

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

C.P. No.2850/I&BP/2018

Under section 8 &9 of the IBC, 2016

In the matter of

Endo Lighting Accessories (India) Pvt.
Ltd.,

Survey No.131/1B/3/2, 1st Floor, Akshay
Electronics, Ram Indu Park Lane, Baner-
Mhalunge Road, Baner, Pune-411045

....Petitioner

v/s.

Shimera Project Lighting Private Limited,
Unit No.5, Ground Floor, Raghuvanshi
Mansion, Raghuvanshi Mills Compound,
S.B. Marg, Lower Parel (West), Mumbai-
400013

....Respondent

Order delivered on: 11.03.2019

Coram:

Hon'ble Bhaskara Pantula Mohan, Member (Judicial)

Hon'ble V. Nallasenapathy, Member (Technical)

For the Petitioner: Mr. ShilpanGaonkar, Advocate.

For the Respondent: Mrs. Masum Bhanushali, Advocate.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. This Company Petition is filed by Endo Lighting Accessories (India) Pvt. Ltd., (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Shimera Project Lighting Private Limited (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default on 21.10.2013 in making payment to the extent of Rs. 1,48,02,824/- which is inclusive of interest of Rs. 74,91,784/- calculated @ 18% p.a. on the delayed payment of the principal outstanding of Rs. 73,11,040/- by invoking the provisions of Sections 8 & 9 of I & B Code (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (AAA) Rules, 2016.

2. The Petition reveals that the Petitioner supplied lighting fixtures and equipment to the Corporate Debtor based on the purchase orders issued by the Corporate Debtor and raised invoices. The petitioner submits that they have issued demand notice on 20.02.2018 under section 8 of the Code, through an advocate, demanding a sum of Rs. 1,41,92,302/- which is inclusive of interest @ 24% p.a.. The petitioner also enclosed the reply sent by the advocate of the Corporate Debtor dated 20.03.2018 for the demand notice issued by the petitioner. In the said reply the Corporate Debtor denied the liability on various grounds and also stated that the petitioner is liable to pay a sum of Rs.45 lacs to the Corporate Debtor.

3. The petitioner filed reply to the petition and raised the following issues;

- (a) The petitioner has not approached this Tribunal with clean hands.
- (b) The petitioner is guilty of suppressio veri and suggestio falsi.
- (c) The claim of the petitioner is on the basis of the purchase order for the year 2013 and the same is barred by limitation.
- (d) Previously the petitioner had issued demand notice on 18.05.2016 to the Corporate Debtor demanding a sum of Rs. 1,15,63,279/- and the Corporate Debtor replied to the same on 04.07.2016 by placing on record several facts suppressed by the petitioner.
- (e) The Corporate Debtor further submitted in the reply to this petition as below;

"it was suppressed that an agreement was arrived at between the parties in a meeting held on 29th of December, 2013, which was recorded in the minutes of meeting that the Corporate Debtor would give a list of 'Key Accounts' which would be binding upon the Operational Creditor and no other channel partner would be allowed to engage with a Key Accounts. The Corporate Debtor would also provide a list of competitors which the Operational Creditors could not appoint as a channel partner. It was agreed that any business solicited would be through the Corporate Debtor. The Operational Creditor could engage with any account/customer who was beyond the purview of the Corporate Debtor. The Operational Creditor could appoint other channel partners only if they operated beyond the Key Accounts of the Corporate Debtor as also beyond the segments handled by the Corporate Debtor. This agreement was recorded in

an email dated 5th January, 2014 addressed by the Operational Creditor to the Corporate Debtor. A copy of the letter dated 18th May, 2016 from the Operational Creditor to the Corporate Debtor is marked Exhibit 1. A copy of the reply by the advocate of the Corporate Debtor dated 4th July, 2016 is marked Exhibit 2. A copy of the e-mail dated 5th January, 2014 is marked Exhibit 3.

In breach of the agreement the Operational Creditor approached some of the Corporate Debtor's Key Accounts without their knowledge. This was despite the Corporate Debtor having shared the list of their Key Accounts with good spirit and intent so as to avoid conflict of communication and for proper message delivery to the high profile specifiers/ architects, to show the Key Accounts that both the Operational Creditor and the Corporate Debtor work as one team. The Corporate Debtor came to know of the breach by the Operational Creditor in February 2014. Thus by its e-mail dated 26th February, 2014 addressed to the Operational Creditor, the Corporate Debtor placed on record the breach by the Operational Creditor, and brought to their notice that the Key Accounts which were being serviced by and were associated with the Corporate Debtor for last 50 years with full knowledge of Endo Products and Services. These Key Accounts had informed the Corporate Debtor of the requests made by the Operational Creditor for meetings without keeping the Corporate Debtor in the loop. These Key Accounts had been asking for clarification in the stand as to why they have been approached separately without the Corporate Debtor being in the loop. Questions were raised as to whether the parties were no more together as a team. This had caused damage to the image of the Corporate Debtor. A copy of the e-mail dated 26th February, 2014 addressed by the Corporate Debtor is marked as Exhibit 4.

By an e-mail dated 20th February, 2014 addressed by the Operational Creditor it was stated that the purported policy had been shared with the Corporate Debtor. The Corporate Debtor by e-mail dated 3rd March, 2014 sought an explanation/ clarification on the policy referred by the Operational Creditor in its e-mail dated 28th February, 2014. It was also pointed out there was no policy shared with the Corporate Debtor regarding approaching key clients accounts without keeping the Corporate Debtor in the loop. A copy of the email dated 28th February, 2014 from the Operational

Creditor along with a copy of the e-mail dated 3rd March, 2014 by the Corporate Debtor is marked Exhibit 5.

The Corporate Debtor by e-mail dated 12th May, 2014 sought registration of the projects mentioned therein. There was no response to the said e-mail. Vide another e-mail dated 18th August, 2014 addressed by the Corporate Debtor to the Operational Creditor, the Operational Creditor was pointed out that their team chosen to stay away from basic business principle of supporting the Corporate Debtor as their dealer. It was pointed out that despite numerous written communications and assurances the Corporate Debtor had not received any concrete reply on registration of projects. It was pointed out that the Operational Creditor was damaging the Corporate Debtor's business and market standing. A copy of the e-mails dated 21st May, 2014 and two e-mails dated 18th August, 2014 from the Corporate Debtor are marked Exhibit 6 hereto.

The Corporate Debtor had by its Advocates letter dated 4th July, 2016 showed his willingness to deliver the sample stock to the Operational Creditor and failure to inform the place of delivery within 7 days, would be taken as due delivery of the sample stock of the Operational Creditor. By the said letter it was denied that any amounts were due or payable to the Operational Creditor. By the said letter the Corporate Debtor demanded the sum of Rs. 45,00,000 (Rupees Forty-Five Lakh only) towards the value of the stock being returned as set out in Para 21 of the said letter".

4. The first demand notice dated 18.05.2016 issued by the petitioner and the reply by the Corporate Debtor dated 04.07.2016 were annexed to the reply filed by the Corporate Debtor. Both these letters were not annexed to the petition filed by the petitioner. The said reply clearly reveals that there were so many disputes raised by the Corporate Debtor as early as on 4th July, 2016 itself which is clearly before the issue of the recent demand notice dated 20.02.2018 based on which this Petition is filed. It is necessary to refer some of the disputes raised by the Corporate Debtor in the reply dated 04.07.2016 which are as below;

"1. Our clients have placed in our hands, your letter dated 18th May, 2016 (without Annexure-1) addressed by you on behalf of your client, Endo Lighting Accessories (I) Pvt. Ltd. (hereinafter referred to as you

letter under reply” for short), received by our clients on 26th May, 2016, with instructions to reply thereto as follows.

2. At the outset, our clients deny each and every statement, claim, averment, allegation and submission contained in your letter under reply, which is in any manner, contrary to and or inconsistent with what is stated herein, as if the same were set out herein verbatim and traversed seriatim. Nothing contained in your letter under reply is or be construed to have been admitted by our clients for want of specific traverse or otherwise howsoever.

3.

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8. It is thus evident and apparent that your client had in categorical terms had agreed, inter alia, that:

(a) Your client shall not deal with any of the Key Accounts of our client, without our clients involvement and knowledge;

(b) Your client shall appoint or engage with any of our clients’ competitors in any manner whatsoever and any business solicited shall only be through our client, Shimera Project Lighting Pvt. Ltd.;

(c) Your client shall provide continuous Project Protection to our client and shall proactively extend full support and co-operation in servicing such projects;

(d) Your client shall work with our client as a Team to help service the existing business as also to generate additional business. This includes and applied to the designated segments as also to enquiries which overlap the designated segments, and on which our respective clients were to jointly work as a Team.

9. Pursuant to the Agreement as aforesaid, our clients did hand over to your client, list of our clients’ Key Accounts, being serviced by our client. The said Key Accounts were fully noted by your client’s representative in the said meeting and had also noted our client’s involvement in the said Key Accounts.

10. In spite of the aforesaid and in clear breach of the Agreement between the parties, your client directly approached some of our client’s Key Accounts, without our client’s knowledge, despite your client’s Sale Team, having been jointly working with our clients on those Key Accounts. This was despite our clients having shared list of our clients’ Key Accounts with our client, with good spirit and intent, so

as to avoid conflict of communication and for proper message delivery through our clients' channel to such sensitive and high profile specifiers/ Architects (Accounts), so as to show the Key Accounts that our respective clients work and deal as one team. Our clients came to know of this fact in or about February, 2014. Our client thus vide its email dated 26th February, 2014, addressed to your client, placed on record, inter alia, the aforesaid breach by our client and also brought to your client's managements notice the fact that these Key Accounts were being serviced by and were associated with our clients for last 50 years with full knowledge of Endo Products and Services. Our client further pointed out to your client's management that our clients had invested on foreign trips and business development on these Key Accounts, keeping in mind single contact need. In view of your client's Sales Team having approached those Key Accounts directly, in breach of the Agreement, as aforesaid, our clients had been receiving phonecalls from these Key Accounts, asking for the reasons for sending them meeting requests/ meeting them, without keeping our clients in the loop. These Key Accounts had been asking clarification on the stand, as to why they were being approached separately by your client, without our clients in the loop and had asked if our respective by your clients were separate and no more together has a team. It was further pointed out that this was causing severe damage to the image and name of our respective clients in the market and was spreading wrong message / creating false perception of rift between our respective clients. Our clients also placed on record that when questioned on the aforesaid, your client's sales team falsely denied having approached our clients Key Accounts. The management of your client was thus called upon to explain the aforesaid conduct of your clients sales team indirectly approaching our clients Key Accounts.,----

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17. Our clients have instructed us to state that despite the aforesaid, there has been no reply/ response received by our clients from your client till date on any of the aforesaid issues viz.;

- (i) the issue of your client, through its local team, directly approaching and dealing with our clients Key*

Accounts behind our clients back in contravention of the agreement arrived at between our respective clients;

(ii) your clients local team spreading rumors of rift between our respective clients;

(iii) one of your client's local team member approaching our client's loyal customers and insisting that they pulled our clients margin in bargain;

(iv) your clients engaging with an appointing as your client's dealers, the dealers which were engaged and appointed by our clients;

(v) complete non cooperation and rather no response at all in the matter of registration of projects and support therefore;

(vi) No business development support; and

(vii) No response to the request for taking back the stocks carried by our clients by providing due credit to our clients.

18. Our clients have instructed us to state that your client is directly approaching and dealing with her clients Key Accounts in clear breach of the agreement between our respective clients has caused to our clients severe loss of business and your client is bound and liable to compensate our clients for the said loss of business. Our clients verily believe that your client has unjustly enriched itself at the cost of our client's business. Our clients are entitled to a complete and true disclosure of the profit made by your client as aforesaid. Our clients shall shortly quantify these amounts to be claimed and recovered from your client.

19. -----

20. Our clients have further instructed us to state that your client has also breached the agreement between the parties by refusing to extend co-operation and business support to our clients, as dealers of your client. Our clients has on the strength of the covenant and assurances by your client that your client would extend full co-operation and business support on first priority basis, procured several orders from our clients customers so also from the market. However, on account of the complete non-cooperation not only in extending business support but also by failing to (rather abstaining from) even register the projects and to acknowledge business support to our

clients, our clients in spite of having put in so much of effort, suffered business loss as several of the orders and projects procured by our clients were lost to other parties. Our clients have on account thereof suffered a business loss which our clients are entitled to claim and recover from your client and your client is bound and liable to pay our client. Our clients shall shortly quantify the amount to be claimed and recover from your client.

5. From the above it is very clear that there is an existence of dispute as early as on 04.07.2016 itself, before the issue of demand notice under the Code.
6. The Hon'ble Supreme Court in the case of Mobilox Innovations Pvt. Ltd. v/s. Kirusa Software (P) Limited- 2017 (SCC Online SC 1154) held as below:-
"40..... Therefore, all that the adjudicating authority is 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. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application".
7. When the law laid down by the Hon'ble Supreme Court in the above case is applied to the facts of the present case it is established that there is a clear dispute relating to a breach of representation or warranty as provided u/s 5(6)(c) of the Code.
8. Further, the Corporate Debtor submits that last payment made by the Corporate Debtor was on 26.03.2014 and the present petition was filed on 27.07.2018 and hence the claim is barred by limitation. The Counsel for the Petitioner submits that since the Corporate Debtor impliedly accepted the liability on 04.07.2016, in the reply through advocate by saying that "...Our client state that as per accounts maintained by our clients, after set-off, a sum of Rs. 45 lacs is to be received by our clients from your client...", the claim is not time barred and the same is an acknowledgement of liability under Section 19 of the Limitation Act, 1963.

In support of his argument he had relied on the judgments of the Hon'ble Madras High Court in the case of *Bharat Heavy Electricals Limited v. Dowel Erectors* (MANU/TN/2424/2004) and *Sivakasi Match Exporting Co. V. Ramanlal Mohanlal Bros.* (MANU/TN/0139/1963). The contention of the Petitioner is correct and the debt is not time barred. However, in view of the finding that there is an existence of dispute, the Petition is liable to be dismissed.

9. In view of the above discussions, the petition is dismissed with liberty to the Petitioner to proceed in accordance with law. No cost.

SD/-

V. Nallasenapathy
Member (Technical)

SD/-

Bhaskara Pantula Mohan
Member (Judicial)