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NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH

(IB)-713(ND)/2018

In the matter of

Mehta Tubes Ltd.

Having its Registered Office

915-916, Plaza Panchsheel,

9th Floor, 55, Hughes Road,

Mumbai-400007

.....Operational Creditor

V/s

NSP Hospitech India Pvt. Ltd.

H-1537, Lower Ground Floor,

Chitranjan Park,

New Delhi-110019

Also at:

14A, Selimporo Road, 2nd Floor,

Kolkata-770031

.....Corporate Debtor

SECTION: 9 of IBC, 2016

Order delivered on 04.12.2018

Present:

SMT. INA MALHOTRA, HON'BLE MEMBER (J)
SMT. DEEPA KRISHAN, HON'BLE MEMBER (T)



Handwritten signature and date: 04/12

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Present:
For the Petitioner: Mr. R.K. Bachhan Advocates
For the Respondent: Mr. P. Bhattacharya &
Mr. Yashraj Singh, Advocates

ORDER

PER SMT. INA MALHOTRA, MEMBER (J)

The petitioner, as an Operational Creditor, has claimed a sum of Rs. 84,97,571/- from the respondent/Corporate Debtor being the unpaid liability against material supplied to them which despite repeated requests and demands have not been paid. The petitioner has therefore now filed the present petition under Section 9 of Insolvency Bankruptcy Code (herein after referred to as the "Code"), praying for initiation of Insolvency Resolution Process of the Respondent/Corporate Debtor.

2. It is the Operational Creditor's case that they had supplied Copper Pipes between 03/08/2015 to 30/09/2015 to the Corporate Debtor used for surgical purposes in setting up Operation theatres in Hospital at its various locations. The amount under claimed 5 invoices was for a total sum of Rs. 1,94,97,571/- as detailed below:



Invoice bearing No.	Dated	Rs.
243	03.08.2015	76,43,642
327	11.09.2015	32,44,997
328	11.09.2015	34,20,748
335	15.09.2015	17,40,724
372	30.09.2015	34,47,460

3. It is the Operational Creditor's case that the receipt of the goods were duly acknowledged by the Corporate Debtor and used in the course of their business. The Operational Creditor submits that the goods were supplied to the satisfaction of the Corporate Debtor. The Corporate Debtor made a part payment of Rs. 73,56,358/- leaving the outstanding balance as Rs. 84,97,571/-. The Petitioner has been following up their demand which has not been heeded to by the Corporate Debtor, thereby constraining them to send a demand notice under Section 8 of the Code. The petitioner has also claim interest @ 24% per annum.

4. As per averments, the petitioner had earlier filed a petition i.e. Co. Pet. (IB) No. 580/(ND)/2018 which was withdrawn on grounds of technical defects with liberty to file the petition again. The first demand notice was issued on 01.02.2018 through their advocates. Thereafter, a fresh demand notice issued to the respondent on 23.05.2018 was duly



served at their Delhi address. The claim was neither disputed by the Corporate Debtor nor any payment made. The petitioner has also filed a statement of their Bank account to substantiate that no amount had been received by them.

5. On entering appearance, the Corporate Debtor has filed its reply and has raised certain objections. It has been pointed out that the affidavit purported to have filed in compliance of the provisions of the section 9(3)(b) does not adhere to the statutory requirement. Further, it has not been disclosed that the said notice was duly replied to. Ld. Counsel submits that such a non-disclosure by the Operational Creditor amounts to suppression of facts and this fact alone is sufficient to dismiss the petition. In addition to this fact, it is pointed out that the goods were defective and led to inordinate delay in execution of their business operation. The Corporate Debtor has submitted that the Company is involved in setting up Surgical Operation Theatres at hospitals situated at various locations and the material supplied by the Operational Creditor was to be used in setting up oxygen supplies. Reliance is made by the Ld. Counsel for the Corporate Debtor upon an email dated 02/11/2015 stating that some goods were received in a damaged stage. The email is reproduced as under:



To,
Director,
Mehta Tube Ltd.
Daman Unit,
Plot number, 100-101,
Panchal Nagar,
Bhimpore,
Daman-3962109(UT)

Sub: Ref to the bill number 0372 on 30.09.2015 of Rs. 3447460/- regarding short shipment and quality issues.

Sir,

Please refer to the above subject and our subsequent discussions regarding short-shipment and quality issues as per the above bill.

We would like to inform you that the material supplied was not as per the quantity mentioned on the bill and there were lot of damages due to poor packaging etc. which are under:-

28mm around 400 mtrs was less so the amount as per the bill rate 400×410 - Rs 164000

42mm around 300 mtrs was less so the amount as per the bill rate 300×837 - Rs 251100

28mm around 135 mtrs was damaged so the amount as per the bill rate 135×410 - Rs 55350

42mm around 171 mtrs was damaged so the amount as per the bill rate 171×837 - Rs 143127

Due to the above-mentioned quality issues and damages we have not been able to use those materials as well because of that we have suffered a lot of flak from the customer as the same was required urgently for installation at the respective sites.

You are requested to look into the above matter at the earliest and do the needful at the earliest so that materials can be used for installation at respective sites.

Yours truly,

(Santanu Bakshi)
Director



6. The Corporate Debtor further seeks to raise a dispute that on account of delay in supply of material, they had incurred a loss of reputation as well as had to procure material from outside. The total damages claimed by them is stated to be Rs. 30,00,000/-.

7. Repudiating the submissions, Ld. Counsel for the Operational Creditor submits that the reply to the demand notice was addressed directly to the advocate who had issued the notice on their behalf. The said counsel did not bring this fact to their notice as he had left the profession to join Judicial Service. This non-disclosure of receipt of the reply was therefore not deliberate and was not within the knowledge of the Operational Creditor at the time of filing of the petition. In any event it was not replied within 10 days.

8. On merits, ld. Counsel for the Operational Creditor submits that the dispute with respect to the quality/quantity of goods is being raised for the first time in a bid to defeat the prayer made by them.

9. Having heard both the counsels we find that the objections with respect to compliance of Section 9(3)(b) does not merit much consideration as it is only couched in different wordings. The factum of the demand notice being issued by the advocate and the reply being addressed only to him is also not disputed. Under such circumstances, there is no reason to disbelieve that non-disclosure of receipt of reply was deliberate as it was not within the knowledge of the Operational Creditor.



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The contents of the reply however are being taken into consideration for the purpose of disposal of this petition.

10. With respect to the alleged defects in the good supplied, Ld. Counsel submits that transit damage if any was made good and pertains only to invoice no. 0372 as is evident from the email referred to by the Ld. Counsel for the Corporate Debtor for Rs. 34,47,460/-. With respect to material supplied vide the other invoices, no dissatisfaction in respect of timely delivery, or quality and quantity issues have been raised except in the reply to the Demand Notice. The Corporate Debtor confirms having fully utilised the supplies made and has not once raised the issue of returning any alleged defective goods. The Operational Creditor submits that it was only upon due satisfaction with respect to the quality and quantity of the material supplied, that a payment of Rs. 76 lakhs was made to them. The Corporate Debtor has failed to liquidate the balance due despite various demands, though there are numerous emails on record assuring that payment would be made completely.

11. We find merit in the arguments advanced by the Ld. Counsel for the Operational Creditor. The liability is sought to be avoided on grounds of dissatisfaction of the material supplied vide invoice no. 0372 was never reiterated to corroborate that the remedial steps were not taken by the Operational Creditor. There is no correspondence with respect to return



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of the goods, nor any documents to substantiate the alleged loss of Rs. 30 lakhs accruing on account of loss of reputation or procuring material from the alternates sources. The goods were allegedly all used up by Corporate Debtor. The dispute sought to be raised is weak. Even otherwise the outstanding balance recoverable by the Operational Creditor, being far in excess of the damages claimed, entitles the Operational Creditor for initiation of Resolution Process of the Corporate Debtor, for non-payment of their dues.

12. Accordingly, the petition is Admitted. A moratorium in terms of Section 14 of Code comes into effect forthwith staying:

"(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,



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(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,

(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."

13. The Operational Creditor has not proposed the name of any IRP. Accordingly, we appoint Mr. Mukesh Kumar Grover Registration No. IBB/PA-001/IP-P00383/2017-18/10640, email: mukesh@mjra.co.in,



Mobile No. 9810331606 duly empanelled with the IBBI as the IRP. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17,18,20 and 21. The IRP shall file his report within 30 days as per statutory requirements.

14. The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP, for which he shall be liable to account for.

15. Copy of the order be communicated to both the parties as well as to the IRP.

16. To come up on 09th January, 2019 for further consideration.

Sd-
(Deepa Krishan)
Member (T)



Sd-
(Ina Malhotra)
Member (J)

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Rajiv
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