

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH – V, NEW DELHI
C.P (IB)/68(ND)2022

An application under section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

M/s JAINCO INDUSTRIES,

Through its partner Mr. Shashi Kant Jain

A partnership firm duly formed under

the Indian Partnership Act, 1932

having its Office at Plot No. 203,

Sector-27 & 28, Delhi Road, Hisar,

Haryana- 125044.

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

M/S SHREE AMBIKA IMPEX LTD.

A company incorporated

Under Companies Act, 1956

having its Reg. Office at 316,

B.ID. Chamber, 10/54,

D. B. Gupta Road,

Karol Bagh, New Delhi-110005.

Email id: shreeambikaimpexltd1@gmail.com

...RESPONDENT/CORPORATE DEBTOR

Order Delivered on: 23.07.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)
DR. SANJEEV RANJAN HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. S P Singh Chawla,
Mr. Ashish Kr. Gupta, Mr. Sachin, Adv.
For the Respondent : Mr. Mukesh Sukhija, Adv.

ORDER

PER: DR. SANJEEV RANJAN, MEMBER (TECHNICAL)

1. The instant application is filed by M/S Jainco Industries, through its partner Mr. Shashi Kant Jain (hereinafter referred as 'Applicant'/Petitioner/ 'Operational Creditor') under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the CODE/IBC') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process ("CIRP") against M/s Shree Ambika Impex Ltd. (hereinafter referred as 'Respondent/Corporate Debtor') for failing to make the payment amounting Rs.1,61,32,532/- (Rupees One Crore Sixty One Lakhs Thirty Two Thousand Five Hundred Thirty Two only). The Respondent Company M/S Shree Ambika Impex

Ltd. was incorporated under the provisions of the Companies Act, 1956 having its registered office situated at 316, B.ID. Chamber, 10/54, D. B. Gupta Road, Karol Bagh, New Delhi-110005. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under subsection (1) of Section 60 of the Code.

Averments of the Applicants:

2. Briefly stated the facts of the present case as averred by the applicant are that the Corporate Debtor approached to the Applicant for the supply of goods. The Operational Creditor/Applicant raised various invoices between 26.11.2020 to 25.05.2021 for the goods supplied to the Corporate Debtor. Despite reminders, the Corporate Debtor failed to make payments for the goods supplied, amounting to Rs. 1,41,51,336/- (Rs. One Crore Forty-One Lakh Fifty-One Thousand Three Hundred Thirty-Six only) plus interest at 24% (i.e., Rs. 19,81,196/-), totaling Rs. 1,61,32,532/-. This amount remains outstanding and unpaid by the Corporate Debtor.
3. Applicant submitted that the Corporate Debtor instead making of the outstanding due, the Corporate Debtor sent a false and vogue letter/email dated 22.11.2021 and legal notice dated 02.12.2021 in which the Corporate Debtor said that they need details of 1st seller or origin of material they purchased from the Applicant and they shall only make the payment after receiving the details of 1st seller. Applicant further submitted that it was never agreed between the parties, any such

details would be provided in the business principal, practice and ethics and never under any agreement between the parties.

4. Applicant submitted that the statutory notice dated 14.12.2021 in accordance with Section 8 of the Insolvency and Bankruptcy Code, 2016 was sent by the applicant through its counsel, at the Registered Office address, official email of the corporate debtor. The Corporate Debtor instead of paying the admitted outstanding dues to Operational Creditor sent its reply dated 27.12.2021, and raised false pleas of pre-existing dispute for the first time without any basis.
5. Applicant further submitted that as Corporate Debtor has not been able to make any payments towards dues amounts, the Operational Creditor is constrained to prefer this Application before this Adjudicating Authority.

Reply of the Respondent Corporate Debtor:

6. On the other hand, the respondent through his reply submitted that all averments, statements, submissions, grounds, contentions or allegations made by the Applicant are baseless, misconceived and false, and hence, are denied in entirety.
7. Respondent submitted that the Respondent Company is engaged in the business of trading of 'Zinc Ingots' and has been purchasing the goods from the Applicant, since the year 2020, in the normal course of its business. Respondent further submitted that the Zinc Ingots are manufactured in India by Hindustan Zinc Limited (a PSU) or otherwise are imported, thus there are only two sources of the 'Zinc Ingots'.
8. Respondent submitted that the based upon the representations of the Applicant about the legitimate sources of the goods, the Respondent Company gave an order for supply of Zinc Ingots to the Applicant, accordingly the good

purchased from the Applicant had sold the said goods to one of its customers i.e. Trevani International Private Limited.

- 9.** Respondent submitted that after some time when the Respondent Company demanded the outstanding money from M/s Trevani International Private Limited, they demanded the details of the ultimate-dealer from whom the goods have been purchased by the Respondent Company to check the genuinity of the goods sold by the Respondent to M/s Trevani International Private Limited, the said fact was communicated to the Applicant, to which the Applicant refused to provide the details of the ultimate supplier from whom the goods were purchased by it.
- 10.** Respondent further submitted that the Applicant was not providing the information as requested by the Respondent Company and to put pressure for outstanding amounts the Applicant filed a reference under Section 18 of the MSME Act, with the appropriate authority. Applicant submitted that the Applicant has filed a suit under Section 18 in respect of the dispute with the Respondent Company.
- 11.** The Respondent submitted that the Applicant, on 14.12.2021, issued the notice under section 8 of the IBC despite knowing that there was an existing dispute between the parties. Therefore, the present application is liable to be dismissed on the ground of a pre-existing dispute alone.

Rejoinder by the Applicants

- 12.** The Operational Creditor through its rejoinder has submitted that the reply filed by the Corporate Debtor is totally false, frivolous and vexatious and is devoid of any merit. Further submitted that Mr. Chirag Mittal is duly authorized to represent the present Application as per rules. It further submitted that Corporate Debtor has not placed records of minutes of meetings for the said board meeting wherein Mr. Chirag Mittal is duly authorized.
- 13.** Applicant further submitted that Applicant admitted that Corporate debtor is engaged in the business of trading of "Zinc Ingot" and has been purchasing the

goods from the applicant, since 2020, in normal course of business Applicant further submitted the Legal notice dated 02.12.2021 issued by Corporate Debtor through its counsel stated that "Zinc Ingot" is controlled sale and only Hindustan Zinc Limited has the selling monopoly over the products, adding that Zinc Ingot is manufactured by Hindustan Zinc Ltd. or otherwise imported. That it is evident that Corporate Debtor is just trying to evade its lawful liability under the light of baseless afterthought facts. It is further submitted that "Zinc Ingot" is not the controlled item whereas Hindustan Zinc Ltd. manufacture it in India and also it is imported by various importers in raw form as well.

- 14.** Applicant submitted that the contractual agreements of Operational Creditor is with Corporate Debtor and not with any third party and Corporate debtor is conducting business for profit purpose and for the same they are at liberty to sale goods to its customers along with risk entrusted with the customers. Applicant submitted that there is no written agreement regarding the origin of goods, ultimate dealer and genuinity, etc. and goods are sold by Operational Creditor bona fide and in good-faith that the payment of the same shall be release upon delivery of goods.
- 15.** Applicant submitted that the application for outstanding claim of Rs. 1,41.51,336/- before MSME, Panchkula. Haryana is dismissed vide order date 25.11.2021 due to statutory technicalities as Operational Creditor is a trader instead of manufacturer, however the said application was no dismissed over the merits of the claim.
- 16.** The Applicant further submitted that no dispute exists between the Corporate Debtor and the Operational Creditor under the IBC. The Applicant contends that the legal notice dated 02.12.2021 is merely an afterthought by the Corporate Debtor to illegally withhold the legitimate dues of the Operational Creditor. Applicant submitted that almost six months since the material was sold to the Corporate Debtor, the Corporate Debtor remained silent and did not raise any so-called dispute. However, as soon as the Corporate Debtor became aware of the legal proceedings initiated by the Operational Creditor for the recovery of their legitimate dues, the Corporate Debtor sent a false and vexatious email dated 22.11.2021 and a legal notice dated 02.12.2021 with the

sole purpose of fabricating a pre-existing dispute and withholding the hard-earned money of the Operational Creditor.

Analysis and Findings

- 17.** We have heard Ld. Counsels for the applicant as well as the Ld. Counsel for the Respondent and perused the averments made in the application, duly authorized counter affidavit and rejoinder filed by the Respondent. The relevant documents annexed with the submissions have also been examined.
- 18.** It is noted that there was a business relationship between the Applicant/Operational Creditor and the Respondent/Corporate Debtor wherein the Operational Creditor has supplied various goods to Corporate Debtor and various invoices were raised against the said goods supplied. The default amount stated by the Applicant/Operational Creditor is 1,61,32,532/- for which a demand notice under section 8 of the IBC was issued on 14.12.2021 by the Applicant/Operational Creditor and duly served to the Respondent/Corporate Debtor. The proof of service is also placed on record. Against the Demand notice dated 14.12.2021 the Respondent/Corporate Debtor filed its reply on 28.12.2021 wherein apprised the Applicant about the pendency of the dispute between the parties. The copy of the reply dated 28.12.2021 is on record.
- 19.** Therefore, before examining the other aspects it would be appropriate to examine whether there is a Pre-existing dispute with respect to the amount claimed to be due in the present petition or not.
- 20.** To prove its contention Respondent has preferred the legal notice dated 02.12.2021, wherein the Respondent demanded the origin of the purchase of metals period from i.e. 01.11.2020 to 25.05.2021 by m/S Shree Ambika Impex Ltd.

- 21.** From a perusal of Annexure A5 (collated) (page no. 71) and Annexure A8 (collated) (page no. 100) of the instant application, we observe that the Respondent sent an email dated 22.11.2021 and filed a reply on 27.12.2021 against the Demand Notice dated 14.12.2021 to the Applicant, wherein the Respondent asked the Applicant to disclose the details of the first seller of the purchased material (its origin). It is pertinent to note that the Applicant herein has not produced any documents before this Tribunal to establish that there were any agreed terms between the parties which mandates the supplier to disclose the origin of the goods/service or the identity of the first seller of the rendered goods/services. Imposing such a condition prior to releasing the due payment by any party is not a valid ground. Therefore, the Applicant's failure to disclose information regarding the origin of goods, ultimate dealer, and authenticity, etc., in the absence of any written agreement, shall not be considered a pre-existing dispute under the ambit of section 9 of the IBC.
- 22.** Furthermore, from a perusal of Annexure A4 (page no. 66) filed by the Applicant herein, we observed that the application (i.e., Case no. 3103/21) filed by the Applicant MSME, Panchkula, Haryana, was dismissed by an order dated 25.11.2021 due to statutory technicalities, as the Operational Creditor is a trader instead of a manufacturer and without a hearing on merit. Therefore, the aforementioned application cannot be considered a pre-existing dispute between the parties.
- 23.** Further, on perusal of the invoices and the account maintained by the applicant, we come to conclusion that the nature of debt is a "Operational Debt" as defined under section 5 (21) of the Code and the amount of outstanding Operational Debt is above the pecuniary threshold limit of Rs.1 Crore as envisaged under Section 4 of the Code, 2016. It has also been established that there is a "Default" as defined

under section 3 (12) of the Code on the part of the Corporate Debtor. Therefore, the two essential qualifications, i.e., existence of „debt“ and „default“, for admission of a petition under section 9 of the Code, 2016 have been met in this case.

24. The Hon“ble Supreme Court in **Mobilox Innovations Private Limited Vs Kirusa Software Private Limited [Civil Appeal No. 9405 of 2017 para 34**, wherein the Hon“ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9. “34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) *Whether there is an “operational debt” as defined exceeding Rs 1 lakh? (See Section 4 of the Act)*
- (ii) *Whether the documentary evidence furnished with the Application shows that the aforesaid Debt is due and payable and has not yet been paid? And*
- (iii) *Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational Debt in relation to such dispute?*

If any one of the aforesaid conditions is lacking, the Application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

25. It is a settled proposition of law that an application under Section 9 of the Code, 2016 has to be mandatorily admitted if all the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) of the IBC are satisfied.

26. At this juncture, it will be advantageous to refer to the judgement dated 12.07.2022 of the Hon“ble Supreme Court in the case **Vidharbha Industries Power Limited vs. Axis Bank Limited [Civil Appeal No. 4633 of 2021]** wherein the Hon“ble Supreme Court observed as follow:

“74. Sub-section (5) of Section 9 of the IBC provides that the Adjudicating Authority (NCLT) shall, within 14 days of the receipt of an application of an operational creditor under sub-section (2) of Section 9, admit the application and communicate the decision to the Operational Creditor and the Corporate Debtor, provided, the conditions stipulated in clauses (a) to (e) of Section 9(5)(i) of the IBC are satisfied. The Adjudicating Authority (NCLT) must reject the application of the Operational Creditor in the circumstances specified in clauses (a) to (e) of Section 9(5)(ii) of the IBC.

An application of an Operational Creditor for initiation of CIRP under Section 9(2) of the IBC is mandatorily required to be admitted if the application is complete in all respects and in compliance of the requisites of the IBC and the rules and regulations thereunder, there is no payment of the unpaid operational debt, if notices for payment or the invoice has been delivered to the Corporate Debtor by the Operational Creditor and no notice of dispute has been received by the Operational Creditor. The IBC does not countenance dishonesty or deliberate failure to repay the dues of an operational creditor.”

27. Having regard to the conspectus of facts of the present case and the judgements cited (supra), this Adjudicating Authority is of the considered view that the corporate debtor is in default of payment of the outstanding operational debt owed to the applicant and the mandatory requirements as prescribed under Section 9(5) of the Code, 2016 are satisfied.

Therefore, the present company application (C.P. No. (IB)- 68/(ND)/2022) stands admitted and the CIRP is hereby initiated against M/s. Shree Ambika Impex Limited.

- 28.** The applicant in Part -III of the application has proposed the name of IRP, accordingly, this bench appoints Mr. Ram Phal Bhardwaj, as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-001/IP-P01308/2018-19/12053 and email id – bhardwajca@hotmail.com. The IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 is attached with the application.
- 29.** We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Ram Phal Bhardwaj to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however shall be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.
- 30.** We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(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;

(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.”

(e)The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.”

- 31.** It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the

surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

- 32.** The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations.
- 33.** It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under section 19 of the IBC to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day-to-day affairs of the 'Corporate Debtor'.
- 34.** A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

Let copy of the order be served to the parties.

Sd/-

(DR. SANJEEV RANJAN)
MEMBER (TECHNICAL)

Sd/-

(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)