

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH - V

C.P. (I.B) No. 861/MB/2022

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

MM Aqua Technologies Limited

40/1A, Block-B New Alipore,

Kolkata – 700053

Registered Address:

Behrampur Road, Khandsa

Gurgaon, Haryana 122-001

.....Petitioner/Operational Creditor

Vs

Clean Flow Cooling Tower Solutions Pvt. Ltd.

Having its registered office at:

H. No. 67, Near Post Office

P.O. Gholwad, Taluka- Dahanu

Gholwad, Thane, Maharashtra- 401602

.....Corporate Debtor

Order Reserved On: 10.11.2023

Order Pronounced On: 05.12.2023

Coram:

Ms. Reeta Kohli, Hon'ble Member (Judicial)

Ms. Madhu Sinha, Hon'ble Member(Technical)

Appearances:

For the Petitioner/Operational Creditor: Adv. Iqra Khan

For the Corporate Debtor: Kajol Punjabi

ORDER

Per: Madhu Sinha Member (Technical)

This Company Petition is filed by **MM Aqua Technologies Limited** (hereinafter referred as “**the Petitioner/Operational Creditor**”) on **18.03.2020** seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as “**CIRP**”) against **Clean Flow Cooling Tower Solutions Pvt. Ltd.** (hereinafter called “**Corporate Debtor**”) 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. 21,20,155/- (Principal Amount of Rs. 17,14,593/- plus interest on principal amount of Rs. 4,05,562/- till 15.10.2019).**

Brief Facts and Submission by the Operational Creditor:-

1. The Corporate Debtor engaged the Operational Creditor for delivering materials of requisite specification and quality in furtherance of its business of production of major cooling tower components. The Corporate Debtor raised five Purchase Orders dated 28.11.2016, 13.01.2017, 04.05.2018, 20.08.2018 and 27.11.2018 for supply of various materials.
2. The Operational Creditor raised five Delivery Invoices corresponding to each Purchase Order, two of which were dated 24.01.2017, third being dated 10.08.2018, fourth being dated 22.09.2018 and fifth being dated 28.12.2018. The dates of the aforementioned invoices are the various Dates of Default as well.

The total sum of these Delivery Invoices amounted to Rs. 26,37,676.38/-.

3. It is the case of the Operational Creditor that the Corporate Debtor has made a payment of only Rs. 9,23,083.50 out of the total sum due of Rs. 26,37,676.38/- thereby the balance Principal Amount along with Interest remains due and is therefore claimed by way of this Petition.
4. The Operational Creditor further submitted that the Corporate Debtor had alleged through an email dated 16.10.2018 that 30% of the delivered materials are deformed. The Operational Creditor replied to the Corporate Debtor through an email dated 30.10.2018 that the deformity in the delivered material arose on account of placing the material under direct sunlight at the Corporate Debtor's Site. The Operational Creditor went to the extent of writing an email dated 08.12.2018 wherein it informed the Corporate Debtor to either make the payment or return the materials which were alleged as deformed by the Corporate Debtor. However, the Corporate Debtor did not resort to any option in pursuance of this email dated 08.12.2018 also.
5. Thereafter, the Operational Creditor issued 3 Demand Notices dated 21.01.2019, 22.02.2019 and 27.06.2019 however, the Corporate Debtor still did not pay any heed to any of them.
6. The Operational Creditor was thus compelled to enforce its legal rights and was constrained to issue two Demand Notices dated 07.08.2019 and 24.10.2019 under section 8 in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for the amounts of Rs. 11,34,920/- and Rs. 21,20,155/- respectively.
7. It was only as an afterthought to the Demand Notices sent under the Code that the Corporate Debtor came up with the defense of delay in delivery and liquidated damages being imposed on it by

some third party. The case of the Operational Creditor is that these defenses are only raised with a view to portray a false case of pre-existing dispute whereas in reality the Corporate Debtor has earlier accepted all deliveries and raised no objection at any stage in any manner whatsoever.

8. The Operational Creditor further brought to the notice of this Tribunal that the present Petition has been filed before the issuance of the Notice dated 24.03.2020 by the Ministry of Corporate Affairs, Government of India which raised the Pecuniary Jurisdiction of the National Company Law Tribunal from Rs. 1 Lakh to Rs. 1 Crore and hence this present Petition falls well within the Pecuniary Jurisdiction of this Tribunal.

Submissions by the Corporate Debtor:

9. The Corporate Debtor completely disputes that the total outstanding amount of **Rs. 21,20,155/-** is due and payable.
10. The Corporate Debtor submitted that dismissal of the present Petition finds reason in the settled position of law that separate Purchase Orders cannot be clubbed together to invoke legal relief under Section 9 of the Code. The Operational Creditor in the present case had clubbed five Purchase Orders of different dates together and this fact itself forms reason for dismissal of the present Petition.
11. The Corporate Debtor further submitted that the Delivery Invoice dated 24.01.2017 in relation to two Purchase Orders dated 28.11.2016 and 12.01.2017 is barred by Limitation.
12. It is the case of the Corporate Debtor that as per the terms of the Purchase Order dated 20.08.2018 delivery against the aforementioned Purchase Order was to be made directly to "Bharat Oman Refineries Ltd." (Client of the Corporate Debtor) on

25.08.2018. However, the delivery actually took place on 22.09.2018 which can be established from the Delivery Invoice dated the same. Therefore, the claim of delay in delivery is based on documentary evidence rather than as an afterthought as alleged by the Operational Creditor.

13. The Corporate Debtor further submitted that not only was there a delay in delivery with respect to the abovementioned Purchase Order but also substantial quantity of the material was defective. The Corporate Debtor on receipt of information of the defective materials from Bharat Oman Refineries Ltd. made several telephonic conversations with the Operational Creditor however in vain. Finally, through an email dated 16.10.2018, with all photos of the defective material, the Corporate Debtor requested the Operational Creditor to replace the materials which were defective. The Operational Creditor replied to the abovementioned email vide an email dated 30.10.2018 wherein it stated that placing of the materials under direct sunlight led to its deformation and defect. However, it is the case of the Corporate Debtor that the major defective material was in the middle of the bunch and not on the upper side which ideally should have been the case if placement under direct sunlight would be the reason of defect. It is further case of the Corporate Debtor that email of the Operational Creditor dated 08.12.2018 wherein it informed the Corporate Debtor to either make the payment or return the material which was alleged as deformed by the Corporate Debtor itself substantiates the fact that the Operational Creditor admitted the defect in substantial quantity of material and hence asked the Corporate Debtor to return the same.

14. For the aforementioned reasons of defective material and delay in delivery on the part of the Operational Creditor, the Corporate Debtor had to bear the following costs:-

Serial Number	Particulars of the Cost endured	Amount (Rs.)
1	Amount deducted by Bharat Oman Refineries Ltd. due to delay in delivery	4,25,866/-
2	Cost of New Materials supplied to Bharat Oman Refineries Ltd.	10,90,084/-
3	Cost of Transportation and Handling Charges	48,000/-
	<u>TOTAL</u>	<u>15,63,950/-</u>

15. As a result thereof, the following Invoice/Debit Notes were raised by the Corporate Debtor on the Operational Creditor:-

PO No.	Invoice Date	Invoice/Debit Note No.	Particulars	Invoice Amount (Rs.)
PO/16-17/05-113	27.06.16	1	Spacer for drift eliminator 4000 set	1,22,400

-	24.11.18	DN01	Cost of rejected material	10,19,756
-	02.11.19	DN02	Cost of Material and Transportation	4,73,866
			TOTAL	16,16,022

Thus in all, a clear case of pre-existing dispute forms ground for the rejection of this Petition. The Corporate Debtor had further submitted that the Operational Creditor failed to produce the ledger statement along with the abovementioned debit notes raised by the Corporate Debtor and hence this Petition ought to be dismissed also for suppressing the material facts.

16. It was further submitted by the Corporate Debtor that a full and final amount of Rs. 9,23,083.50/- had been paid by the Corporate Debtor against the Invoice Dated 22.09.2018 which amounted to Rs. 19,42,840.50/- as the balance of Rs. 10,19,756/- had been deducted towards supply of defective material and a Debit Note had been issued to the same effect. It is admitted by the Operational Creditor that the above payment had been received by the it.
17. The total of the five Delivery Invoices amounting to Rs. 26,37,676.38/- out of which only 9,23,083.50/- had actually been paid which leaves a balance of Rs. 17,14,592.88/-. This outstanding balance is scored off to the amount of Rs. 16,16,022/- as per the Debit Notes which leaves a balance of only Rs. 98,570.88/- .

18. The Corporate Debtor submitted that this sum of Rs. 98,570.88/- had been paid by it to the Operational Creditor vide Cheque No. 000193 dated 02.11.19 drawn on Bank of Baroda which the Operational Creditor accepted without raising any objection in any manner whatsoever.
19. The Corporate Debtor finally submitted that it is a solvent company and is capable of discharging its liabilities. It has an annual turnover of Rs. 18 crores and provides employment to 65 people. If it is dragged into frivolous litigation, then many innocent people would be affected.

Findings

1. In order to address the first contention of the Corporate Debtor that various Purchase Orders cannot be clubbed to file a single Petition under Section 9 of the Code, this Bench is of the considered view that a single Petition covering several Purchase Orders of the same Operational Creditor is allowed to be filed as there is nothing in the Code barring the same. This practice of filing a single Petition would in fact have the advantage of reducing multiplicity of litigation. This Bench relies on the judgement of the Hon'ble NCLAT in **International Road Dynamics vs. D.A. Toll Road Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 77 of 2017]** wherein it was held that a single Petition under Section 9 can be filed for the claims arising out of multiple agreements and the same cannot be rejected on this ground. Hence, in view of the above, it can be safely concluded that multiple purchase orders can be clubbed in a single application and the same is maintainable.
2. The second contention of the Corporate Debtor is that the two Delivery Invoices Dated 24.01.2017 are barred by Limitation. This

Bench is consensus ad idem with the Corporate Debtor on this fact as the limitation period with respect to the said invoices expired on 23.01.2020 and the present Petition was filed on 18.03.2020. However, the total monetary value of the materials delivered under the said Invoices amounted to Rs. 1,70,188/- and Rs. 90,366/- respectively. However, the said amounts along with corresponding interest if deducted from the total claim amount would not result in the balance claim amount to become less than the minimum pecuniary jurisdiction of Rs. 1 Lakh (Before issuance of the Notice dated 24.03.2020 by the Ministry of Corporate Affairs, Government of India which raised the Pecuniary Jurisdiction of the National Company Law Tribunal from Rs. 1 Lakh to Rs. 1 Crore) as is applicable to this case. Also, the remaining three Delivery Invoices are not barred by limitation. Therefore, the maintainability of the Petition as a whole, on this ground, cannot be challenged.

3. On close perusal of the Pleadings and after hearing both the parties, and particularly in light of the Purchase Order dated 20.08.2018 wherein it is clearly mentioned that delivery against the aforementioned Purchase Order was to be made on 25.08.2018, yet, the delivery actually took place on 22.09.2018 as is substantiated by the Delivery Invoice of the same date. Thus, the contention of the Corporate Debtor regarding delay in delivery stands established.
4. On further perusal of all the Purchase Orders, it is clearly evident that Post Dated Cheques were to be issued by the Corporate Debtor 30 or 45 days before despatch of each corresponding Purchase Order as the mode of payment. However, the Operational Creditor itself has waived this condition and hence the situation of filing this Petition has arisen. Therefore, it can be seen that the Operational

Creditor itself had been giving waivers to obligations of the Corporate Debtor.

5. On close perusal of the Photographs showing the defective material it is evident that significant quantum of defect lies in the middle of the bunch of materials. The Operational Creditor himself vide the email dated 08.12.2018 has categorically asked the Corporate Debtor to return the goods. Therefore, both these documentary evidences substantiate the fact that defect in material was not caused due to its placement under direct sunlight as contended by the Operational Creditor. The Corporate Debtor was therefore justifying in raising the Debit Notes even before the Demand Notice was served. The Operational Creditor has not raised any objections or queries in any manner whatsoever against the full and final payment of Rs. 98,570.88/-. This Tribunal further relies on the judgement of the Hon'ble NCLAT in **Anshul Vashistha v. M/s Jayhind Steel Traders [Citation]** in which it was held-

“In a case of running account where running accounts are yet to be reconciled and settled an email like 05.02.2018 sent before Section 8 demand notice dated 13.06.2018 asking Operational Creditor to take back rejected material reflects pre-existing dispute in such case Adjudicating Authority cannot sit down to settle the account and calculate the Debt dues”.

In light of the above facts and circumstances of the case and the settled law the existence of pre-existing dispute is established.

6. Reliance is also placed on the judgement of the Hon'ble Supreme Court in **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 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.

7. In conclusion, therefore, the present CP No. 861/MB/2022 is **rejected**.

SD/-

MADHU SINHA
MEMBER (TECHNICAL)

SD/-

REETA KOHLI
MEMBER (JUDICIAL)