BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

COURT- III

IB-218/ND/2020

U/S. 9 of the IBC, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule, 2016

IN THE MATTER OF

M/s Hind Tradex Limited

Registered office at:

B-8/195, 1st Floor, Sector-3, Rohini

New Delhi-110085 ...Operational Creditor

Versus

M/s AGL Televentures Private Limited

Regd. Office:

S-206, 1st Floor, Panchsheel Park

New Delhi-110017 ...Corporate Debtor

Delivered on 09.06.2022

Coram:

Shri Bachu Venkat Balaram Das, Hon'ble Member (Judicial)

Shri Narender Kumar Bhola, Hon'ble Member (Technical)

Appearances:

Operational Creditor : Adv. Mohit Chaudhary and Adv. Imran Ali

Corporate Debtor: Adv. Nishant

ORDER

Per: Narender Kumar Bhola, Member (Technical)

1. This is IB-218/ND/2020 filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditors, M/s Hind Tradex Limited are seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s AGL Televentures Private Limited, declare moratorium and appoint Interim Resolution Professional (hereinafter referred as 'IRP').

2. The Operational Creditor/Petitioner has averred as follows: -

   a. It is the case of the Operational Creditors that operational creditor is engaged in the business of trading of steel, electrical and electronic goods. The corporate debtor requested the operational creditor to supply computer servers to the corporate debtor.

   b. It is submitted that debt has occurred with respect to the business transaction entered upon by the operational creditor and corporate debtor in May, 2015 wherein the operational creditor supplied goods i.e., Lenovo System X-3950, X6-8U servers (10 pieces) pursuant to the order placed by the corporate debtor vide purchase order no. 08 dated 30.04.2015.

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It is stated that the operational creditor maintained running accounts and raised regular invoices with respect to the supplied goods against the abovementioned orders. The Corporate Debtor began defaulting in making payments from the beginning of the business arrangement. The Corporate Debtor was required to make payments against each invoice within 120 working days of issue of invoice along with dispatch of material, however, the corporate debtor only made payments despite receiving the materials.

c. It is further submitted that the operational creditor terminated the business transaction due to default in payment after issuing the last invoice dated 04.05.2015. It is further stated that operational creditor supplied Computer Software to the Corporate Debtor, valued at Rs. 3,41,25,000/- out of which the Corporate Debtor only paid an amount of Rs. 1,44,95,000/- The total amount due against the goods supplied by operational creditor to corporate debtor as on date is Rs. 1,96,30,000/-. It is submitted that to discharge its liability the Corporate Debtor issued Cheques in the name Operational Creditor amounting to Rs. 1,96,30,000/- as on 25.04.2018. However, on presentation of said cheques, the operational creditor received cheque return memos by the bank.

d. The Operational Creditor has issued the demand notice u/s 8 of IBC, 2016 on 06.05.2019. Hence, the present petition for initiation of CIR Process of Corporate Debtor as it has failed to pay the outstanding of the operational creditor.

3. The Corporate Debtor has also filed reply to the captioned petition and submitted that Corporate Debtor had given dissatisfactory feedback about the performance of the Products. It is stated that in March 2018, within the warranty period of the Products, Corporate Debtor received complaints from its customer regarding genuinity of the product stating that the Products supplied to it are fake and counterfeit and they are unable to utilize the warranty provided with the Products. The customer informed that when they contacted the Customer Care of Lenovo, they refused to support the Warranty as the Product Serial Numbers were fake and could not be found in the record of manufacturer. It is further stated that such high-end products are expected to have a life of over 10 years. However, almost all the Products stopped working in less than 3 years from the date of supply. In order to bring the same to the knowledge of Operational Creditor, the corporate debtor sent letter dated 16.04.2018 to operational creditor and disputed the liability. Hence, the corporate debtor prayed for dismissal of petition in the light of judgment of Hon'ble Supreme Court in the matter of M/s Innoventive Industries Ltd. v/s ICICI Bank and Ors. reported in (2018) 1 SCC 407. It was held that the moment there is an existence of such a dispute then the petition filed by the operational creditor u/s 9 of the IBC, 2016 shall be dismissed. The

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corporate debtor further relied on the Hon'ble Apex court judgment in the matter of Mobilox Innovations Pvt. Ltd. v/s Kirusa Software (P) Limited-2017 1 SCC Online SC 353. It was held that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing i.e., it must exist before the receipt of the demand notice or invoice. It is the submission of the corporate debtor that above mentioned judgments are fully applicable on the present case as the corporate debtor has raised the dispute vide letter dated 16.04.2018 and the demand notice was issued on 06.05.2019. It is further submitted that the documents and communications exchanged between Corporate Debtor and Operational Creditor were found stolen along with some cash and cheque books and some other documents by the office boy Rohit Kumar of Corporate Debtor, in respect of which an FIR No. SDMN000554 dated 4.5.2019 has been lodged by the Corporate Debtor and just after 2 days the demand notice was issued by the operational creditor clearly shows the malafide intention of operational creditor. It is also the argument of the corporate debtor that the demand notice was never served to corporate debtor. Hence, prayed that the petition is liable to be dismissed in its present form.

4. The Operational Creditor also filed the written submission and reiterated all the facts of the petition and further submitted that the demand notice was properly served to the corporate debtor and proof of service was filed through filing of additional affidavit. It is

stated that there is no pre-existing dispute between the parties and the letter dated 16.04.2018 is a false/frivolous fictitious document created as an afterthought. The Operational Creditor relied on the Hon'ble Supreme Court judgment in the matter of Mobilox Innovations Private Limited vs Kirusa Software Private Limited, (2018) 1 SCC 353. The relevant extract is reproduced below:

> *"40.... Therefore, all that the adjudicating authority is to see at this stage is whether there is 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 a bluster...."*

It is stated that the corporate debtor has relied on the FIR against the office boy of CD Company. However, no allegation is levelled against the operational creditor or any person remotely connected to the operational creditor, therefore, the said FIR has no bearing whatsoever to the present case

5. The Corporate Debtor also filed its Written Submission reiterated all the contentions already raised in the reply. In short, it is stated that the operational creditor mis-represented and suppressed the material facts in their insolvency petition, there is pre-existing dispute and petition is barred by law of limitation.

6. We have perused the Pleadings and argument advanced by the Operational Creditor and Corporate Debtor. It is admitted fact that the Operational Creditor has provided the goods. Before going into the merits of the present case, it is pertinent to mention that the

FIR relied upon by corporate debtor is against some boy working in the office of corporate debtor and no allegation is there in the FIR against the Operational Creditor. Hence, the said FIR does not have any evidentiary value in the present case. Firstly, the corporate debtor has raised the issue regarding limitation. It is seen from the records that the corporate debtor has issued the cheques and same dishonoured on 07.05.2018 and the present petition is filed on 09.01.2020. Therefore, the petition is filed well within the limitation. The Corporate Debtor has raised the objection regarding existence of pre-existing dispute. This Adjudicating Authority has to look whether there is pre-existing dispute actually exist or not. Dispute is defined under section 5(6) of IBC, 2016, which is reproduced below:

> *"dispute" includes a suit or arbitration proceedings relating to–*
> *(a) the existence of the amount of debt;*
> *(b) the quality of goods or service; or*
> *(c) the breach of a representation or warranty;"*

Now, the question before this Adjudicating Authority is whether the corporate debtor has raised any issue that comes within the ambit of dispute as discussed above. The Corporate Debtor has relied upon the letter dated 16.04.2018. It is pertinent to discuss the content of the said letter dated 16.04.2018. On perusal of the said letter, it is clear that the said letter was not accompanied by any evidence. Furthermore, the corporate debtor did not follow-up with the operational creditor regarding the issue raised in the letter dated 16.04.2018. Rather on the other hand, corporate debtor has issued the cheques dated 25.04.2018 amounting to Rs.1,96,30,000/- to discharge its liability. Hence, we believe that the said letter dated 16.04.2018 is mere counterblast and afterthought by corporate debtor in order to escape its liability. It is also important to mention that the Corporate Debtor has not instituted any proceeding against the Operational Creditor on the basis of the said letter dated 16.04.2018. Therefore, this Adjudicating Authority is of the opinion that such argument in not maintainable in the eyes of law as corporate debtor has failed to produce any satisfactory evidence to show the existence of pre-existing dispute. Hence, this tribunal is inclined to initiate the CIRP of Corporate Debtor as a result the Petition is **admitted**.

7. The Operational Creditor has proposed the name of the IRP. However, on perusal of the form-2 it is seen that the proposed IRP is already having more than 10 assignments and here it is pertinent to go through clause 22 of first schedule (Code of Conduct for Insolvency Professional) of IBBI (Insolvency professional) Regulations, 2016 which is as follows:

   "22. An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.

   Clarification: An insolvency professional may, at any point of time, not have more than ten assignments as resolution professional in corporate insolvency resolution process, of which not more than three shall have admitted claims exceeding one thousand crore rupees each."

   Therefore, in view of the above regulation, this Adjudicating Authority is inclined to appoint the insolvency professional from the IBBI list. Hence, this Adjudicating Authority appoints Mr. Vikky Dang having Regn. No.- IBBI/IPA-003/IP-N00359/2021-22/13763 (Email ID – vikkydang@gmail.com) as IRP from IBBI list. The said IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

8. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all the following, namely:

    a. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

    b. Transferring, encumbering, alienating or disposing of by the Corporate Debtor's assets or any legal right or beneficial interest therein;

    c. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

9. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

10. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.

11. The Operational Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., with respect to said project and make compliance with this order as per the provisions of IBC, 2016.

12. The Operational Creditors are directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect.

13. Further operational creditor shall provide initial finance to tune of Rs. 2,00,000/- to the aforesaid Interim Resolution Professional within a weeks' time from the date of this order as advance towards initial cost and expenses of CIRP process. The said advance of Rs.

2,00,000/- shall be adjustable as CIRP cost by the Committee of Creditors immediately its constitution by the IRP.

14. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.

15. The order is pronounced by this Adjudicating Authority in virtual Hearing.

Sd/

(Bachu Venkat Balaram Das)
Member (Judicial)

Sd/-

(Narender Kumar Bhola)
Member (Technical)