

**In the National Company Law Tribunal  
Kolkata Bench  
Kolkata**

**Coram: Shri Jinan K.R.  
Hon'ble Member (J)  
&  
Shri M.B.Gosavi  
Hon'ble Member (J)**

**CP(IB) No. 547/KB/2017**

**In the matter of:**

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016

-And-

**In the matter of:**

M/s. Daya Engineering Works Private Limited, registered office at Gaya Dhobi Road, Rampur, Gaya 823 001;

... **Applicant/Operational Creditor**

-And-

**In the matter of:**

M/s. UIC Udyog Limited, Anandlok, Block - A, 1<sup>st</sup> Floor, 227, A.J.C. Bose Road, Kolkata 700 020.

... **Corporate Debtor/Respondent**

**Counsels appeared:**

For the Operational Creditor: 1. Mr. Soumik Chakraborty  
2. Mr. Sourojit Dasgupta  
3. Ms. Deebleena Ganguly

For the Corporate Debtor: 1. CS Deepak Kumar Khaitan

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Order pronounced on 16/05/2018

**ORDER**

**Per Shri Jinan K.R., Member (Judicial)**

This is an application filed u/s. 9 of the Insolvency and Bankruptcy Code, 2016 by M/s. Daya Engineering Works Pvt. Ltd. allegedly an operational creditor for initiating Corporate Insolvency Resolution Process in respect of M/s. UIC Udyog Ltd.

1. Brief averments in the application for the consideration of the points for determination are the following:-

(a) The applicant is engaged in the business of manufacturing and supplying of all pre-stressed concrete Sleepers. The applicant issued various purchase orders on the corporate debtor for supply of HTs wire to its sleeper manufacturing unit at Mirza, State of Assam from time to time. But the corporate debtor made short supplies in respect of purchase orders placed by the operational creditor in the financial year 2014-15 though after receipt of advance payment against supplies.

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(b) Operational creditor was paid an amount of Rs. 4,14,42,916/- as on 04/03/2015 and corporate debtor have supplied the material value of Rs. 4,02,33,473/- only and the balance amount of Rs. 12,09,443/- is liable to be returned for non-supply of the material equivalent to the said debit value be made. The corporate debtor deliberately failed to supply the purchase order quantity after taking advance. The corporate debtor neither supplied the material nor refunded the money in spite of repeated requests.

(c) In spite of repeated requests and reminders made by the operational creditor, the corporate debtor have neither supplied the materials nor refunded the said advance amount of Rs. 12,09,443/- though admitting said advance is due as per the books of account. Finally, the operational creditor had issued legal notice dated 22<sup>nd</sup> May, 2017 to the corporate debtor through its legal counsel Sri Krupachand Gogineni and called upon the corporate debtor to pay the legitimate dues, which are illegally holding by them. However, in spite of receipt of the said notice the corporate debtor failed and neglected to pay the said dues till date. Hence, the operational creditor is entitled to initiate proceedings under the Insolvency and Bankruptcy Code, 2016 to recover the legitimate dues from the corporate debtor.

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(d) Despite notice the corporate debtor did not pay the amount due to the tune of Rs. 12,09,443/- . plus interest of 24% per annum from 04/03/2015 to 30/06/2017, totaling to an amount of Rs. 21,00,683/- .

(e) The applicant produced the copies of the Purchase Orders and marked as Annexure **"C"**. Tax-cum-Excise Invoice issued by the corporate debtor also produced as Annexure **"D"** **(it is mentioned in the application that those invoices were issued by the applicant. It is admittedly a mistake)**. A computation of amount due is annexed and marked as Annexure **"F"**. Despite notice the corporate debtor did not discharge the debt and therefore filed the application for initiating Corporate Insolvency Resolution Process against the corporate debtor.

2. The corporate debtor entered appearance and filed reply affidavit contending in brief is the following:-

(a) The application filed is not in the prescribed format. There is deliberate misleading of facts. There is no proper authorisation so as to authorize the signatory Mr. Surodip Mukherjee has been given or produced. The application is incomplete for want of affidavit u/s. 9(3)(b) and 9(3)(c) of the I & B Code. Section 9(3)(c) certificate is

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prepared by the applicant itself and it is a self made certificate. The address of the operational creditor also not given in the Form. The authorisation produced along with the application does not provide any authorisation in favour of Ms. Sanchari Chakraborty, Advocate.

(b) The corporate debtor further contended that there was no power of attorney executed despite passing of the resolution so as to prove the authorisation. Copy of the Article of Association and the Certificate of Incorporation produced for proving the registration of the corporate debtor is of a company not belonging to the existing corporate debtor and it belongs to UIC Wires Limited.

(c) The contention of the applicant is that there was no reply to the demand notice issued by the applicant is incorrect. On the other hand the corporate debtor sent a reply in response to the demand notice denying the claim and raising existence of disputes. A copy of the reply is produced along with the reply affidavit marked as Annexure **"A"**. So also the corporate debtor had replied to the notice dated 22/09/2017 vide reply letter dated 17/10/2017 and copy of the reply is produced and marked as Annexure **"B"** to the reply affidavit. There is



no affidavit in support of the verification of the petition also produced by the applicant along with the application.

(d) The corporate debtor had to bear the financial burden for taxes amounting to Rs.17,83,908/- and interest and penalty on the said amount to Commercial Tax Department on account of non-issuance of Form C against the relevant invoices amounting to Rs. 63,39,694/- and late submissions of Form C amounting to Rs. 5, 37,13,179/-. Therefore, the corporate debtor is entitled to recover the same from the operational creditor along with the necessary damages.

(e) The corporate debtor further contended that the petitioner company owes Rs. 2,12,992/-, i.e., Rs. 73,632/- and Rs. 1,39,360/- to the respondent company in respect of the supplies made to Gaya Unit and Mirza Unit respectively. A detailed ledger for financial years 2015-16 and 2016-17 annexed with the reply affidavit and collectively marked as Annexure "E". In fact it is surprising that the petitioner owes money to the respondent for goods supplied to them whereas no goods were ever supplied by the petitioner to the respondent. It is further submitted that Daya

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Engineering Works Private Limited, the petitioner herein cannot be considered as an "operational creditor" and the amount claimed by them cannot be considered as an "operational debt". Upon the said contentions the corporate debtor prays for dismissal of the application with costs.

3. The applicant filed rejoinder to the reply affidavit but admit that there are certain errors occurred in the application and that errors are in technical and curable defects. Denying the contentions raised by the respondent in its reply affidavit the applicant also contends that Mr. Surodip Mukherjee has been given proper authorisation and copy of the Board Resolution also produced along with the rejoinder and marked as Annexure **"B"**. So also regarding the late submissions of Form C, the applicant contends that applicant issued Form C in right time and that the corporate debtor has failed to show any proof of payment due to alleged late submissions of Form C and to strengthen the contention the applicant produced Form C and marked as **Annexure "C"** to rejoinder. It is not correct to say that any amount is due to the corporate debtor from the applicant as is claimed by the corporate debtor. It is contended by the applicant that the claim is the

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legitimate claim as against the corporate debtor and the applicant is an operational creditor and the amount due is an operational debt and, therefore, liable to be allowed.

4. Heard the Ld. Counsel for the applicant and the Ld. Pr. CS for the respondent. Perused the records and the citations referred to by the Pr.CS.

5. M/s. Daya Engineering Works Pvt. Ltd., a company dealing with business of manufacturing and supplying of pre-stressed concrete Sleepers admittedly issued Purchase Orders annexed as Annexure "C" at page nos. 82 and 83. ( **Purchase orders annexed as Annexure "C" at page nos. 84 and 85 seems to be not the Purchase Orders issued by the applicant to the corporate debtor but issued by some other company. That too according to the applicant annexed mistakenly).**

6. So evidently the applicant is a purchaser of goods who purchased goods from the respondent, who is allegedly a corporate debtor. Admittedly, on the basis of the Purchase Orders raised by the applicant the respondent/corporate debtor supplied goods. The



contentions on the side of the applicant is that because of short supply of goods valued at an amount of Rs. 12,09,443/- the respondent is liable to pay that amount, which the respondent is retaining without any right to retain with commercial rate of interest at 24% p.a. According to the applicant an advance amount of Rs. 4,14,42,916/- was paid on 04/03/2015 to the respondent for purchasing materials. However, respondent supplied materials valued at Rs. 4,02,33,473/- and, therefore, for want of supply of materials the balance amount of Rs. 12,09,443/- is due from the respondent or respondent liable to supply materials equivalent to said debt value to the petitioner. Despite demand notice for returning the amount the respondent did not return and, therefore, the debt due to the petitioner is an operational debt and the applicant is an operational creditor and therefore, application of this nature is maintainable and prays for admitting the claim.

7. An interesting question arises for consideration in the case in hand. Here in this case the applicant is a purchaser and not a dealer of goods. The applicant claims return of a portion of advance amount admittedly given to the respondent for purchase of certain materials. The respondent admittedly supplied materials

but retain a portion of the amount to the tune of Rs. 12,09,443/- on account of respondent's alleged liability payable to commercial tax authority for late submission of Form C. The respondent raised a dispute in respect of the amount claimed by the applicant contending that the amount claimed by the applicant is not an operational debt and that the claim is in dispute. So the first question arises is as to whether there exist a pre-existing dispute as alleged?

8. The dispute regarding liability to return the amount claimed by the applicant no doubt is not a pre existing dispute as held in **Mobilox Innovations Private Limited V. Kirusa Software Private Limited [Ca No, 9405 of 2017] SC**. No document produced on the side of the respondent to prove that the dispute raised in the reply affidavit or in the late reply notice was raised prior to receiving the demand notice. More over the contention that the respondent was compelled to pay commercial tax due to late submission of Form C not at all satisfactorily established by the respondent. On the other hand the applicant produced copies of Form C (**Annexure "A"**) served on the respondent along with rejoinder. So the contention that there exist a pre existing dispute regarding the claim of refund of the

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balance amount already received by the respondent for supply of goods is found devoid of any merit. Even if there exist a dispute that was a dispute raised subsequent to the receipt of the demand notice. So it cannot be ruled out that the dispute was raised for the sake of avoiding resolution to be initiated by the applicant under section 9 of the I & B Code. The dispute if any is not a *bonafide dispute*.

9. So the next question is whether the applicant qualifies as an operational creditor and if the payment owed to the applicant is an operational debt?

The respondent in the reply affidavit admitted retaining the balance amount as claimed by the applicant. Paragraph No. 2 in the reply read as follows:-

*"The amount retained has been towards non-submission of 'C' forms amounting to Rs. 69,39,694/- and late submission of 'C' forms amounting to Rs. 5,37,13,179/- for which our company had to bear tax amounting to Rs. 17,83,908/- and applicable interest & penalty on the said amount to the Commercial Tax department."*

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Thus the respondent admitted receipt of the advance and retaining the amount as alleged by the petitioner. Though the quantum of amount retained is not mentioned in detail it is not in dispute. What is disputed is its liability to refund.

In order to maintain an application under section 9 of the I & B Code the applicant has to prove that applicant is an operational creditor. The operational creditor is defined u/s. 5(20) of the I&B Code, 2016. An *"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"***. Operational debt is defined under section 5(21) of the I & B Code, 2016 and **operational debt "means a claim in respect of the provision of goods or services including employment or a debt in respect of 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 "**.

*So in order to qualify an operational debt the claim must fall within the four categories. It must be in respect of the provision of -*

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*Goods or ;*

*Services;*

*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;*

At the outset it appears to us that the claim of the applicant in this case does not fall any one of the above said categories. According to the Ld. Counsel for the applicant the amount claimed by the applicant is an amount due from the respondent as per the provisions of the Indian Contract Act, 1872. However, no provisions of contract brought to our notice so as to fall the claim under any one of the categories of the operational debt. The operational debt also not bear interest but a financial debt bears interest too. Here in this case the applicant claim refund of an advance with interest at 24% p.a. Admittedly there is no purchase agreement enabling the applicant to claim refund of advance in the case of failure of supply of materials or in case of shortfall of materials received by the applicant on account of the purchase orders

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issued by the applicant. In the light of above said discussions we are of the considered view that the claim of the applicant does not fall with in the definition of operational debt and hence the applicant is not an operational creditor as alleged.

Much argued on the side of the respondent that the applicant who signed the application had no authority on the date of filing the application and the authorisation produced along with rejoinder is a deliberate attempt to mislead the facts regarding resolution not taken on the date as shown in the resolution annexed with the original application. Truly on a comparison of the copy of the resolution annexed with the application (Annexure B) and the resolution annexed with the rejoinder there are misleading inconsistent facts regarding the authorisation and execution of power of attorney. However, being found that this application is not maintainable as the applicant is not an operational creditor and this application is liable to be dismissed we are not go in deep of the allegation in respect of the production of resolution in an attempt to prove authorisation given to the signatory in the application.

In view of the above said discussion we have no hesitation in holding that the application is not maintainable

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under section 9 of the I & B Code and therefore deserve dismissal.

In the result the application is dismissed. However, no order as to cost.

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(M.B. Gosavi)  
Member (J)

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(Jinan K.R.)  
Member(J)

Signed on this, the 16<sup>th</sup> day of May, 2018.

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