

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-797/(ND)/2020

Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

M/s The System Overseas

Having its office at:-

513, Commercial Complex

Lakshmi Tower, Azadpur

New-Delhi-110033

...Operational Creditor/Applicant

Versus

M/s Bobieri Creazon Fashion Accessories Pvt. Ltd.

Having its Registered office at:-

D-47, Mansarovar Garden

West Delhi, New Delhi-110015

...Corporate Debtor/Respondent

Coram:

MR. P.S.N. PRASAD

Hon'ble Member (Judicial)

DR. V.K. SUBBURAJ

Hon'ble Member (Technical)

Order Delivered on: 01.04.2021



ORDER

As Per Dr. V.K Subburaj, Member (Technical)

1. This is an application filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent company, claimed to be the corporate debtor.
2. The applicant, M/s The System Overseas has filed the present application claiming as the operational creditor with the prayer for initiation of Corporate Insolvency Resolution Process under the provisions of the Code.
3. It is the case of the applicant that it had supplied goods on behalf of the Corporate Debtor to overseas buyer namely M/s Divine World Wide General Trading LLC in the months of February and March, 2019 in terms of Sales of Goods Agreement dated 21.12.2018 and has raised 9 invoices. The details of transactions leading to the filing of this petition as averred by the petitioner are as follows:
 - a. That the Operational Creditor is engaged in the business of supply of goods (chemicals) required by the Corporate Debtor.
 - b. The grievance of the Operational Creditor is that it has raised 9 invoices from 12.02.2019 to 15.03.2019 against the corporate debtor amounting to Rs. 14,91,86,098/- out of which the corporate debtor has made payment of Rs.



9,76,08,980/- till 26.09.2019 and the balance amount of Rs. 5,15,77,118/- is still remains due and payable.

- c. That the operational creditor in response to letter dated 22.11.2019 replied vide letter dated 29.11.2019 stating that the goods were delivered after the prior approval of the samples and since March 2019 till Nov 2019 the Corporate debtor has not raised any objection in respect to inferior or defective quality of goods.
- d. That the Operational Creditor had filed criminal complaint bearing FIR No. 0022/2020 dated 19.01.2020 registered under section 406,420,506, 120-B, 34 IPC at P.S Palam Vihar, Gurugram against the Director of the Corporate Debtor.
- e. The operational creditor sent a Demand Notice dated 19.12.2019 demanding payment of an unpaid operational debt as per provisions under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 via Speed Post. Copy of the Demand Notice dated 19.12.2019 demanding payment in prescribed Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 duly served upon the address as per the website of Ministry of Corporate Affairs, Government of India, where the operational creditor supplied services to the Corporate Debtor which was replied to.
- f. It is submitted that the corporate debtor for the first time mentioned about the List of Defective Goods and Letters dated



12.06.2019 and 25.10.2019 sent by the overseas buyers in its reply and the said documents were ante-dated and were created by the said overseas buyer upon the instruction of the corporate debtor in the month of July 2020 only after the initiation of criminal prosecution in the month of January 2020.

- g. The Investigation Officer on 17.08.2020 filed its final report stating that the investigation was closed as no criminal offence was made out and the dispute was regarding the payment of money arising out of business transaction.
 - h. Further it is submitted that the Directors of the Corporate Debtor had falsely submitted before the investigating officer that they had provided the Debit Notes raised by Divine World Wide to the applicant along with the letter dated 22.11.2019. Furthermore from the aforesaid letter it is seen that only 3 Debit Notes dated 22.11.2019 were raised by the Corporate Debtor.
 - i. Further it is submitted that the Corporate Debtor has failed to place on record any written communication or email from the month of March 2019 till 22.11.2019 complaining about the inferior or defective quality of the goods.
4. The Corporate Debtor in its reply to the application submits that:
- a. There is pre-existing dispute as the corporate debtor had raised the dispute from the applicant from March, 2019 and



the demand has been raised by the applicant from December, 2019.

- b. That the Corporate Debtor and the applicant has entered into a Sale of Goods Agreement dated 21.12.2018 wherein the corporate debtor had to transfer ownership and deliver possession of the goods to the respondent's overseas client on behalf of the respondent. Further, thereafter an receipt of the payment from the overseas client, the respondent shall make payment to the applicant for the purchase of goods or before that, subject to the availability of the funds with the respondent on the discretion of the respondent to make the payment on advance or remit payment or wait till the entire payment is received by the respondent from its overseas client.
- c. As per agreed terms and conditions of the agreement, it is submitted that the operational creditor shall be responsible for the quality, packaging delivery, warehouse clearance, sort out any objection from customs on the goods supplied etc to the overseas clients of the corporate debtor and shall bear all the expenses/risk of the damaged, loss or delay of the goods etc. Further they have agreed that the corporate debtor shall not be liable to make any payment on defective goods if supplied by the applicant.
- d. That in the month of February- March, 2019 the operational creditor supplied the goods to the overseas client and upon



the delivery of the same at the destination, it was found that the goods supplied by the applicant was of poor/ inferior quality and were defective in nature. In furtherance to which the overseas client raised concern about the same and said that they will not be liable to make payment as the goods supplied are not of any use. Furthermore they provided with the list of the defective goods.

- e. That the corporate debtor vide letter dated 22.11.2019 intimated the applicant about the inferior quality of the goods supplied and of its defective nature along with the debit note list received from the overseas clients which ruined their goodwill and reputation.

Copy of the debit note received by the respondent from its overseas clients are annexed alongwith.

- f. Further the applicant instead of paying the legitimate dues of the client, send a reply dated 29.11.2019 threatening the respondent that if the invoice amount is not paid, then the respondent shall have to face dire consequences.
- g. It is pertinent to mention that as per the clauses 4,5 and 6 of the agreement dated 21.12.2018, it is mentioned that the applicant shall be responsible for the good quality of the goods, delivery of the goods. It is further stated that the respondent shall not be liable to make any payment in case of the goods are found to be defective or inferior in nature.



h. Further it is pertinent to mention that the applicant managed to get the FIR registered against the Director of the respondent company at Gurugram bearing FIR No.0022 dated 19.01.2020 at the Police Station Palam Vihar and the same was investigated by the cyber police station in a supervision of a very senior officer and found out that the claimed filed by the applicant was completely false, baseless and documents submitted by the applicant were fake and fabricated. Further, after proper investigation, the said FIR was cancelled at the Police end itself.

Copy of the FIR alongwith the Cancellation Report is filed alongwith.

5. Heard the parties and perused the case records.
6. In respect of definition of "dispute" in the Code, Hon'ble Supreme Court has held in the case of Mobilox Innovative Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. 2018 1 SCC 353 *inter-alia* that:

*"Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which required 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 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.” (emphasis given).

7. It is the case of the respondent that there has been pre-existing dispute as the corporate debtor had raised the dispute from the applicant from March, 2019 and the demand has been raised by the applicant from December, 2019. Also the respondent has placed on record letter dated 22.11.2019 intimated the applicant about the inferior quality of the goods supplied and of its defective nature along with the debit note list received from the overseas clients in order to prove it's claim. The copies of the debit notes received from the overseas clients are placed on record. The applicant has denied the allegations. However, the documents on records show that the respondent raised its dispute much before issuance of demand notice.

8. In the factual background it is seen that there has been no admission of operational debt by the respondent. In fact, there has been a dispute regarding the quality of the goods being supplied by the applicant and in furtherance to which the overseas client raised concern about the same and said that they will not be liable to make payment as the goods supplied are not of any use.



9. There was existence of dispute much prior to the issuance of notice under Section 8 of the Code. Respondent has raised the dispute with sufficient particulars. The amount of claim raised by the applicant clearly falls within the ambit of disputed claim. The claim of dispute suggests the need of elaborate investigation. In the facts it is reiterated that existence of genuine dispute in the present case cannot be ruled out.

10. As per Section 9 (5) (ii) (d) of the Code provides that adjudicating authority shall reject the application if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility.

11. For the reasons stated above this petition fails and the same is rejected.

12. We make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy and the right of the Applicants before any other forum shall not be prejudiced on account of dismissal of instant application.

Let the copy of the order be served to the parties.



(DR. V.K.SUBBURAJ)
MEMBER (TECHNICAL)



(P.S.N PRASAD)
MEMBER (JUDICIAL)