

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH - V**

**C.P. (I.B) No. 225/MB/2023**

**Under Section 9** of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules 2016)

*In the matter of*

**M/s Nooriya Traders**

**Through its Authorised Partner**

**Mr. Aamir Kachhi**

Having its address at 214, Old nagaon Road, Shirol, MIDC, Kohlapur-416 122.

**.....Petitioner/Operational Creditor**

Vs

**M/s New Melting Centre Pvt. Ltd.**

Having its registered office at 11/12, B ward, Y P Powar Nagar, Kolhapur 416 008.

**.....Corporate Debtor**

**Order Dated: 24.04.2024**

**Quoram:**

Reeta Kohli, Hon'ble Member (Judicial)

Madhu Sinha, Hon'ble Member(Technical)

**Appearances:**

**For the Petitioner/Operational Creditor:** Mr. Subhash Gupta (PH)

**For the Corporate Debtor:** Adv. Mehul Shah

**ORDER**

*Per: Reeta Kohli, Member (Judicial)*

This Company Petition is filed by **M/s Nooriya Traders** (hereinafter referred as **“the Petitioner/Operational Creditor”**) seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as **“CIRP”**) against **M/s New Melting Centre Pvt. Ltd.** (hereinafter called **“Corporate Debtor”**) on **21.12.2022** by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy Code, 2016 (hereinafter called **“the Code”**) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for committing default in payment of an Operational Debt of **Rs. 2,73,35,093/- (Rs. 2,53,32,653/- due as on the date 03.07.2022 as per the Demand Notice and Rs. 20,02,440/- due as on the date 10.09.2022 as three invoices fell due subsequent to issuance of demand notice wherein the last invoice dated 12.06.2022 fell due and payable on 10.09.2022).**

**Brief Facts and Submissions by the Operational Creditor:-**

1. The Corporate Debtor owns, operates and manages a foundry for casting metals by procuring the materials from suppliers including the Operational Creditor.
2. The Operational Creditor supplied raw materials such as C.I. cast Boring, M S Scrap (**Hereinafter referred to as “Goods”**) to the Corporate Debtor in due course of business between June 2019 to June 2022 and accordingly raised several invoices against the same. However, since December 2021 various invoices were due for payment.
3. The Operational Creditor states that the Goods were delivered via vehicles which were weighed at one Five-Star Mahat Weigh Bridge,

being a neutral independent third party. The goods were weighed in presence of the representatives of the Corporate Debtor. Only after satisfaction regarding the quality, quantity, weight and other aspects of the goods that the corporate debtor accepted the goods and provided an acknowledgement of delivery in writing. It is also pertinent to note that all invoices together with acknowledged challans and weighing receipt etc. are placed on record of this Hon'ble Tribunal. It is hence the case of the Operational Creditor that the Corporate Debtor had become liable from the time the goods were delivered to his premises to his satisfaction and the substantiation of such satisfaction is established through the acknowledged/accepted invoices, delivery challans and weighing receipts. This establishes the Debt Due and also according to the Law of Estoppel, the party which itself had acknowledged the above stated documents is barred from now denying them.

4. The Operational Creditor further stated that the Corporate Debtor despite frequent reminders, requests and demands from the Operational Creditor failed to clear the outstanding dues.
5. The Corporate Debtor had raised objections qua three invoices bearing nos. 458, 461 and 462. Hence, the Operational Creditor vide email dated 12.07.2022, had not demanded the amount due under these disputed invoices in its Demand Notice dated 21.08.2022.
6. As no payments were forthcoming in relation to the undisputed invoices, the Operational Creditor sent a Demand Notice dated 21.08.2022 in Form 3 under Section 8 read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditor further submits that the date of default as on Demand Notice was 03.07.2022 and the Amount of Default was Rs. 2,53,32,653/-.

7. However, 3 invoices fell due subsequent to issuance of the above stated Demand Notice. Thus the Date of Default was further revised, vide this petition, to 10.09.2022 based on the last invoice dated 12.06.2022. Hence an additional amount of Rs. 20,02,440/- qua these 3 invoices are claimed by way of this petition.
8. The Corporate Debtor in its Reply to the Demand Notice dated 27.08.2022, alleged that the goods were stolen by the Operational Creditor by manipulating the weighing machines in collusion and connivance with the concerned persons of Shree Sai Samarth Weigh Bridge and Five Star Mahat Weigh Bridge. Therefore, the Corporate Debtor was constrained to lodge a police complaint on 13.07.2022 in the Gokul-Shirgaon Police Station, Kolhapur.
9. The Operational Creditor submitted that the F.I.R. of 2022 filed by the Corporate Debtor had been followed by the Closure Report of the Investigating Officer dated 20.04.2023 taken on record by the Hon'ble High Court vide its Order dated 30.06.2023 stating that sufficient evidence so as to prosecute the Operational Creditor was not found. Additionally, the Corporate Debtor raised a dispute for the supplies made 18 months prior to the date of F.I.R. without any reasonable basis and based on its own vague and unsubstantiated calculations.
10. The Operational Creditor relies on the following two judgements to counter the claim of pre-existing dispute based on the above stated F.I.R.-
  - **Suzlon Global Services v. Array Land Developers Private Limited** (C.P./197/2022) wherein the Hon'ble NCLT, Chennai Bench held that the claim of the Corporate Debtor, based on the police complaint, that there is a pre-existing dispute does not hold any water as the complaint closure report has been filed before this Tribunal.

- **BV Gautam v. Clarke Energy India Pvt. Ltd.** [Company Appeal (AT) (CH) (Ins) No. 148/2022] wherein the Hon'ble NCLAT, Chennai Bench dismissed the dispute raised by the Corporate Debtor after 13 months from supply.
11. Furthermore, it is pertinent to note that even after filing the F.I.R., the Corporate Debtor had recorded all the invoices of the Operational Creditor in its books, deducted TDS on the said invoices and had also paid it to the credit of the Operational Creditor.
  12. The auditor of the Corporate Debtor and the Directors in its annual report dated 26.09.2022 (post 2 months of filing the F.I.R.), are unsure whether any fraud is actually committed. Furthermore, the Auditors of the Corporate Debtor recorded that the management of the Corporate Debtor had conducted a physical verification of the inventory and no major discrepancies were found.
  13. On 07.02.2023, a commercial suit was filed by the Operational Creditor against the Corporate Debtor claiming an amount of Rs. 2,98,75,062/- and on 29.04.2023 the Corporate Debtor had also filed a commercial suit bearing e-filing No. C202300002 of 2023 claiming an amount of Rs. 11,31,97,760/- which is only after issuance of the Demand Notice. It is a settled position that a suit filed after issuance of Demand Notice shall have no consequence to the application under the Code.

**Submissions by the Corporate Debtor:**

14. The Corporate Debtor completely disputes that the total outstanding amount of **Rs. 2,73,35,093/-** is due and payable.
15. It is the case of the Corporate Debtor that the Operational Creditor had no cause of action or locus standi to file the present petition.

This is so as the Corporate Debtor had already filed the FIR bearing No. 137 of 2022 on 13.07.2022 under Sections 420, 406, 465, 467, 471, 264 and 266 of the Indian Penal Code, 1860 against the Operational Creditor and other accomplices, before the date of the Demand Notice which is 21.08.2022. Therefore, existence of pre-existing dispute stands established clearly.

**The chronology of events which led to the filing of F.I.R. is as follows:-**

- a. It is the case of the Corporate Debtor that the Operational Creditor in collusion and connivance with other Accomplices, had played fraud upon the Corporate Debtor by delivering less quantity of raw materials due to which he suffered a huge loss to the tune of Rs. 9,74,98,000/-.
- b. **The details of the above stated Accomplices are as follows:**
  - M/s Kalyani Enterprises through its Proprietor, Ananda Babu Shinde ('Kalyani')
  - M/s Heera Enterprises, through its Proprietor, Parshuram Gaikwad ("Heera")
  - Sai Samarth Weigh Bridge through its Proprietor/Partner Tushar Ashok Suryavanshi ("weighing vendor 1")
  - Five Star Weigh Bridge through its Proprietor/Partner Wasim Akram Mahat ("weighing vendor 2")
  - Pandhurang Maruti Kumbhar
  - Gajanan Hindurao Parit
  - Kalpesh Baloso Kumbhar
  - Amir Abdul Gaffar Kachhi
  - Ganesh Parshuram Gaikwad
- c. The Corporate Debtor submitted that since 2018-2019, the Operational Creditor and Kalyani supplied goods to the Corporate Debtor in the quantity demanded after being weighed twice by

weighing vendor 1 and weighing vendor 2. However, on various occasions it was noticed that one Mr. Pandhurang Kumbhar (who used to get the goods weighed and collected the weighing receipts issued by weighing vendor 2) would get the weighing done by vendor 2 even before the representative of Corporate Debtor could reach the place of weighing vendor 2.

- d. The Corporate Debtor further stated that normally, in due course of business, waste of 2-7% is generated from the actual quantity of raw material used in the production process. Consequently, the acceptable industry standard of output is 92-97%. In the Financial Year 2021-2022, the weight of the final casting products manufactured through the manufacturing process was within range. However, on cross checking of physical verification qua the inventory register, it was found that there was a shortage of 1733 tons of raw material for the Financial Year 2021-2022 and 645 tons of raw material for the period of 01.04.2022 to 30.06.2022. Taking the average rate of the goods at Rs. 41,000/- the total short supply to the tune of 2378 tonnes is worth Rs. 9,74,98,000/-. Accordingly, the management of the Corporate Debtor in its meeting dated 21.06.2022, decided to physically weigh each consignment at site before taking delivery. The Corporate Debtor found that amongst all its suppliers the shortfall in supply was only by the Operational Creditor (largest supplier), Kalyani and Heera.
- e. According to the incident of 22.06.2022, wherein the Corporate Debtor placed an order for 4.290 tons of the goods but when he actually weighed the goods there was a huge difference of 2.195 tons worth Rs. 91,641/- in the actual goods demanded and delivered by the Operational Creditor.

- f. On the same day, the huge difference of approximately 2.079 tons worth of Rs. 87,115/- and 2.066 tons worth of Rs. 86,255/- were found by the Corporate Debtor in the actual quantity of goods stated in the invoice and delivered by Kalyani and Heera, respectively.
- g. Finally, on the same day, Pandurang Kumbhar had been confronted by the office bearers of the Corporate Debtor about the short supply and on confrontation, he ran away from the said godown without giving any responses to the Corporate Debtor's office bearers. Thus it is clear that goods to the tune of 2378 tonnes have not been provided by the Operational Creditor, Kalyani and Heera by manipulating the weighing machine in collusion with weighing vendors 1 and 2 and Pandurang Kumbhar.
- h. Later on, it also came to light that Mr. Gajanan Parit, the Assistant Purchase Manager of Corporate Debtor, had connived in the entire modus operandi to cheat the Corporate Debtor and he forewarned Kalpesh Balasao Kumbhar (supplier of goods through the front of the Operational Creditor) who was using the Operational Creditor, Kalyani and Heera as front to make money by making short delivery and would in turn pay money to the Assistant Manager. Hence the F.I.R. was filed.
18. After the registration of the above stated FIR, the Operational Creditor addressed two notices dated 21.08.2022 and 01.09.2022 under the Code and under Section 138 of Negotiable Instrument Act, 1881 respectively. The said two notices have been duly responded by the Corporate Debtor vide their Advocate's Letter dated 27.08.2022 and 14.09.2022 respectively. It is pertinent to note that the Corporate Debtor had specifically pointed out the



pre-existence of the dispute before the receipt of the demand notice.

19. Thereafter, CA Nilesh Baheti & Co. who were looking after the accounts of the Corporate Debtor were pleased to issue its Report dated 09.12.2022, whereby they specifically confirmed shortage of 1733 tons of raw material for the Financial Year 2021-2022 and 645 tons of raw material for the period of 01.04.2022 to 30.06.2022 and consequent loss to the tune of Rs. 9,74,98,000/. The Corporate Debtor had paid requisite amount of GST that was levied by the Operational Creditor, Kalyani and Heera on their invoices.

20. On 29.04.2023 the Corporate Debtor had also filed a commercial suit bearing e-filing No. C202300002 of 2023 claiming an amount of Rs. 11,31,97,760/- which is pending adjudication before the commercial court at Kolhapur. Simultaneously, the Corporate Debtor is contesting the commercial suit No. 02 of 2023 filed by the Operational Creditor (after filing the present petition) before the Hon'ble Commercial Court at Kolhapur. The filing of the Commercial Suit by the Operational Creditor even after filing the present petition and for recovery of the same alleged amount, amounts to forum shopping and brings malafide intentions of the Operational Creditor to light. On this ground alone, the present petition deserves to be dismissed with heavy costs.

### **Findings**

- It is the case of the Operational Creditor that duly ordered goods of the value of Rs. 2,73,35,093/- were delivered to the Corporate Debtor. The goods were weighed in presence of the Corporate Debtor by a neutral independent third party, i.e., weighing vendor 2, and only after satisfaction regarding the quality, quantity, weight and other aspects of the goods that the Corporate Debtor

issued acknowledged challans and weighing receipt which have been placed on record of this Hon'ble Tribunal.

- On the other hand, it is the case of the Corporate Debtor, that since 2018-2019, the Corporate Debtor purchased goods from the Operational Creditor after getting it weighed twice by weighing vendors 1 and 2. However, the alleged case of the Corporate Debtor is, on various occasions weighing was done even before the representative of Corporate Debtor could reach the place of weighing vendor 2. After cross-checking the physical verification qua the inventory register, the Corporate Debtor alleged short supply of goods to the tune of 2378 tonnes of goods worth Rs. 9,74,98,000/- during the period from 01.04.2021 to 30.06.2022. The Corporate Debtor categorically pointed out the incident of 22.06.2022, wherein the Corporate Debtor placed an order for 4.290 tons of the goods but when he actually weighed the goods there was a huge difference of 2.195 tons. In order to address this concern, the Corporate Debtor filed the FIR bearing No. 137 of 2022 much before the date of Demand Notice and also filed the civil suit bearing e-filing No. C202300002 of 2023. Thus, raising the defence of a pre-existing dispute.
- The Operational Creditor categorically counters that the FIR Closure Report of the Investigating Officer dated 20.04.2023 and the same having been taken on record by the Hon'ble High Court vide its Order dated 30.06.2023 makes the contention of Pre-existing Dispute as baseless. It is pertinent to note that the judgements relied on by the Operational Creditor are distinguishable and not fully applicable on the facts and circumstances of the present case, otherwise also none of the judgement so referred has decided any point of law which can be said to be relevant for the present case.

- After close perusal of the documents placed on record by both the parties and appreciating the arguments of both the parties, particularly, in light of the copy of the Reply to the Demand Notice dated 27.08.2022, the existence of pre-existing dispute is proved on the ground of alleged short supply of goods on the part of the Operational Creditor and filing of related police complaint on 13.07.2022 and registration of FIR bearing no. 0137/2022, before the date of the Demand Notice, i.e. 21.08.2022. Subsequent closure of the FIR through the Closure Report dated 20.04.2023, does not disprove the existence of a pre-existing dispute as the same stand has been reiterated by the Corporate Debtor in its reply to the Demand notice as well. So much so that a civil suit too is filed by the corporate debtor which is pending adjudication. This civil suit though filed after the issuance of demand notice raises the issues of concern of short supply of materials. Otherwise too, the legal parameters of criminal jurisdiction are completely different and may not be an impediment in the present case. Finding of the Closure Report by Investigating Agency cannot have a direct bearing on the jurisdiction of this Hon'ble Tribunal. Furthermore, this Hon'ble Tribunal places reliance on the following judgements for the purpose of passing of this Order:

- A. ***Mobilox Innovations Pvt. Ltd. vs. Kirusa Software Pvt. Ltd.*** ***[(2017) ibclaw.in 01 SC]*** with respect to Pre-existing Dispute in which it was held by the Hon'ble Supreme Court that the breach of the terms and conditions of the Agreement entered into between the parties to the case before the Demand Notice is sent under Section 8 of the Code qualifies to be a Pre-existing dispute and, therefore on the ground of existence of such a Pre-existing Dispute, an Application under Section 9 of the Code is not maintainable.

**B. Kay Bouvet Engg. Ltd. v. Overseas Infrastructure Alliance (India) Pvt. Ltd. [LL 2021 SC 370]**

in which it was held by the Supreme Court of India that once the operational creditor has filed an application which is otherwise complete, the adjudicating authority has to reject the application under Section 9(5)(ii)(d) of the Code, if a notice has been received by the operational creditor or if there is a record of dispute in the information utility. What is required is that the notice by the corporate debtor must bring to the notice of the operational creditor the existence of a dispute or the fact that a suit or arbitration proceedings relating to a dispute is pending between the parties. All that the adjudicating authority is required 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.

- This is the case where pre-existing dispute is not the only issue but the case involves Disputed Facts wherein the Operational Creditor claims to have duly supplied goods for consideration and the Corporate Debtor alleges a short supply of goods to the tune of 2378 tonnes (shortage of 1733 tons of raw material for the Financial Year 2021-2022 and 645 tons of raw material for the period of 01.04.2022 to 30.06.2022) worth Rs. 9,74,98,000/- which is a drastic difference in supply. This Tribunal having summary jurisdiction refrains to get into the merits of such disputed facts where one party claims one particular thing and the other party makes counter statements with respect to the amount so claimed. In light of such disputed facts, this forum becomes inappropriate in relation to the present case as it is not

possible to ascertain the debt amount with accuracy which consequently leads to negation in corresponding default.

- Therefore, in the light of the above observation of existence of pre-existing dispute and presence of disputed facts in the instant case, this Hon'ble Tribunal deems it fit to reject the present petition as there is no crystallised debt and therefore default too cannot be specified.
- However, it is categorically pointed out that any observation made in this Order of this Hon'ble Tribunal does not bar the Operational Creditor from continuing to pursue or invoking other legal remedies available to it before any other appropriate forums. Any observation made in the order may not be treated as a comment on the correctness of the dispute between the parties.

**Sd/-**

**MADHU SINHA**

**MEMBER (TECHNICAL)**

//VLM//

**Sd/-**

**REETA KOHLI**

**MEMBER (JUDICIAL)**