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**THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
AT NEW DELHI**

Company Petition no. (IB)-364(ND)/2017

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Vesuvius India Ltd.Applicant/Operational Creditor

Versus

Fenace Auto Ltd. ...Respondent/Corporate Debtor

CORAM:

MS. INA MALHOTRA, MEMBER (JUDICIAL)

MR. S.K.MOHAPATRA, MEMBER (TECHNICAL)

For Operational Creditor: Mr. Mohinder Vig, Advocate

Mr. Vinod Khurana, Advocate

For Corporate Debtor: Mr. Ravinder Singh, Advocate

Ms. Raveesha Gupta, Advocate

Vesuvius India Ltd. Versus Fenace Auto Ltd.

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Judgment delivered on: 15/11/2017

Per: S. K. Mohapatra, Member

ORDER

1. This is an application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rule') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent company, claimed to be the corporate debtor.

2. The Respondent M/s Fenace Auto Limited, against whom initiation of Corporate Insolvency Resolution Process has been prayed for, is a company incorporated under the companies Act, 1956 having its registered office at 7th Floor, DTJ-701 DLF Tower, Jasola (Tower-B), New Delhi-110025. Since the registered office of the respondent company is in Delhi, this Tribunal having territorial jurisdiction over the place is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.



3. It is the case of applicant that the applicant company M/S Vesuvius India Ltd. is a subsidiary of Vesuvius Group Limited, U.K. and is a leading manufacturer of ceramic refractory and other allied products. The applicant has supplied several materials and goods to respondent on credit. Further it has been submitted that a running account in the name of respondent was being maintained by the applicant for the invoices made in the name of the respondent. The respondent has been defaulting on its payments since 30.09.2015 and even after several reminders the respondent has failed to pay their debt against Invoice No. MH012642, MH012898 and MH014588.

Details of the said invoices are as below:

S. No.	Invoice No.	Amount (in Rs.)	Amount Received	Balance (in Rs.)	Interest @ 18% p.a. (in Rs.)
1	MH012642 dated 30.09.2015	4,59,000/-	-	4,59,000/-	151,884.99/-
2	MH012898 dated 01.08.2016	2,29,500/-	-	2,29,500/-	41,310.00/-
3	MH014588 Dated 15.03.2017	1,54,913/-	-	1,54,913/-	10,618.97/-
Total				8,43,413/-	2,03,813.95
Gross total : Rs. 10,47,226.95/-					



4. It is further contended that the applicant operational creditor issued demand notice dated 4th July, 2017 under Section 8 of the Code, requesting the Corporate Debtor to repay the unpaid operational debt in full within ten days from the receipt of the said demand notice. However, no reply has been sent by the Corporate Debtor and corporate debtor failed to make any payment to the Applicant. Accordingly, applicant claimed to be the operational creditor, has prayed for initiation of Corporate Insolvency Resolution Process in respect of the respondent corporate debtor under the provisions of the Code.
5. It is submitted that after expiry of 10 days from the date of service of demand notice under Section 8 of the Code, the present application has been filed by the applicant in FORM-5 as required under Section 9 of the Code read with rule 6 (1) of the Rules. Further as per Part-V of FORM-5 in support of the particulars of the operational debt, copies of said three invoices along with LR receipts, copies of order sheets from the respondent through e-mails, Ledger accounts of applicant from 20.12.2014-15.03.2017 and copies of relevant Bank Statement have been placed on record.
6. Application for initiation of corporate insolvency process by operational creditor, who claims to have not received the unpaid operational debt, is dealt with under Section 9 of the Code. An application under Section 9 of the Code can be filed only by an 'Operational Creditor' in respect of the



operational debt. Therefore a perusal of Section 9 of the Code would show that in order to maintain an application as an 'Operational Creditor' the applicant has to satisfy the requirements of Section 5(20) and (21) of the Code.

7. The aforesaid expressions have been defined in section 5(20) & (21) of the code respectively which envisages that:

"5. In this Part, unless the context otherwise requires,-

(20) "Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred,

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority".

8. From the perusal of the aforesaid definition of 'Operational Debt' it is clear that it is a claim in respect of provision of goods or services including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force and payable to Centre or State Government or local authority. It is thus clear that operational debt may arise out of claim in respect of supply of goods/materials. The applicant in the present case has supplied materials as per the three invoices stated above for a principal amount of Rs. 8,43,413/-. Since the amount towards cost of



the material supplied has not been paid by the respondent company, operational debt has fallen due. The applicant can clearly be termed as operational creditor to whom the operational debt is owed and the respondent company who defaulted in making payment of the operational debt becomes the corporate debtor.

9. The applicant company has filed the relevant copy of the board resolution dated 11.05.2017, which envisages as follows:

“ RESOLVED THAT authority of the Board of Directors of Vesuvius India Limited (“Company”) be and is hereby given to Manoj Bhivare to file applications and documents in the Courts of Law or to National Company Law Tribunal (NCLT) on behalf of the Company, for winding up or for Insolvency and bankruptcy proceedings or to initiate any other proceedings for recovery of dues of dues from Fenace Auto Limited, New Delhi, (CIN No. U74900DL2010PLC210687) and for this purpose to appear before the court/ NCLT, to appoint advocates or practicing company secretaries, to execute and sign vakalatnamas, to give declaration and affidavits and to take all other action as may be required for recovery of dues from Fenace Auto Limited. ”

From a perusal of the above Board resolution it is evident that Mr. Manoj Bhivare, was specifically authorized on behalf of the applicant company to represent and file the present application before this Tribunal.



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10. An affidavit dated 31.07.2017 has also been filed by the applicant company in compliance of Section 9 (3)(b) of the Code, which affirms that no notice of dispute has been given by the respondent in relation to the unpaid operational debt.
 11. In addition, a certificate dated 26.09.2017 from the Axis Bank has been placed on record, in compliance of Section 9 (3) (c) of the Code, certifying that as on the date of the certificate i.e. 26.09.2017, two Cheques of the corporate debtor for Rs. 6,88,214/- and 6,88,500/- have been deposited on 17.08.2015 and 13.01.2016 respectively in the account of operational creditor. The operational creditor has also filed the relevant bank account statements duly stamped by the Axis Bank, Mehsana Branch.
 12. In view of the above, it is seen that the present application is complete in all respect. The materials placed on record clearly establish that respondent corporate debtor committed default in repayment of operational debt even after demand made by the applicant operational creditor.
 13. Ld. Counsel on behalf of respondent Corporate Debtor has put in appearance in this case and has filed its reply on 24th October, 2017. One of the grounds taken in the reply is that the applicant had sent a legal notice dated 04.07.2017 raising a demand of Rs. 10,35,996.85. It is contended that the applicant has however claimed a different amount of Rs. 10,47,226 in the present petition. It is pertinent to note here that the demand notice was issued



on 04.07.2017 whereas the instant application has been filed subsequently on 14.09.2017. Therefore, with the change of date and time there has been minor change/variance in the claimed operational debt. It is pertinent to note here that in the demand notice as well in the application, the claimed principal amount has remained the same.

14. It is also the case of the respondent that the applicant has not placed any purchase order nor a perusal of retail invoice shows that any interest is liable to be paid by respondent and therefore the amount of Rs. 2,03,813.95 towards interest is imaginary. In this regard it is seen that the claim of principal amount is based on three invoices supported by respective lorry receipts and the relevant ledger account. The applicant has also relied on several order sheets dated 19.08.2015, 25.08.2015, 08.03.2017 and 09.03.2017 issued by the respondent corporate debtor placing order with the applicant operational creditor. It is not for the tribunal to adjudicate as to how much is 'due'. The present proceeding is only a summary adjudication for ascertainment and satisfaction of occurrence of default. In any case the respondent corporate debtor would be entitled to raise objection of any mismatching of claim before the committee of creditors/ resolution professional. What is material that the default is at least one lac.
15. Respondent company has taken further stand that it is financially sound and possesses the necessary funds to make the alleged outstanding payment.



Such contention cannot stand as once there has been clear default in payment of operational debt, the claim of solvency becomes immaterial.

16. The respondent has also contended that there exists a *bonafide* dispute between the parties on account of which, the instant alleged outstanding payment has not been made. In this regard it is seen that the ground of existence of dispute has been raised for the first time in the reply of respondent. In the absence of any documentary evidence, the mere plea taken in the reply cannot be accepted. There is absolutely no correspondence/document to support of the contention of existence of dispute. When a person is bound to prove the existence of any fact, the burden of proof lies on that person. The onus to prove the existence of dispute, therefore, lies with the respondent. There is however absolutely no documentary evidence adduced to support the contentions of the corporate debtor. Authenticity of facts can only be ascertained by the supporting evidence and mere submission that there exists dispute will not help the corporate debtor. Without any iota of documentary evidence or material, mere assertion in repudiating the claim in the reply for the sake of dispute, is undoubtedly illusory.

17. The futile stand taken by the respondent that there exists a dispute is without any substance. There has been no communication of dispute to the operational creditor about the quality of goods supplied. No damage/counter

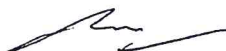


claim has been lodged. No arbitration and/or legal proceedings in the matter are pending. When there is absolutely no document or particulars to support the claim of existence of dispute, the mere claim of dispute rose for the first time in the pleadings in defense, can be termed as vague, illusory and motivated to evade the liability.

18. In view of the above, we are satisfied that the present application is complete and the Operational Creditor is entitled to claim its dues towards the goods supplied to the corporate debtor and there has been a default in payment of the operational debt. Therefore, on fulfilment of the requirements of Section 9 (5) (i) (a) to (d) of the Code, the present application is admitted.

19. A moratorium in terms of Section 14 of the Code is being issued prohibiting the following:

- *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;*
- *transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
- *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;

- *recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

20. It is further directed that:

- a) *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.*
- b) *The provisions of sub-section (1) of section 14 of the Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.*

21. As no proposal for an interim resolution professional has been made in the application, a reference under section 16(3)(a) of the Code be made to the Insolvency and Bankruptcy Board of India for recommending the name of a registered Interim Resolution Professional to be appointed in this case.

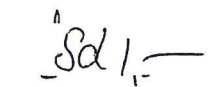


22. The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process as per Sub-Section (4) of Section 14 of the Code.

Let the copy of the order be supplied to the parties including the Board.



(S. K. Mohapatra)
Member Technical



(Ina Malhotra)
Member Judicial