

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

(IB)-647(ND)2022

IN THE MATTER OF:

Shubham Steel Industries

(Through its Sole Proprietor)

Mr. Shubham Agarwal

84/21 Fazal Ganj, Kanpur,

Uttar Pradesh - 208012

... Petitioner/Operational Creditor

VERSUS

Prime Gold Sail JVC Limited

Registered Office at :

5/2, Punjabi Bagh,

Extension, New Delhi - 110026

... Respondent/Corporate Debtor

Section: 9 of the IBC, 2016

Order Delivered on: 14.03.2023

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Petitioner : Adv. Sandeep Bajaj, Adv. Naman Tandon

For the Respondent : Adv. Simran Jyot Singh, Adv. Shreya Sharma

ORDER

PER: SHRI. ASHOK KUMAR BHARDWAJ, MEMBER (J)

Stating succinctly, the short issue arises to be determined here in the present petition is, “whether the Corporate Debtor/Respondent made a default in making the payment of the outstanding operational debt to the Operational Creditor, there existed dispute between the parties before delivery of notice under Section 8(1) of IBC, 2016 upon the Respondent and the Respondent need to be admitted to CIRP”. To prologue, Shubham Steel Industries through its Sole Proprietor, Mr. Shubham Agarwal (hereinafter referred to as the **‘Petitioner/Operational Creditor’**) has preferred the present petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity, the ‘IBC, 2016’) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity ‘the Rules’) with a prayer to initiate the Corporate Insolvency Resolution Process against M/s. Prime Gold Sail JVC Limited (hereinafter referred to as **‘Respondent/Corporate Debtor’**).

2. The Respondent namely, M/s. Prime Gold Sail JVC Limited is a Company incorporated on 01.12.2012 with CIN U28113DL2012PLC 245537 in terms of the provisions of the Companies Act, 1956 having its registered Office at 5/2, Punjabi Bagh Extension, New Delhi - 110026, which is within the territorial jurisdiction of this Bench. As has been

reflected in its Master Data, the Authorized as well as Paid-up Share Capital of the Respondent is Rs.18,00,00,000/-.

3. According to the Petitioner, as on 13.04.2022, the Respondent defaulted in making payment of the outstanding operational debt of an amount of Rs.1,07,38,363/-, which included Principal Amount of Rs.48,77,414/- payable qua the supply of billets by the Petitioner to the Respondent.

4. As has been captioned in the petition, in the year 2021, the director of the Respondent approached the Petitioner to supply billets to the Respondent on regular intervals as and when required by it. Subsequently, the Respondent and Petitioner entered into negotiations and the Petitioner agreed to supply billets to the Respondent on a prevailing market rate and upon the delivery of billets, the Respondent would clear invoice with respect to the same.

5. In the month of July 2021, the Petitioner supplied the first tranche of billets to the Respondent and subsequently raised the invoice against the same. It is the plea espoused in the Petition that the Respondent clearly mentioned that the supply of the billets was to be made at its plant situated at Gwalior, Madhya Pradesh and upon the delivery of material the Respondent would clear the invoices.

6. Thereafter, the Authorized Representative of the Respondent conveyed its demand to the Petitioner for the supply of the billets from time to time and in turn the Petitioner made supply of the specified

quantity of billets at the plant of the Respondent and raised invoices against the supply. It is pertinent to mention that initially the Respondent cleared the invoices of the Petitioner. However, from the month of September, 2021, the Respondent started defaulting in making the payment against the invoices raised by the Petitioner qua the supply of the billets. The Petitioner raised the following invoices upon the Respondent, which according to him are still outstanding:

Sl. No.	Date of Invoice	Due/Default Date	Amount of Invoice (In Rs.)
1.	16.09.2021	21.09.2021	10,36,583
2.	16.09.2021	21.09.2021	9,86,716
3.	20.09.2021	23.09.2021	15,22,408
4.	20.09.2021	23.09.2021	7,40,037
5.	20.09.2021	23.09.2021	12,38,288
Total Amount (X)			55,24,032
Amount received from the Respondent (Y)			6,46,618
Interest as on 13.04.2022 (calculated at the rate of 18% per month) (Z)			58,60,949
Total Outstanding as on 13.04.2022 [X-Y+Z]			1,07,38,363

7. As has been stated in the petition, the invoices raised against the Respondent clearly mentioned that the interest @ 18% per month would payable by the Respondent if the amount mentioned in the invoices was not paid upon the delivery of the material. The Petitioner requested the Respondent time and again for clearing the outstanding dues and also issued reminder letters to it in this regard.

8. The Petitioner has averred in the petition that the Respondent admitted its liability qua the payment of unpaid invoices to the Petitioner and deducted as also deposited TDS in this regard. The Petitioner delivered a notice dated 13.04.2022 under Section 8(1) of the IBC, 2016, demanding the payment of the amount involved in the default. The demand notice was received by the Respondent and was replied to in terms of the communication dated 23.04.2022. As could be espoused by the Respondent, the quality of the billets supplied by the Respondent was deficient. The plea in this regard raised by the Petitioner is that the Respondent never raised the issue of quality of the billets for about six months from the date of the supply and it was only upon the receipt of the demand notice dated 13.04.2022, it alleged that the quality of billets was inferior. In terms of the averments made in the petition itself, the Respondent also alleged that it had suffered losses due to the inferior quality of billets, thus, had filed a mediation application before the Learned District Court, Tis Hazari, Delhi.

9. There are also averments in the petition that the Petitioner acting in terms of some Fee Letter raised its Invoice dated 27.03.2019, bearing No: R182UP04144 upon UNITED for an amount of Rs.88,50,886 and the Respondent was obligated to make payment towards the Invoice in terms of the Fee Letter. It was also stated in the Invoice that payments had to be made within seven days from the date of issue of the invoice and

payments received after the due date were subject to interest @ 2 % per month.

10. The case of the Petitioner is that after much persuasion, the Respondent agreed to make payments in parts and gave certain cheques, which were not honoured thus Petitioner got two Legal Notices dated 01.03.2021 U/s 138 of Negotiable Instrument Act served upon the Respondent, but still no payments were made by the Respondent.

11. The particulars of the Operational Debt claimed including the total amount of default and the date of default has been mentioned in Part IV of the petition which reads thus:

PART - IV		
PARTICULARS OF OPERATIONAL DEBT		
1.	TOTAL AMOUNT OF DEBT,	<p><u>TOTAL AMOUNT DUE:</u></p> <p>Rs. 1,07,38,363/- (Rupees One Crore Seven Lakh Thirty Eight Thousand Three Hundred Sixty Three Only) – Inclusive of Interest Amount as on 13.04.2022</p> <p><i>(Principal Amount = 48,77,414)</i> <i>(Interest Amount=58,60,949)</i></p>
	DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE AND ALONG WITH THE	<p>a. The Corporate Debtor is a private limited company and is involved in the business of manufacturing of TMT approached Operational Creditor for the supply of billets. Whereas, the Operational Creditor is a sole proprietor engaged in the business of trading of steel products.</p> <p>b. The Corporate Debtor and Operational Creditor entered into negotiations and it was agreed between the Parties, the Operational Creditor would supply</p>

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			<p>billets to the Corporate Debtor and the upon the delivery of billets, the Corporate Debtor would clear invoice raised by the Operational Creditor.</p> <p>c. That upon the instruction of Corporate Debtor, the Operational Creditor used to supply billets to the Corporate Debtor. The Operational Creditor raised invoices for each supply which provides for payment of interest at the rate of 18% per month in case Corporate Debtor failed to clear the invoice on delivery of material. It is relevant to state here that the Corporate Debtor had made the part payment of Rs. 6,46,618/- against the invoice dated 16.09.2021, however failed to clear the said invoice and other invoices which were raised by the Operational Creditor.</p> <p>d. As per Corporate Debtor's demand and requirement, the Operational Creditor supplied billets to the Corporate Debtor for which Operational Creditor raised invoices, however the Corporate Debtor failed to clear the below invoices. Details of Outstanding amount including interest as on 13.04.2022 and due date are provided hereinbelow in a tabular form:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 10%;">Sr. No.</th> <th style="width: 20%;">Date of Invoice</th> <th style="width: 20%;">Due Date</th> <th style="width: 50%;">Amount of Invoice (In Rs.)</th> </tr> </thead> <tbody> <tr> <td></td> <td>16.09.2021</td> <td>21.09.2021</td> <td>10,36,583</td> </tr> <tr> <td></td> <td>16.09.2021</td> <td>21.09.2021</td> <td>9,86,716</td> </tr> <tr> <td></td> <td>20.09.2021</td> <td>23.09.2021</td> <td>15,22,408</td> </tr> <tr> <td></td> <td>20.09.2021</td> <td>23.09.2021</td> <td>7,40,037</td> </tr> <tr> <td></td> <td>22.09.2021</td> <td>25.09.2021</td> <td>12,38,288</td> </tr> <tr> <td colspan="3">Total Amount [X]</td> <td>55,24,032</td> </tr> <tr> <td colspan="3">Amount received from the Corporate Debtor [Y]</td> <td>6,46,618</td> </tr> <tr> <td colspan="3">Interest as on 13.04.2022 (calculated at the rate of 18% per month) [Z]</td> <td>58,60,949/-</td> </tr> <tr> <td colspan="3">Total Outstanding as on 13.04.2022 [X-Y+Z]</td> <td>1,07,38,363</td> </tr> </tbody> </table> <p>e. The Operational Debt continues to be due and payable in light of the amount of Operational Debt remaining outstanding as per the running account maintained by the Operational Creditor, in respect of the transactions between the Operational Creditor and the Corporate Debtor.</p> <p>Copy of all invoices of the Operational Creditor which are due and payable are annexed herewith as Annexure "D".</p> <p>The Operational Creditor time and again issued reminder letters to the Corporate Debtor for making the</p>	Sr. No.	Date of Invoice	Due Date	Amount of Invoice (In Rs.)		16.09.2021	21.09.2021	10,36,583		16.09.2021	21.09.2021	9,86,716		20.09.2021	23.09.2021	15,22,408		20.09.2021	23.09.2021	7,40,037		22.09.2021	25.09.2021	12,38,288	Total Amount [X]			55,24,032	Amount received from the Corporate Debtor [Y]			6,46,618	Interest as on 13.04.2022 (calculated at the rate of 18% per month) [Z]			58,60,949/-	Total Outstanding as on 13.04.2022 [X-Y+Z]			1,07,38,363
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		<p>payment of outstanding amount. Copy of the reminder emails issued by operational Creditor is annexed herewith as Annexure – “E”.</p> <p>The Corporate Debtor even deducted TDS on the unpaid invoices. Copy of Form 26AS is annexed herewith as Annexure – “F”.</p>																																							
<p>AMOUNT CLAIMED TO BE IN DEFAULT,</p> <p>THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTATION OF AMOUNT AND DATES OF DEFAULT IN TABULAR FORM)</p>	<p>Rs. 1,07,38,363/- (Rupees One Crore Seven Lakh Thirty Eight Thousand Three Hundred Sixty Three Only) . Detailed calculation sheet of default amount as on 13.04.2022, refer to Appendix-“A”.</p> <p>As stated hereinabove:</p> <table border="1"> <thead> <tr> <th>Sr. No.</th> <th>Date of Invoice</th> <th>Due/Default Date</th> <th>Amount of Invoice (In Rs.)</th> </tr> </thead> <tbody> <tr> <td>a.</td> <td>16.09.2021</td> <td>21.09.2021</td> <td>10,36,583</td> </tr> <tr> <td>b.</td> <td>16.09.2021</td> <td>21.09.2021</td> <td>9,86,716</td> </tr> <tr> <td>c.</td> <td>20.09.2021</td> <td>23.09.2021</td> <td>15,22,408</td> </tr> <tr> <td>d.</td> <td>20.09.2021</td> <td>23.09.2021</td> <td>7,40,037</td> </tr> <tr> <td>e.</td> <td>22.09.2021</td> <td>25.09.2021</td> <td>12,38,288</td> </tr> <tr> <td colspan="3">Total Amount [X]</td> <td>55,24,032</td> </tr> <tr> <td colspan="3">Amount received from the Corporate Debtor [Y]</td> <td>6,46,618</td> </tr> <tr> <td colspan="3">Interest as on 13.04.2022 (calculated at the rate of 18% per month) [Z]</td> <td>58,60,949/-</td> </tr> <tr> <td colspan="3">Total Outstanding as on 13.04.2022 [X-Y+Z]</td> <td>1,07,38,363</td> </tr> </tbody> </table> <p>Further, the default happened on 19.11.2021, when the Corporate Debtor made the part payment against the outstanding amount.</p>	Sr. No.	Date of Invoice	Due/Default Date	Amount of Invoice (In Rs.)	a.	16.09.2021	21.09.2021	10,36,583	b.	16.09.2021	21.09.2021	9,86,716	c.	20.09.2021	23.09.2021	15,22,408	d.	20.09.2021	23.09.2021	7,40,037	e.	22.09.2021	25.09.2021	12,38,288	Total Amount [X]			55,24,032	Amount received from the Corporate Debtor [Y]			6,46,618	Interest as on 13.04.2022 (calculated at the rate of 18% per month) [Z]			58,60,949/-	Total Outstanding as on 13.04.2022 [X-Y+Z]			1,07,38,363
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12. The Part IV of the Application (ibid) reflects that the Petitioner has claimed the total outstanding/defaulted amount as Rs. 1,07,38,363/- till 13.04.2022. Further, the date of default as canvassed by the Petitioner is 13.04.2022.

13. On issuance of notice to the Respondent, it filed its reply espousing thus:- (i) it had preferred the Pre-Institution Mediation dated 1st Feb, 2022 under Section 12A of the Commercial Courts Act, 2015 in statutory Form 1, against the Petitioner, before West District Legal Service Authority, Tis Hazari Court, specifically raising the issue of quality of material supplied by the Operational Creditor during the month of September; (ii) in the Pre-Institution Mediation (ibid), the Respondent had also raised the issue of failure of supply of the ordered goods by the Petitioner at agreed price, without any prior intimation, which caused the Respondent to purchase the goods from open market at higher price, for which the Respondent had raised a debit note of differential value; (iii) it was only after the disputes as to the deficiency in quality and supply of the goods, raised by the Respondent that the Petitioner has preferred the present petition; the Demand Notice dated 13.04.2022, received by the Respondent on 19.04.2022 was delivered by the Petitioner, only after 1st Feb 2022, when a dispute had already been raised; (iv) in furtherance of the Pre-Institution Mediation, the Respondent has preferred a Commercial Suit bearing C.S. No. 946/2022 before the District Judge (Commercial Court), Tis Hazari, West District, New Delhi, which is pending adjudication; (v) the Petition is barred by Section 4 of IBC, 2016, as the amount of default is less than Rs. 1 crore, which is the threshold limit for filing any petition under Section 9 of IBC, 2016; (vi) in the wake of the notice of dispute served by the Respondent,

upon the Petitioner, the petition is liable to be dismissed; (vii) the Petitioner has preferred the present petition, just to strong arm the Respondent; (viii) the Petitioner cannot use the Insolvency Code as a substitute for debt enforcement procedure; (ix) the interest @ 18% per month was never agreed by the Respondent.

14. Besides, the Respondent has also espoused in its reply that the billets supplied by the Petitioner during September 2021 were put to use in October/November 2021 and on being placed over the rolling mill for the production of TMT Bars, due to the inferior quality of billets the reheating furnace broke down and the entire production was stopped for 5 days and in addition to layoff charges due to such stoppage, the Respondent had also to bear a cost of Rs. 30,18,471.00/-. According to the Respondent, it is entitled to recover Rs. 63,09,096/- along with interest @ 18% from the Petitioner. In the reply filed by it, the Respondent has also made allegations of defamation and cheating against the Petitioner.

15. We have heard the counsels for the parties and perused the record. As can be seen from the reply dated 23.04.2022 (page 49 of the counter reply filed by the Respondent) given by the Respondent to the notice delivered to it by the Petitioner under Section 8(1) of the IBC, 2016, it brought to the notice of the Petitioner, the pre-existing dispute regarding the deficiency in quality and supply of the billets (goods). In para 5 of the reply, the Respondent has referred to Pre-Litigation Mediation, and sought to be invoked by it. With its reply, the Respondent

has also enclosed a debit note dated 15.10.2021. We also find that the Respondent has enclosed a copy of the Mediation Application Form dated 25.01.2022 and bearing online transaction no. 203211946591 dated 01.02.2022 with counter reply. The application contained the reference of the transaction of supply of billets by the Petitioner to the Respondent and the dispute between them in this regard. It is not so that the dispute was regarding such defects or deficiencies, which were required to be met and removed by the Petitioner. The dispute raised by the Respondent pertains to the entitlement of the Petitioner to the amount of default claimed by it. For convenient reference, the relevant excerpt of the Mediation Application Form submitted by the Respondent is extracted thus: -

2. Quantum of Claim:

That the PG herein seeks recovery of total amount of Rs. 63,09,096/-along with *pendente lite* and future interest @ 18% p.a., details of the same are reproduced herein below in tabular form for ready reference:

S.NO.	PARTICULARS	AMOUNT
A.	Differential Amount / Direct Loss Incurred By PG While Purchasing The Billets From Open Market At An Escalated Price:	1290625.00
B.	Direct Loss Due To Faulty Supply: (Rs1542614+1214262+45000+76700+7676+132219)	3018471.00
C.	Direct Loss Caused Due To Wrongful And Illegal Circulation Of Whatsapp Messages (Orders Cancelled):	2000000.00
D.	Interest @ 18% P.A. Calculated Till 31 st Jan 2022: (6309096*18%)/12*1.5	141968.00
Total:		6451068.00

Here, it is stated that the above claim is exclusive of future interest, which would be calculated at the date of final payment, further, PG, also reserves it's right to initiate appropriate criminal proceedings against SS on account of misrepresentation, cheating, defamation/reputational loss. The claim is also exclusive of claims under aforesaid heads.

16. We do not find any rejoinder, filed by the Petitioner, rebutting the plea of pre-existing dispute raised by the Respondent (ibid), uploaded on the DMS. The dispute alleged in the Mediation Form dated 01.02.2022 pertains to the quality of goods and supply, which is of the nature defined in Section 5(6) of IBC, 2016. In Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. 2018 1 SCC 353, Hon'ble Supreme Court could take a view that in such cases, where the notice of dispute is found received by the Operational Creditor, the Adjudicating Authority must reject the application under Section 9(5)(ii)(d) of the IBC, 2016. In said judgment, Hon'ble Supreme Court ruled, "what the Adjudicating Authority need to see is whether there is a plausible contention which requires further investigation and the dispute is not patently feeble legal argument or an assertion of fact unsupported by evidence. In terms of the view taken by the Hon'ble Supreme Court in the said judgment, this Adjudicating Authority need not satisfy itself that the defense of the Respondent is likely to succeed. What this court needs to see, is "whether a dispute truly exists in fact and is not spurious, hypothetical or illusory". The view taken in Mobilox (ibid) was followed by Hon'ble Supreme Court in K Kishan Vs. Vijay Nirman Co. (P) Ltd. (2018 17 SCC 662). In the said judgment Hon'ble Supreme Court also viewed that the Operational Creditor cannot use the Insolvency Code as a substitute for debt enforcement procedure. In Philips India Limited vs. Goodwill Hospital & Research Centre Ltd, the Hon'ble NCLAT viewed thus: -

"27. Sub-section (6) of Section 5 read with sub-section (2)(a) of Section 8 also cannot be confined to pending arbitration

or a civil suit. It must include disputes pending before every judicial authority including mediation, conciliation etc. as long there are disputes as to existence of debt or default etc., it would satisfy sub-section (2) of Section 8 of the 'I & B Code'.

28. Therefore, as per sub-section (2) of the 'I & B Code', there are two ways in which a demand of an Operational Creditor can be disputed:

i. By bringing to the notice of an operational creditor, 'existence of a dispute'. In this case, the notice of dispute will bring to the notice of the creditor, an 'existence of a dispute' under the Code. This would mean disputes as to existence of debt or default etc.; or

ii. By simply bringing to the notice of an operational creditor, record of the pendency of a suit or arbitral proceedings in relation to a dispute. In this case, the dispute in the suit/arbitral proceeding should relate to matters (a)-(c) in sub-section (6) of Section 5 and in this case, showing a record of pendency of a suit or arbitral proceedings on a dispute is enough and to intent of the Legislature is clear, i.e. once the dispute (on matters relating to 3 classes in sub-section (6) of Section 5 of the 'I & B Code') is pending adjudication, that in itself would bring it within the ambit of sub-section (6) of Section 5 of the 'I & B Code'.

29. The definition of dispute for the purpose of Section 9 must be read alongwith expression operational debt as defined in Section 5(21) of I&B Code, 2016 means:

(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;"

Thus the definition of dispute, 'operational debt' is read together for the purpose of Section 9 is clear that the intention of legislature to lay down the nature of 'dispute' has not been limited to suit or arbitration proceedings pending but includes other proceedings "if any".

30. Therefore, it is clear that for the purpose of sub-section (2) of Section 8 and Section 9 a 'dispute' must be capable of being discerned from notice of corporate debtor and the meaning of "existence" a "dispute, if any", must be understood in the context."

17. In the wake of the averments made in the reply and the Mediation Application Form enclosed at Annexure A-2 to the reply filed by the Respondent, we have no option, but to take a view that there existed a dispute between the Petitioner and the Respondent. We also find that the Respondent satisfied the requirement of Section 8(2) of the IBC, 2016 i.e., it impressed upon the Petitioner that there existed a dispute. The Respondent also referred to Mediation Application Form in its reply. As the present application is liable to be rejected, in terms of Section 9(5)(ii)(d) of the IBC, 2016, we need not examine any other issue, cropped up in the matter. **The petition is accordingly dismissed.** It is made clear that the limited scope of our examination was, "whether the CD should be admitted to CIRP or not", thus nothing recorded or viewed hereinabove should be perceived as an opinion over the tenability of the claim of the Petitioner against the Respondent. **No order as to cost.**

Sd/-

**(L. N. GUPTA)
MEMBER (T)**

Sd/-

**(ASHOK KUMAR BHARDWAJ)
MEMBER (J)**