

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

Before Shri Madan B. Gosavi, Hon'ble Member(Judicial)

C.P.(IB) No.62/KB/2018

IN THE MATTER OF:

An application for initiation of Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

-And-

IN THE MATTER OF:

M/s. Prowess International Private Limited, a company incorporated under the Companies Act, 1956, having its Registered Office at A-18, 6th phase, Adityapur Industrial Area, Gamharia, Jamshedpur, Jharkhand- 832 108;

.. Operational Creditor/ Applicant

-Versus-

M/s. Jai Balaji Industries Limited, a company incorporated under the Companies Act, 1956 having its registered Office at 5, Bentinck Street, Kolkata, West Bengal-700 001;

... Corporate Debtor

Counsels appeared:

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| 1. Mr. Akhilesh Kr. Shrivastava, Advocate |] | For the Operational Creditor |
| 2. Mr. Akash Sharma, Pr.C.S. |] | |
| 1. Mr. Abhrajit Mitra, Sr. Advocate |] | |
| 2. Ms. Manju Bhuteria, Advocate |] | For the Corporate Debtor |
| 3. Ms. Rajshree Kajaria, Advocate |] | |

Date of Pronouncement of Order : 09.08.2018

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ORDER

Operational Creditor, M/s. Prowess International Private Limited has filed this petition under section 9 of the Insolvency & Bankruptcy Code, 2016 (in short, I&B Code) against the Corporate Debtor, M/s. Jai Balaji Industries Ltd.

2. The following facts are not in dispute-

(i) The Operational Creditor sold and supplied to the Corporate Debtor certain raw materials for their new steel mill project at Durgapur plant during the year 2007 to 2013. The part of price of the materials worth Rs.2,25,90,062/- has not been paid by the Corporate Debtor. Hence, in the year 2016, the Operational Creditor had filed a petition for winding up of the Corporate Debtor company in the Hon'ble High Court at Calcutta bearing no.667/2016. However, that petition was rejected by the Hon'ble High Court for the reasons that the Corporate Debtor company had referred to BIFR on 19.08.2015. Hence, the petition not being maintainable stands dismissed under section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985.

(ii) Thereafter in the year 2017, the Operational Creditor again filed one more petition under section 433,434 and 439 of the Companies Act, 1956 against the Corporate Debtor for winding up. However, it was also dismissed by this Tribunal holding that, "previous winding up petition filed in the Hon'ble High Court at Calcutta being CP No.667/2017 under section 433 and 434 of the Companies Act was dismissed by the order dated 21.09.2016. It is pertinent to mention here that the petitioner filed fresh petition first time on 05.01.2017 before the NCLT which is not a transferred petition from the Hon'ble High Court at Calcutta. The present petition is not maintainable on the

ground that no notice under section 8(1) of the I&B Code read with Rule 5 Form-3 of the Rules, 2016 was given prior to filing of this petition.

3. It is further observed that the petition is also not maintainable on a ground that the petitioner herein is a Corporate Debtor in CP No.150/2017 undergoing Corporate Insolvency Resolution Process and the order in C.P. No.150/2017 dated 20.04.2017 is on record. As per the provisions of section 11 of I&B Code, 2016, the petition is not maintainable.

4. It is not in dispute that the above order dated 31.08.2017 was challenged by the Operational Creditor before the Hon'ble NCLAT vide Appeal No. Company Appeal (AT)(Insolvency) 250 of 201. That appeal was also dismissed by the Appellate Authority. While dismissing the appeal, it is observed that, "In view of the facts that the petition was filed under section 433, 434 and 439 of the Companies Act, 1956 which is held to be not maintainable by the Tribunal, we hold that the appeal under section 61 of the I&B Code is not maintainable".

5. Thereafter on 04.11.2017, the Operational Creditor gave notice under section 8 of I&B Code to the Corporate Debtor calling upon them to pay the due debt of Rs.2,25,90,062/- along with the interest. Notice was received by the Corporate Debtor. The Corporate Debtor vide letter dated 15.11.2017 replied to the notice stating that the company has filed Money Suit bearing no.5 of 2017 in the Court of Learned Civil Judge (Senior Division) at Saraikela due to losses and damages suffered by the company and the same is pending for adjudication. Moreover, the Corporate Debtor is already undergoing CIRP. Hence, the demand notice was not legally maintainable.

6. On backdrop of the above fact and on 12.01.2018, the Operational Creditor filed this petition against the Corporate Debtor to start CIRP of the

Corporate Debtor stating that they are unable to pay sale price of the raw materials worth Rs.2,25,90,062/-.

7. Upon service of the notice of this petition, the Corporate Debtor appeared in this proceeding. They filed affidavit-in-reply dated 03.03.2018. It is their contention that they have filed the suit bearing no.05 of 2017 against the Corporate Debtor in the Court of Civil Judge (Sr. Division) at Saraikela raising dispute about the debt as claimed. As the dispute is raised prior to receipt of notice under section 8 of I&B Code and the suit is also filed, this petition is not maintainable. Moreover, earlier petitions of the Corporate Debtor has already been dismissed. Even appeal filed challenging earlier orders has been dismissed. This petition is not maintainable. They also stated in their affidavit-in-reply elaborately to what is exact dispute in between them.

8. I heard the Ld. Counsel Mr. Akhilesh Kr. Shrivastava for the Operational Creditor and the Ld. Sr. Counsel Mr. Abhrajit Mitra for the Corporate Debtor. Both the Ld. Counsels were very apt in their submissions as to the point whether the pendency of suit in between the parties creates the bar for this Adjudicating Authority admitting the CIRP against the Corporate Debtor. More particularly when the suit was filed prior to the demand notice under section 8 of I&B code but after the culmination of earlier proceedings in between the parties.

9. The Ld. Counsel for the Operational Creditor submitted that the Operational Creditor claimed recovery of debt way back in the year 2016. When they filed first petition against the Corporate Debtor for their winding up (667 of 2016), it was dismissed on technical ground. Then another petition is filed before this authority bearing no.150/2017. It was also dismissed on technical ground because it was filed without giving notice to the Corporate

Debtor. Thereafter, notice under section 8 of I&B code was sent. At that point of time, the Corporate Debtor came out with the contention that the dispute was raised by filing the suit in Civil Court. The Ld. Counsel further submitted that sub-section (2) of section 8 of I&B Code, requires the Corporate Debtor to reply to the demand notice within ten days pointing out the existence of dispute or record the pendency of suit. Existence of dispute has to be construed as the existence of dispute prior to initiation of the first proceeding against the Corporate Debtor in the year 2016. The Corporate Debtor has admittedly filed the suit in the year 2017, i.e. much after the Operational Creditor proceeded against the Corporate Debtor in the Hon'ble High Court. According to the Ld. Counsel, it is a created dispute raised after-thought only to thwart this petition. The petition may be admitted.

10. As against this, Ld. Sr. Counsel for the Corporate Debtor submitted that sub-section (2) of section 8 of I&B Code makes it clear that the Corporate Debtor shall reply to the demand notice within 10 days of its receipt and bring to the notice of Operational Creditor the existence of dispute, if any, or the pendency of suit or arbitration proceeding filed, before the receipt of such notice. In this case, the Corporate Debtor received the notice under section 8 of I&B Code and within 10 days of receipt of that notice, the reply of the notice pointing out the dispute and the fact that in March, 2017 itself, they have filed Money Suit raising dispute about the debt in the Civil Court, Saraikela. Ld. Sr. Counsel submitted that since the suit is already filed raising dispute about the debt, this petition is not maintainable at all. Ld. Sr. Counsel also submitted that in that suit, various contentions about the late supply of raw materials by the Operational Creditor are being raised and they are to be investigated by the Civil court. The Hon'ble Supreme Court in the case of Mobilox Innovations Private Ltd. -vs- Kirusa Software Private Ltd.(2018) 1 Supreme Court Cases 353 has held that the Adjudicating Authority has to see whether there is a plausible contention which requires

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