

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

CP(IB) No. 36 /KB/2019

In the matter of:

Under section 9 of the Insolvency and Bankruptcy Code, 2016 read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

And

In the matter of:

Chhotaria Exim Private Limited, a company incorporated under the Companies Act, 1956 and being a Company within the meaning of the Companies Act, 1956, and being a company under the Companies Act, 2013, having Corporate Identification No- U51909WB1994PTC064574 and its registered office at 40, Girish Park (North) 1st Floor Kolkata-700006, in the State of West Bengal.

.....Operational Creditor

-Versus-

A.K. Hirise Private Limited, a company incorporated under the Companies Act, 1956 and being a company under the Companies Act, 2013, having Corporate Identification No- U70101WB2007PTC117947 and its registered office at A/08/05 Salap More, Howrah Amta Road & Bombay Road Crossing Howrah - 711403, in the State of West Bengal.

.... Corporate Debtor

Date of Hearing :25th April 2022

Date of pronouncing the order: 20th May 2022

Coram:

Shri Rohit Kapoor, Member(Judicial)

Shri Harish Chander Suri, Member(Technical)

Appearances (via video conferencing):

For Operational Creditor : Mr. Rahul Singh, Advocate

For Corporate Debtor : Mr. Shounak Mukhopadhyay, Advocate
Mr. Kallol Saha, Advocate

ORDER

Rohit Kapoor, Member (Judicial):

1. This Court convened through video conferencing.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) by **Chhotaria Exim Private Limited (Operational Creditor)**, seeking to initiate Corporate Insolvency Resolution Process (“CIRP”) against **A.K. Hirise Private Limited (“Corporate Debtor”)**.
3. The case of the Operational Creditor is that it had supplied the Corporate Debtor with goods being TMT Bars, MS Plates and Joist against invoices dated 1.03.2016, 13.02.2018 and 05.05.2018. The Corporate Debtor had made partial payments in respect of the said invoices but has subsequently failed to clear the entire dues owed by it to the Operational Creditor for the supply of the said goods.
4. The total amount claimed by the Operational Creditor as on 10.10.2018 is ₹16,76,249.58 inclusive of interest @18% per annum. The date of default as mentioned in the Petition is 31.03.2018. According to the Operational Creditor, the Corporate Debtor had accepted the goods without any complaint or demur and it is obliged to pay the balance amount of bills issued to them with interest, for loss of business.
5. On 10.10.2018, the Operational Creditor had sent a demand notice under section 8 of IBC to the Corporate Debtor. The same was dispatched on **13.10.2018** and is annexed at Page no. 12 of Application.
6. A reply to the said demand notice was sent by Corporate Debtor to Operational Creditor on **22.10.2018** wherein the Corporate Debtor raised certain disputes regarding the signatures of the person authorised to issue the notice and also trade discounts not forming part of the value of goods does not contain any signatures of the person authorised.
7. Afterwards, clarifications were issued by the Operational Creditor via their amended demand notice. On receipt of the same, the Corporate Debtor issued a reply on **6.11.2018** wherein the Corporate Debtor disputed the dues. The said reply is annexed at page 53 of the application.

8. The Operational Creditor has filed an affidavit under Section 9 3(b) of the Code wherein the Operational Creditor has claimed that it has not received any reply/dispute raised by the corporate debtor with regard to the operational debt as claimed by the operational creditor, pursuant to section 9(3)(b) of IBC.
9. In reply affidavit filed by the Corporate Debtor, at Page 4 para (e), mentions the existence of pre-existing disputes. Going by the Reply Affidavit, the Corporate Debtor had written to the Operational Creditor on 11.5.2018 and 28.05.2018 indicating that the goods are defective and the same should be lifted.
10. We have heard the Ld. Counsel for the parties, perused the record and pleadings.
11. While dealing with the aspect of Pre-existing disputes, our attention has been drawn to letters dated 11.05.2018 and 28-11-2018, extracts of which is reproduced hereinunder:

“Please refer to the discussions the undersigned had with you on various occasions when you were informed that the quality of materials supplied vide Bill No. CUN/061/17-18 dated 13-02-2018, Bill No. CUN/04/2018-19 dated 12-04-2018 are not the standard which were supposed to be supplied by law.

Since the materials have no utility, the same are treated as rejected and you are requested to lift the materials immediately from our site office at Hemnagar, Hingalgang, 24 parganas (North).”

Extract of the letter dated 28.05.2018 is reproduced hereinunder:

“ Please refer to our earlier letter dated 11.05.2018 Till date you have not lifted the materials and as you are aware that we were unable to complete the project due to your supply of defective materials and as such we had to ask for extension of time for completion of the project from the appropriate government authorities.”

12. In the rejoinder filed by the Operational Creditor at page 4 para 6, it pleaded that the Operational Creditor never received the said letter dated 11.05.2018

and there is no proof to show that such letter was received on behalf of the Operational Creditor. It has been further pleaded that the signature of receipt on the aforementioned letter does not match to any of the authorized persons of the Operational Creditor.

13. However, it is significant to note that in the rejoinder, the Operational Creditor has denied receiving the letter dated 11.05.2018 but the receipt of letter dated 28.05.2018 has not been denied. This letter dated 28.05.2018 refers to the earlier letter dated 11.05.2018 and there is a re-iteration of the grievance of the Corporate Debtor regarding the quality of the goods supplied. As such, in both the letters, the Corporate Debtor has raised its dispute regarding the quality of materials and in view of which it was unable to complete the project.
14. Even in the reply dated 6.11.2018, as sent by the Corporate Debtor to the demand notice under section 8, disputes regarding the missing signature of the authorized person on the tax invoices and incomplete Form 3 have been raised.
15. In the matter of **Mobilox Innovations Private Limited vs. Kirusa Software Private Limited** [Civil Appeal No. 9405 of 2017], the Hon'ble Supreme Court has held the following:

“40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application. Under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. 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 defence which is

mere bluster. However, in doing so, the Court does not need to be satisfied that the defence 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.”

16. We are satisfied from the facts and record before us that there exists a pre-existing dispute which is not based on merely feeble legal argument or assertion of fact unsupported by evidence. The dispute of quality of goods was raised by the Corporate Debtor in its communications dated 11.05.2018 and 28.05.2018 and these were raised before the issuance of the demand notice by the Operational Creditor.
17. Also, the failure of the Corporate Debtor to mention these disputes in their reply to the demand notice should not bar them from bringing forth material facts and disputes. In this regard, we would like to rely on the decision taken by the Hon'ble NCLAT in the matter of **M/s. Brand Realty Services Ltd. Vs. M/s. Sir John Bakeries India Pvt. Ltd.** [Company Appeal (AT) (Insolvency) No. 958 of 2020] wherein the following was held:

“[...] We thus are of the considered opinion that mere fact that Reply to notice under Section 8 (1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there are pre-existing dispute which may lead to the rejection of Section 9 application. In the above context, we may refer to Judgement of this Tribunal in “Neeraj Jain Vs. Cloudwalker Streaming Technologies Private Limited” (Company Appeal (AT) Ins. No. 1354 of 2019) decided on 24th February, 2020 in paragraph 50 following observations have been made by this Tribunal: “...Even otherwise, mere failure to reply to the demand notice does not extinguish the rights of the Operational Creditor to show the existence of a pre-existing dispute...” (para 13)

18. In light of the above facts and circumstances and the law laid down in this regard, it is clear that there exists a pre-existing dispute. Hence, we are of the view that this petition is not maintainable under IBC and hence reject the Company Petition on the grounds stated above. Consequently, **C.P.(IB) No. 36/KB/2019** shall stand rejected.
19. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
20. Certified Copy of this order may be issues, if applied for, upon compliance of all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 20th day of May, 2022

SM[LRA]