

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD BENCH

COURT - 1

ITEM No. 141

CP (IB) No. 423/NCLT/AHM/2019

Order under Sections 9 of Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF:

Bnk Securities Pvt Ltd.

....Operational Creditor

Versus

Sebacic India Limited

....Corporate Debtor

Order delivered on: 11/01/2023

Coram:

Dr. Madan B. Gosavi, Hon'ble Member(J)

Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :

ORDER

The case is fixed for the pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-SD-

**KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)**

-SD-

**DR. MADAN B GOSAVI
MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1**

CP (IB) No. 423/NCLT/AHM/2019

(A petition filed under Section 9 of Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process)

In the matter of:

BNK Securities Private Limited

CIN – U67120WB1995PTC071182

Having Registered Office at:

2 Palm Avenue, Ground Floor,
Kolkata 700019

....Operational Creditor

Versus

Sebacic India Limited

CIN – U24100GH2007PLC051697

Having Registered Office at:

301 World Trade Centre,
Sayajigunj, Vadodara 390005

.... Corporate Debtor

Order Delivered on: 11:01:2023

Coram: Dr. Madan B.Gosavi, Member (Judicial)

Mr. Kaushalendra Kumar Singh, Member (Technical)

Appearance:

Learned Counsel, Mr. Arjun Sheth, appeared for the Operational Creditor. Learned Counsel, Mr. Nandish Chudgar, appeared for the Corporate Debtor.

ORDER

1. This application has been filed by BNK Securities Private Limited, claiming to be an Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **IBC, 2016**) for initiation of Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor namely Sebacic India Limited.

2. Registered office of the Corporate Debtor is situated in Vadodara, in the state of Gujarat and, therefore, this Tribunal has jurisdiction to entertain and try this application.

3. The amount of debt claimed in default is Rs. 26,55,000/- (Rupees Twenty Six Lakhs and Fifty- Five Thousand only) and the date of default is 29.12.2018. The present application is filed on 19.06.2019, which is within limitation and not barred by limitation.

4. The facts, in brief, as stated by the applicant are that in 2018 the Corporate Debtor contacted Mr. Alkesh Goradia (Operational Creditor) for the purpose of assigning the task of identifying a suitable investor for the Corporate Debtor. In March 2018, the Operational Creditor, with the help of an independent Financial Consultant, contacted one Mr Sridhar Ramachandran (Chief Investment Officer, IndiaNivesh Renaissance Fund ("INRF")), to explore their interest as a potential investor in the Corporate Debtor. Then up until May 2018, the Operational Creditor initiated a dialogue between itself, the representatives of

INRF and an existing investor (Corporate Debtor through its Nominee Director, Mr. Ravi Lekhrajani also a representative of Wayzata III Indian Ocean Limited) for the Corporate Debtor for discussing the potential investment in the Corporate Debtor and the information pertaining to the same was shared.

5. Thereafter, a meeting was held in March 2018 in the office of INRF which was attended by the Operational Creditor, the Corporate Debtor, Mr Prodyut Bhattacharya and Mr Sridhar Ramachandran of INRF to discuss the proposed transaction.

6. The Operational Creditor submitted that it was decided by and between Corporate Debtor and the Operational Creditor, that though a mandate was to be issued by the Corporate Debtor to the Operational Creditor appointing the Operational Creditor as Financial Consultants for the proposed transaction, the same would be issued by the Corporate Debtor, if material progress was made in the evaluation of the data and possibility of the transaction achieving closure by way of issue of a Draft Term Sheet being issued by INRF.

7. The Operational Creditor further submitted that the Operational Creditor had initiated dialogues through e-mail and other modes communication between the representatives of INRF, wherein the aforementioned potential investment in the Corporate Debtor was discussed and information pertaining to the same was shared. Based of the data shared and information exchanged facilitated by the Operational Creditor, INRF offered to invest in the Corporate Debtor on certain terms as more particularly set

out in the Draft Term Sheet dated 9 May 2018; A copy of the e-mail communications in March and April 2018 between inter alia the Operational Creditor, INRF and Corporate Debtor have been annexed to the Application.

8. On 15 May, 2018, the Corporate Debtor issued an engagement letter wherein inter alia it appointed the Operational Creditor as its "Financial Consultant" for the purpose of arranging private equity funds as part of its restructuring business. Vide the Engagement Letter, the Petitioner was entitled to a "Success Fee" which was valued at 2% of the "transaction value", ie, the amount to be invested by the proposed investor.

9. Further, an Investment Agreement ("the said Agreement") was entered into between inter alia INRF, the Corporate Debtor wherein inter alia INRF had agreed to invest a sum of Rs. 33,00,00,000/- (Rupees Thirty-Three Crores Only) against 3,30,00,000/- (Three Crores and Thirty Lakhs Only) Compulsory Convertible Preference Shares ("CCPS") of the Corporate Debtor wherein the face-value of each CCPS was Rs. 10/- (Rupees Ten Only); dated 21 December 2018.

10. The subscription and allotment of the "Investors Shares (First Tranche)" (as defined vide Clause 1.1 of the said Agreement) took place. Hence, an amount of Rs. 11,25,00,000/- (Rupees Eleven Crores and Twenty-Five Lakhs Only) was invested by INRF against 1,12,50,000/- (One Crore Twelve Lakhs and Fifty Thousand Only) CCPS of the Respondent; dated 28 December 2018, thereafter, on 2 January 2019, the Operational Creditor

issued the Invoice bearing no MBD2 ("the said Invoice") upon the Corporate Debtor wherein the Operational Creditor sought payment of its "Success Fee" amounting to Rs. 26,55,000/- (Rupees Twenty-Six Lakhs and Fifty-Five Thousand Only) being 2% of the amount invested by INRF, which is in accordance with inter alia the said Engagement Letter, A copy of the said Invoice has been annexed to the said Demand Notice in the Application.

11. The Operational Creditor sent a Demand Notice under Section 8(1) of the Insolvency and Bankruptcy Code, 2016. A copy of the Demand Notice dated 18.02.2019 is annexed with the application. The Corporate Debtor has replied with a letter dated 28.02.2019 to the said Demand Notice under Section 8. The Operational Creditor further submitted that the default in payment occurred on 29.12.2018 when the amount claimed to be in default was due and payable on 28.12.2018.

12. The Corporate Debtor appeared before this Adjudicating Authority and filed its reply to the present petition, and denied the averments made by the Operational Creditor. The Corporate Debtor has submitted the following points:

- That there is pre-existing dispute with respect to scope of work to be performed and services to be provide to the Corporate Debtor was communicated to the Petitioner vide the Dispute Letter dated January 12, 2019 and therefore was within the petitioner's knowledge even before issuance of Demand notice dated February 18, 2019.

- That the petitioner was never involved in assisting the Corporate Debtor so as to work out the valuation/ pricing of corporate Debtor's Company, neither arranged meeting with the promoters of Corporate Debtor except the introductory/ preliminary meeting, failed to Co- ordinate the due diligence process, failed to provide inputs on the proposed structuring mechanism and never assisted in preparing Documentation for transaction.
- Petitioner has neither shown that it has provided services falling squarely within its scope of work defined under the Engagement Letter nor it has responded to the Corporate Debtor's Dispute Letter. The time frame for petitioner's appointment was never renewed due to such failure of the Petitioner to provide services as per the Engagement Letter.
- As the claim of debt has been disputed, the question of default doesn't arise and the Petitioner has completely disregarded the terms of Engagement Letter.

13. Heard submissions and perused the documents placed on record. In order to understand whether the dispute raised by the Corporate Debtor is genuine or can be categorised as moonshine, it is necessary to read the meaning of dispute as per the Code:

Section 5(6): dispute includes a suit or proceeding relating to-

- a) The existence of the amount of debt;*
- b) The quality of goods and services; or*
- c) The breach of a representation or warranty;*

14. Further the Hon'ble Supreme Court in the matter of "Mobilox Innovative Private Limited vs. Kirusa Software Private Limited", held as follows:

"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."

15. We heard both the learned counsels and gone through the records, we found that the Corporate Debtor has produced a dispute letter where the Corporate Debtor has specified dissatisfaction from the work of Operational Creditor and has also not renewed the Engagement Letter of Operational Creditor

stating that the Corporate Debtor was not involved in assisting, valuation/Pricing for the Corporate Debtor, neither arranged any meeting with promoters of the Company apart from introducing and preliminary meeting, the Operational Creditor failed to Co-ordinate the due diligence process, no inputs on the proposed structuring mechanism and never assisted in preparing documentation for transaction.

16. In our considered opinion, such a dispute cannot be resolved in an inquiry of this application under Section 9 of the IBC. In order to ascertain the correctness of the work done by the Operational Creditor and the Corporate Debtor respectively, there requires a detailed hearing for which the parties have to approach the proper Forum.

17. This Adjudicating Authority, sitting in a limited jurisdiction, cannot dwell upon the issue as to whose account is accurate and correct. There appears a serious dispute about the actual amount payable by the Corporate Debtor to the Operational Creditor. In fact, the Corporate Debtor contends that nothing is due and payable now since there was no renewal/extension of engagement letter. The Corporate Debtor informed this fact in its reply to the notice.

18. We note that there is a serious dispute about the Operational Creditor's claim which was raised even prior to the service of Demand Notice by the Corporate Debtor. It appears that Operational Creditor is trying to initiate CIRP against the Corporate Debtor by suppressing the material fact of dispute

existing prior to Demand Notice. Considering all the facts and circumstances of the case, we hold that application is liable to be dismissed due to Pre Existing Dispute in our considered view. Therefore, without going into further details, we reject this application, bearing CP (IB) No. 423/NCLT/AHM/2019 under section 9 Application and the Operational Creditor may approach the correct forum for addressing the grievances.

19. Registry is directed to produce the same to the Bench to show the compliance of our order. In the result, the application filed under Section 9 stands dismissed and disposed of in terms indicated above.

20. Urgent certified copy of this order, if applied for, to be issued to all concerned parties upon compliance with all requisite formalities

-SD-
KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

-SD-
DR. MADAN B GOSAVI
MEMBER (JUDICIAL)

Divya/LRA