notice despatched vide postal receipt (Annexure-R, page 62, Sr. No. 1) was delivered to the respondent-corporate debtor on 01.11.2017 as per tracking report at page 73 of the paper book. The notices are said to have been sent at other addresses of the corporate debtor but we are not referring the same as the service to the

corporate debtor at one of the addresses is the main concern which stands proved.

5. The instant petition was filed on 10.01.2018 i.e. much after the expiry of 10 days period as required under Section 9 of the Code. The petitioner has attached affidavit at Annexure-B furnished by the proprietor of the petitioner-company in order to comply with the requirement of Section 9(3)(b) of the Code. However, it is stated that the petitioner received a reply dated 05.11.2017 and 27.12.2017 (page 27 and 31 of the paper book) to the demand notice from the respondent.

6. The amount in default is stated to be ₹ 23,09,720/- comprising principal amount of ₹ 20,57,626/- and interest amount of ₹ 2,52,094/-.

7. When the matter was listed on 20.03.2018, it was observed that the petitioner had earlier sent the copy of the application along with paper book at the corporate office and not at the registered office of the corporate debtor as per requirement of sub-rule (2) of Rule 6 of the Rules and the Registry was directed to list the matter after the said compliance is made. The petitioner filed compliance affidavit attaching therewith copy of postal receipt and tracking report in proof of compliance of Rule 6(2) of the Rules. Notice of the petition was issued to the respondent corporate debtor and appearance was made by Mr. Harinder Singh, Advocate who filed Memo of Appearance and time was granted to file Power of Attorney with resolution of Board of Directors along with the reply. Despite affording many opportunities, the respondent-corporate debtor did not file the reply.

8. When the matter was listed on 08.08.2018, the learned counsel for the respondent handed over two cheques to the authorised representative of the petitioner towards the settlement of the instant petition and one cheque

for settlement of payment in the case of CP (IB) 63/Chd/Hry/2018 filed against the same corporate debtor, copies of which were placed on record. The last date of maturity of third post- dated cheque was 15.10.2018 and therefore, the matter was adjourned to 17.10.2018 for arguments. On 17.10.2018, it was stated on behalf of the petitioner that all the three cheques bounced. Time was requested on behalf of the respondent for making payment and an undertaking was given to make the payment along with interest from the date of bouncing of the cheques to the date of payment. It was ordered that in case of failure by the respondent to make payment, the matter shall be posted for arguments without further liberty to the respondent to file reply. Neither the payment has been made nor any objections have been filed.

9. We have heard the authorised representative of the petitioner, the learned counsel for the respondent and carefully perused the record.

10. All the invoices of transactions between the parties have been annexed with this petition which are from page 44 to 53 (Annexure-F to Annexure-O). Delivery of the demand notice to the respondent has been established as per the facts discussed above. The evidence of the operational creditor is further fortified from the ledger account of the respondent being maintained by the petitioner in the regular course of business which is Annexure-P and outstanding amount as on 31.10.2017 is ₹23,09,720/-. The last entry at page 55 of the paper books shows that interest amount is ₹ 2,52,094/- whereas the principal amount is ₹ 20,57,626. We have also perused both the replies which the respondent corporate debtor sent to the petitioner. In the reply dated 05.11.2017 (page 27 of the paper book), the corporate debtor has admitted that Purchase Orders have been placed on the petitioner-operational creditor, issued Form 38 and two 'C' Form after full

settlement with the petitioner. However, it is stated that the petitioner has not supplied the material in accordance with the specifications pointed out to the petitioner from time to time. In the second reply dated 27.12.2017 (page 31 of the paper book), contention was raised that complete invoices have not been supplied. It is not the version of the respondent that the respondent has raised any dispute with the petitioner in respect of the invoices in question before service of the demand notice.

11. The matter is to be considered in the light of the settled principle of law laid down by the Supreme Court. Hon'ble Supreme Court in **Mobilox Innovations Private Limited Versus Kirusa Software Private Limited (2018), 1 SCC 353**, has held as under:-

“51. 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.”

12. The present is not a case of pre-existing dispute and during the course of hearing of the instant petition, the respondent virtually admitted claim of the petitioner by issuing cheques in favour of the petitioner as a token of

settlement. No reply has been filed to the instant petition either to dispute the petitioner's claim or to point out any defect in the petition despite affording sufficient opportunities. The petitioner has also filed its bank statement maintained in the ICICI Bank as required by Form 5, computation of calculations of the principal amount and interest amount at page 75 of the paper book. The petitioner has also filed a certificate dated 15.12.2017 (Annexure-V) from the ICICI Bank where it is maintaining its account wherein it has been certified that no payment from SRS Meditech Limited (corporate debtor) has been received in the account of the petitioner from 01.04.2016 to 30.11.2017.

13. It was in the month of October, 2017 that fresh notice under Section 8 of the Code was sent to the respondent. Similar certificate dated 14.12.2017 was issued by Yes Bank, the other banker of the petitioner, certifying that no payment has been received from the respondent-corporate debtor in the accounts of the petitioner during the period 01.04.2016 to 30.11.2017. The petitioner has also filed a copy of its bank statement from Yes Bank which are from page 91 to 105 of the paper book. The petitioner has thus satisfied the requirement of Section 9(3) (c) of the Code.

14. Reference has already been made to the affidavit filed by the petitioner with regard to no dispute raised by the respondent-corporate debtor. Subsequent to this, the petitioner again filed affidavit vide Diary No. 2867 dated 06.08.2018 stating therein that no notice has been given by the corporate debtor relating to existence of dispute of unpaid operational debt. The petitioner has thus satisfied the requirement of Section 9(3) (b) of the Code also.

15. The petitioner being an operational creditor is not bound to propose the name of registered professional to be appointed as the Interim Resolution Professional and therefore, the matter has to be taken up in accordance with Section 16(3)(a) of the Code.

16. In view of the foregoing discussion, we admit the instant petition filed under Section 9 of the Code. The matter be posted on 15.11.2018 for passing formal order of declaration of moratorium as well as appointment of Interim Resolution Professional.

Sd/-
(Pradeep R. Sethi
Member (Technical)

Sd/-
(Justice R.P. Nagrath)
Member (Judicial)

November 02, 2018
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