

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

CP (IB) No.1110/MB-V/2021

Under Section 9 of the I&B Code, 2016

In the matter of:

Sh. Ramesh Naidu

...Operational Creditors/Applicant

V/s

Sahara Hospitality Limited

...Corporate Debtor/Respondent

Order Dated:02.11.2023

Coram:

Ms. Reeta Kohli Hon'ble Member (Judicial)

Ms. Madhu Sinha Hon'ble Member (Technical)

Appearances:

For the Operational Creditor : Adv. Rajeev Waglay

For the Corporate Debtor : Mr. Sandeep Bajaj a/w. Ms. Ambrin Khan,
(Adv)

ORDER

Per: Reeta Kohli Member (Judicial)

1. This is an application bearing C.P. (IB) No. 1110/MB/C-V/2021 filed by **Sh. Ramesh Naidu**, the Operational Creditors/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against **Sahara Hospitality Limited**, Corporate Debtor.

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2. The Operational Creditor is a proprietor of Greencare. Application is filed by Operational Creditors claiming total outstanding amount of Rs.1,49,19,588/- inclusive of an interest @ 18% p.a. effective from 1/04/2018.
 3. It is submitted that, the Operational Creditor Greencare is engaged in the business of maintenance work for the fish tanks. The Operational Creditor has entered into a Work order given by Corporate Debtor bearing no. WO/H-225/ENG/2015 dated 09.03.2015. Thereafter the Operational Creditor has raised several invoices, dated 30.06.2017, 30.07.2017, 20.12.2017, 31.12.2017 and 31.03.2018 bearing invoice nos. GC/03/17-18, GC/GST/1/17-18, GC/GST/6/17-18, GC/GST/7/17/17-18 and GC/GST/8/17-18 respectively to the Corporate Debtor amounting to Rs. 1,18,83,495/-.
 4. The case of the Operational Creditor is that since the Corporate Debtor has failed to make the payments with respect to above stated invoices, various emails/reminders were sent by the Operational Creditor to the Corporate Debtor. The Corporate Debtor failed to respond to any of those and neither made any payment to Operational Creditor.
 5. Pursuant to above, the Operational Creditor issued a Demand Notice dated 08.10.2021 to the Corporate Debtor under Section 8 of IBC (Annexure- I) in Form 3 for a sum of Rs. 1,49,19,588/- payable within 10 days from the date of receipt of the Notice. However, the Corporate Debtor neither made any payment nor responded to the said demand notice. Hence the Petition.

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6. In response to the above stated, the case of the Corporate Debtor is that the payment of Operational Creditor whatsoever has been held on account of insufficiency in the services having been provided by him. He submitted that Operational Creditor has miserably failed to comply with the SOP issued against the work order dated 09.03.2015 wherein it was categorically stated that the Operational Creditor has to ensure a minimum of 500 fishes to be maintained in the aquarium, in addition to various other clauses. The Corporate Debtor submitted that on account of inadequacy of services rendered by the Operational Creditor, the Corporate Debtor was left with no other option but to get the deficiencies/defects removed by engaging another party i.e. M/s Utkarsh Fisheries Limited, after the expiry of work contract period with the Operational Creditor. The Corporate Debtor referred to the letter dated 21.03.2019 sent to him by the new vendor, wherein various issues were raised with respect to the non-maintenance of the aquarium. The Corporate Debtor also relied upon the documents placed on record, so as to substantiate that there has been a constant decline in the number of fishes maintained in the aquarium by the Operational Creditor over a period of time. A reference by the Corporate Debtor was made to email dated 03.01.2017 wherein the fish inventory was stated to be 329 which ultimately declined to 54 fishes as mentioned in the email dated 28.08.2017. It also stated that 21 fishes were kept in quarantine. While responding to the contentions of the Operational Creditor, the Corporate Debtor further submitted that even though the Operational Creditor was categorically informed about the insufficiency of services on his part, but rather than removing the above stated insufficiency in services the Operational Creditor conveyed to the Corporate Debtor

vide the email dated 26.04.2018 that they would be taking the legal way to recover the due.

7. Subsequently, after a delay of more than 3 years the Operational Creditor sent the demand notice dated 01.12.2018 demanding unsubstantiated, unreasonable and illogical amount of Rs. 1,49,19,588/- along with interest @ 18% from 01.04.2018 without revealing the dispute having been raised by the Corporate Debtor with respect to the quality of services rendered by the Operational Creditor.
8. Subsequent to the said Demand Notice dated 01.12.2018 (Annexure 10), The Operational Creditor filed a Company Petition bearing No. CP (IB) No. 4010 of 2019 Greencare Vs. Sahara Hospitality Limited in this Tribunal court II, Mumbai Bench. The said Company Petition was dismissed by this Tribunal vide order dated 06.08.2021 (Annexure R-9).
9. Now the Operational Creditor has issued a second demand notice dated 08.10.2021 in which there is no reference given about the dispute between the parties and or dismissal of the previous petition.
10. Thus, after having heard both the parties and perusal of the documents on record, it is evident that the Operational Creditor has made an attempt to mislead the Hon'ble Tribunal by withholding the relevant and necessary facts from this Tribunal. Therefore, on this ground itself the petition deserves to be dismissed. The Operational Creditor has not come to the Court with clean hands and has made an attempt to mislead the Court by withholding the necessary facts from the Hon'ble Court.

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11. The Corporate Debtor also referred to the email dated 11.05.2018, wherein the Operational Creditor has requested the Corporate Debtor to release an amount of Rs. 84,93,688/- remaining after deduction of Rs. 64,25,900/- from the total amount of Rs. 1,49,19,588 outstanding payable by the Corporate Debtor. Thus, Operational Creditor has acknowledged the payment of an amount Rs. 64,25,900/- by the Corporate Debtor. The amount remaining i.e. Rs. 84,93,688/- does not meet the threshold limit so provided under Section 9 of the Code. Thus, on this account as well, the Petition deserves to be dismissed.
 12. The Corporate Debtor further submitted that the Operational Creditor has failed to furnish the Affidavit under Section 9 (3) (b) of the Code, as the Petition under Section 9 shall be filed along with an accompanying affidavit stating that no notice has been given by the Corporate Debtor acknowledging any dispute related to default or unpaid debt.
 13. During the course of arguments, the Operational Creditor emphatically relied upon the 5 Invoices dated 30.06.2017, 30.07.2017, 20.12.2017, 31/12/2017 and 31/03/2018 bearing invoice nos. GC/03/17-18, GC/GST/1/17-18, GC/GST/6/17-18, GC/GST/7/17/17-18 and GC/GST/8/17-18 respectively raised by the Operational Creditor on the Corporate Debtor which the Operational Creditor submitted, were duly accounted for by the Corporate Debtor in their books of account. These were reflected in Form 26AS for the F.Y. 2017-18 (A. Y. 2018-19) which shows that the amounts were credited by the Corporate Debtor and the tax was also deducted at source. The Corporate Debtor had credited the amounts to the account of the Operational Creditor in its books of account and had claimed deduction in respect of the said

expenses u/s. 37 of I. T. Act, 1961. Whereas, on the other hand the Corporate Debtor is stating that the amount is under dispute.

14. On the other hand, the submission of the Corporate Debtor in addition to the above-mentioned facts was also that in view of the fact that there is a pre-existing dispute between the parties on account of insufficiency of services having been rendered by the Operational Creditor, thus, the present Petition under Section 9 deserves to be dismissed on this account itself. The Corporate Debtor relied upon various e-mails exchanged between the parties to substantiate his contention of the dispute. He further contended that the amount so claimed by the Operational Creditor is also disputed and cannot be termed as the crystallized amount. The reference was made on the judgment having been rendered by the Hon'ble Apex Court in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* held that what 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. Therefore, applying the above analogy laid down by the Hon'ble Supreme Court to the present case on hand, this Bench has no option except to hold that there are "**pre-existing disputes**" between the parties and there is no merit in

the above Company Petition and the above Company Petition deserves to be '**dismissed**' on that score alone.

15. In addition, the Hon'ble NCLAT has further clarified in the judgment of *P.M. Cold Storage Pvt. Ltd. Vs. Goouksheer Farm Fresh Pvt. Ltd & others, Company Appeal (AT) (Ins.) No. 615 of 2020* that the fact that the Corporate Debtor has paid TDS on interest payable cannot be considered as acknowledgment in writing of the liability by the Corporate Debtor and therefore, such TDS payment will not have any effect of being an acknowledgment of said debt.
16. Therefore, in view of the above stated facts and circumstances and also the perusal of the judgment referred by the learned Corporate Debtor, this Court is of the considered opinion that the withholding of the relevant facts from the courts itself is a grave error on the part of the Operational Creditor as anybody who approaches the Court of law must come with clean hands. Thus, in the present case, the withholding of relevant and necessary facts has to go against the Operational Creditor.
17. In addition, the perusal of the documents on record also reveals that there is no crystallized debt due to the Operational Creditor. Whatever amount if any due is stated to be disputed. There are enough documents on record to substantiate this fact. In addition, the perusal of the judgment of the Hon'ble Supreme Court also makes it a case of pre-existing dispute, merits no admission by the Hon'ble Tribunal.

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18. The Hon'ble NCLAT has further clarified in the judgment of *Jumbo Paper Products vs. Hansraj Agrofresh Pvt. Ltd., Company Appeal (AT) (Im.) No. 813 of 2021* that the threshold limit will be applicable for applications filed under Sections 7 or 9 of the Code, on or after 24.03.2020, even if the debt is of a date earlier than 24.03.2020.
19. Further post examining whether the present insolvency application is maintainable in terms of Section 4 of the Code, as the Operational Creditor in Part IV of the application has claimed an amount of Rs. 1,49,19,588/- from the Corporate Debtor. The Operational Creditor sent a Demand Notice dated 08.10.2021 to Corporate Debtor wherein the aggregate amount of Rs. 1,49,19,588/- has been claimed. Additionally, the representation of the Applicant in computing the interest to ensure that the application falls within the threshold limit is flawed. The charging of interest was never documented or agreed upon by the parties either in the work order dated 09.03.2015 or any other document placed on record in case of non-payment of dues. The Operational Creditor in perusal of email dated 11.05.2018 (Annexure R-9) had requested the Corporate Debtor to release an amount of Rs. 84,93,688/- as shown by the Operational Creditor himself remaining after the deduction of Rs. 64,25,900/- from the total outstanding payable by the Corporate Debtor. Therefore, Operational Creditor did acknowledge the part payment of Rs. Rs. 64,25,900/- by the Corporate Debtor. Hence the remaining amount of Rs. 84,93,688/- does not meet the threshold limit provided under Section 4 of the Code. Hence it cannot be considered an indicator of the operational debt being due and defaulted in the current set of circumstances of the case.

20. In view of the foregoing, inter-alia including 'Pre-existing disputes between the parties' 'Not meeting the threshold limits' and 'Not coming to the court with clean hands' the above petition merits no consideration. Hence dismissed.

Sd/-

MADHU SINHA

MEMBER (TECHNICAL)

Sd/-

REETA KOHLI

MEMBER (JUDICIAL)