

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

**C.P.(IB)No.634/KB/2017**

**CORAM: Shri M.B. Gosavi, Member(Judicial)**

**In the Matter of:**

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

**-And-**

**In the Matter of:**

FLSmith Private Limited, a Company registered under the Provisions of Companies Act, 1956 having its registered office at FLSmith House, 34, Egatour, Rajiv Gandhi Salai, Kelambakkam, Chennai-603103, Tamil Nadu.

**....Operational Creditor**

**-Versus-**

**In the Matter of:**

Jhabua Power Limited, a company incorporated under Companies Act, 1956 and having its registered office at Macmet House, 7<sup>th</sup> Floor, 10B, O C Ganguly Sarani Kolkata-700020, West Bengal.

**...Corporate Debtor**

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**Counsels appeared:**

For the Operational Creditor

1. Mr. Jishnu Chowdhury, Advocate
2. Mr. Anujit Mookherji, Advocate

For the Corporate Debtor

1. Mr. Sidhartha Sharma, Advocate
2. Mr. Anubhav Kumar, Advocate
3. Ms. Diprani Thakur, Pr. CS

Date of pronouncement of order: 27<sup>th</sup> March, 2019

**ORDER**

**Per Shri M.B Gosavi, Member (J):**

1. M/s FLSmidth Private Limited, the Operational Creditor is a wholly owned subsidiary of FLSmidth & Co., the Company placed in Denmark filed this application under Section 9 of Insolvency and Bankruptcy Code against M/s Jhabua Power Limited, the Corporate Debtor to start Corporate Insolvency Resolution Process (in short CIRP) of the Corporate Debtor as the Corporate Debtor committed default in paying operational debt of Rs. 35,00,00,000/- (Rupees Thirty Five Crore Only) as on 01.03.2017.

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2. The following facts are not in dispute:-

3. The Operational Creditor engage in business of power generation. It supplies all sort of services, goods to the Company which wishes to start power plant. The Corporate Debtor was intending to set up the power plant at Seoni district of Madhya Pradesh. The Corporate Debtor by three separate agreements dated 09.08.2011 requested the Operational Creditor to supply coal handling system to complete civil and engineering work required for installation of coal handling system and to provide ETS for the system. Total price of the contractual work was fixed Rs. 151,45,00,00/- (Rupees One Hundred Fifty One Crore Forty Five Lakh Only).

4. It appears from the record that Operational Creditor supplied the coal machine handling system and also provide required services for its proper installation. However, the Corporate Debtor was not in position to clear the dues as per the payment schedule as agreed by them. Hence, on 10.03.2016 a joint meeting of the representative of the Operational Creditor as well as representative of the Corporate Debtor was held on Gurgaon. It was decided to close the contract. Accordingly, the minutes of meeting for closure of the contract was recorded in writing (page no. 185). As per agreement, the Corporate Debtor agreed to pay sum of Rs. 39,00,00,000/- (Rupess Thirty Nine Crore Only) as a full and final

settlement. 30<sup>th</sup> June, 2016 was the date fixed to complete all formalities relating to the closure. The Corporate Debtor was to pay a sum of Rs. 39,00,00,000/- (Rupees Thirty Nine Crore Only) in three installments by end of March, 2017. The Corporate Debtor paid only Rs. 4,00,00,000/- (Rupees Four Crore Only) leaving balance payment of Rs. 35,00,00,000/- (Rupees Thirty Five Crore Only). Hence, Demand Notice dated 12.09.2017 under Section 8 of Insolvency and Bankruptcy Code was sent to the Corporate Debtor. In spite of receipt of notice, the Corporate Debtor did not pay the amount nor replied the notice pointing existence of dispute relating to amount claimed or services rendered, hence, this proceeding under Section 9 is filed to start Corporate Insolvency Resolution Process of the Corporate Debtor.

5. The Corporate Debtor is served with the notice of this application. Corporate Debtor appeared through Chief Finance Officer, Mr. Harsh Bahal. He filed affidavit-in-reply on 12.06.2018. In para XIV of the affidavit-in-reply, the Corporate Debtor contended that they agreed to pay sum of Rs. 39,00,00,000/- (Rupees Thirty Nine Crore Only) to the applicant however, the applicant was to provide them certain documents related to statutory compliances like Provident Fund, Labour Cess Services Tax and Copy of Lorry Receipts etc.. Since the applicant did not provide all required documents, there is a dispute in paying the amount claimed. The Corporate Debtor contended that there is an

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existence of dispute. It was brought to the notice of the Operational Creditor. In view of the fact that this dispute is pending between them, this proceeding under Section 9 of Insolvency and Bankruptcy Code is not maintainable. They relied on Ruling of the Apex Court in case of Mobilox Innovations Limited Vs. Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017).

6. They further contended that applicant did not produce Certificate issued by the Financial Institution as contemplated under Section 9(3)(b) of the Insolvency and Bankruptcy Code and affidavit stating that there exist no dispute as per Section 9(3)(c) of the Insolvency and Bankruptcy Code. Hence, this application is not maintainable.

7. It is seen from pleadings of the parties that most of the facts are not in dispute. The Corporate Debtor admitted that as per the minutes of the meeting dated 10.03.2016, amount of Rs. 39,00,00,000/- (Rupees Thirty Nine Crore Only) was due and payable by them to the Operational Creditor. The Corporate Debtor also relied on minutes of meeting dated 10.03.2016 at Annexure A of the affidavit-in-reply. The Corporate Debtor further contended that out of that amount, they paid sum of Rs. 5,00,00,000/- (Rupees Five Crore Only) to the Operational Creditor through RTGS dated 21.02.2018 (para 4(ii) page no. 12 of the affidavit-in-reply). Their contention is that they are not liable to pay balance amount

of Rs. 35,00,00,000/- (Rupees Thirty Five Crore Only) unless the Operational Creditor supplies them certain documents as per Memorandum of Meeting dated 10.03.2016.

8. Ld. Counsel for the Corporate Debtor pointed out condition 8 in Memorandum of Meeting dated 10.03.2016 which states that, "***FSL and JPL will take all necessary steps for closure of contract by 30<sup>th</sup> June 2016. FLS shall provide all the necessary documents, no dues, indemnity & also provide no dues certificate from all the contractors, material supplier, vendor, labour supplier who has done work for FLS at JPL site as part of contract closure or provide indemnity for claim stalled for all the contractors, material supplier, vendor, labor supplier who has done work for FLS at JPL site as part of contract closure by 30.06.2016.***"

9. As against this, Ld. Counsel for the Operational Creditor pointed out that the Operational Creditor has already informed the Corporate Debtor that there are no dues payable by them to any of their sub-contractors. He pointed out letter dated 24.08.2016 (Annexure A 6) sent to the Corporate Debtor. He also pointed out that indemnity bond and no dues certificate has already been given to the Corporate Debtor. He pointed out the copy of bond at Annexure A4. Ld. Counsel further submitted that in fact Memorandum of Meeting dated 10.03.2016, the Corporate Debtor was to pay first installment of Rs. 13,00,00,000/- (Rupees Thirteen

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Crore Only) by end of September, 2016. They did not pay but the Corporate Debtor now refused to pay the dues on the ground of such false and created dispute. He also submitted that Corporate Debtor did not reply the demand notice pointing any dispute.

10. At the outset, I note that other objections raised by the Corporate Debtor about non compliance of provisions of Section 9(3)(b) and 9(3)(c) of Insolvency and Bankruptcy Code, the Operational Creditor produced on record the Certificate issued by the HSBC Bank and the affidavit dated 3.11.2017 stating that there exist no dispute. Hence, on that technical ground application cannot be rejected.

11. It is not in dispute that Corporate Debtor received demand notice under Section 8 of Insolvency and Bankruptcy Code but they did not reply the notice within 10 days as per Section 8(2) of Insolvency and Bankruptcy Code. Ld. Counsel for the Corporate Debtor relied on Ruling of Apex Court in case of Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited and submitted that it is enough for the Corporate Debtor to point out existence of dispute even during hearing of the application. He also relied on order of Hon'ble Appellate Tribunal (NCLAT) in case of Uttam Galva Steels Limited Vs. DF Deutsche Forfait AG & Anr. (Company Appeal (AT) (Insolvency) 39 of 2017).

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12. Section 5(6) of Insolvency and Bankruptcy Code, 2016 defines that **"dispute" includes a suit or arbitration proceedings relating to-**

- (a) the existence of the amount of debt;**
- (b) the quality of goods or service; or**
- (c) the breach of a representation or warranty;**

While considering scope of inquiry relating to existence of dispute, Hon'ble Appellate Tribunal and Hon'ble Apex Court hold in para 51 of the case of Mobilox Innovations Limited Vs. Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017) that ***"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.”***

13. It is clear from above statement of law that existence of dispute must relate to the amount claimed, dispute about the service rendered or goods supplied or the dispute relating to the breach of warranty. In this case, the Corporate Debtor raised the dispute that they did not receive certain papers and documents. Such 'dispute' does not fall in definition of dispute as stated under Section 5(6) of Insolvency and Bankruptcy Code. Moreover, the Corporate Debtor wanted 'No Dues' Certificate from Operational Creditor stating that Operational paid all dues to its sub-contractor. I fail to understand how the Corporate Debtor is concerned with the dues payable by the Operational Creditor to their sub contractor. If the contractors of the Operational Creditor has any claim against them, they may take appropriate steps. For this, Corporate Debtor cannot withhold payment of Operational Creditor. In fact despite raising so called dispute, the Corporate Debtor paid sum of Rs. 4,00,00,000/- (Rupees Four Crore Only) to the Operational Creditor on 21.02.2016. This shows that the dispute as raised by the Corporate Debtor, has been raised only to avoid the admission of this Petition against them. Their defence is not tenable.

14. The Operational Creditor has not suggested the name of IRP. However, this Adjudicating Authority can appoint CA Sonu

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Jain as IRP. The application is defect free. Hence, this application is admitted by following order.

### **ORDER**

(i) The application filed by the Operational Creditor under Section 8 and 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process against **M/s Jhabua Power Limited** Moratorium order is passed for a public announcement as stated in Sec.13 of the IBC, 2016.

(ii) The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The IRP shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Sec.15. The public announcement referred to in clause (b) of sub-section (1) of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

(iii) Moratorium under Sec.14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- 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 (54 of 2002);

d) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

(iv) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

(v) 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.

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(vi) The order of moratorium shall affect the date of admission 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 Sec.31 or passes an order for liquidation of corporate debtor under Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

(vii) Necessary public announcement as per Sec.15 of the IBC, 2016 may be made by the resolution professional upon receipt of the copy of this order.

(viii) CA Sonu Jain, Email Id – [casonujain@gmail.com](mailto:casonujain@gmail.com), Mobile No. 9830285088 is appointed as Interim Resolution Professional registered with the ICSI Insolvency Professionals Agency having Registration No.IBBI/IPA-001/IP-P00575/2017-18/11016 as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.

(ix) The Operational Creditor to pay sum of Rs. 50,000/- (Rupees Fifty Thousand Only) to IRP as advance fees as per Regulation 33(2) of IBBI

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(Insolvency Resolution Process for Corporate Persons) Regulation 2016 which shall be adjusted from final bill.

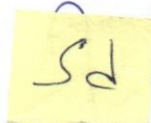
x) The Resolution Professional shall conduct CIRP in time bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

ix) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors.

x) Registry is hereby directed to communicate the order under section 9(5)(i) of the I.B.Code, 2016 to the Operational Creditor, Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through Email.

Interim Resolution Professional to file 1<sup>st</sup> progress report on **08.05.2019.**

Let the certified copy of the order be issued upon compliance with requisite formalities.

  
27/3/2019  
(Madan.B. Gosavi)  
Member(Judicial)

*Signed on this, the 27<sup>th</sup> day of March, 2019.*