THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

CP (IB)4448(MB)/2019

Under Section 9 of Insolvency & Bankruptcy Code, 2016

Ashok Kohli & Associates

Operational Creditor

Vs.

Pusalkar Su-Rak-Sha Components Private Limited

Corporate Debtor

Order delivered on: 17.10.2023

Coram:

Shri Prabhat Kumar Hon'ble Member (Technical)	**Justice Shri V.G. Bisht** Hon'ble Member (Judicial)

Appearances

For the Applicant	:	Ms. Sunita Durmi, Advocate
For the Corporate Debtor	:	Mr. Amit Singh, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an application being C.P. (IB) No. 4448/NCLT/MB/C-I/2019 filed by Ashok Kohli & Associates, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) for initiating Corporate Insolvency Resolution Process (CIRP) in the matter of Pusalkar Su-rak-sha Components Private Limited, the Corporate Debtor.

2. The Application is filed by Mr. Ashok Kumar Kohli, the Operational Creditor, in his capacity as proprietor claiming amount in default amounting to Rs.9,31,290/- (Rupees Nine Lakh, Thirty One Thousand, Two Hundred and Ninety only) inclusive of interest of Rs. 31,290/- calculated @ 18% p.a. The date of Default as per Part-IV is stated as 07.05.2019 onwards.

3. The Applicant M/s. Ashok Kohli & Associates' (hereinafter referred to as the "Operational Creditor") is a sole proprietorship firm having its registered office in Gurgaon. The Corporate Debtor, ‘Pusalkar Su-Rak-Sha Components Private Limited', is a company incorporated and registered under the provisions of the Companies Act, 1956 having its registered office in Pune (hereinafter referred to as the "Corporate Debtor") started procuring services of the Operational Creditor in the year 2019, under the Engagement Letter entered into with the Operational Creditor on 15.12.2018 ("Engagement Letter").

   3.1. Pursuant to the above-referred Engagement Letter, the Operational Creditor started providing the services to the Corporate Debtor. On 04.02.2019, the Operational Creditor inadvertently sent a letter to the Corporate Debtor revoking the Engagement Letter. Subsequently, on the next day i.e. 05.02.2019, the Operational Creditor informed the Corporate Debtor to kindly ignore the above-referred letter of revocation and that the Engagement Letter remains valid.

3.2. Thereafter, the Corporate Debtor continued to obtain the professional services of the Operational Creditor and the Operational Creditor provided its services to the Corporate Debtor. Amongst other aspects, the following aspects evidence the continuity of rendering of the professional services by the Operational Creditor:

a. Flight tickets (for 03.03.2019) sent by the Corporate Debtor to the Operational Creditor, for visit to Corporate Debtor's factory located at Pune, Maharashtra, and Payment of 3 (three) invoices issued by the Operational Creditor for providing professional services to the Corporate Debtor during the period 01.01.2019 to 31.03.2019.
b. Thereafter, without any previous discussion/intimation to the Operational Creditor, the Corporate Debtor sent the letter (dated 25.04.2019) for unilateral termination of the Engagement Letter. The revocation letter sent by the Operational Creditor on 04.02.2019 was stated as the primary reason for termination of the Engagement Letter.
c. That the Corporate Debtor's unilateral action of termination is inter alia in breach of the Engagement Letter, in-specific Clause 6(2) which states that the entire duration of 12 months will be the lock-in period.
d. Further, the Corporate Debtor has concealed the correct reason for termination of the Engagement Letter, which is that of Corporate Debtor shutting down its line of business for which the Operational Creditor was providing services.

3.3. From the period 04.05.2019 till date, Operational Creditor issued around 6 invoices, amounting to Rs. 9,00,000/- (approx.), on the Corporate Debtor. The Corporate Debtor have not made any payment towards these invoices. Accordingly, the Corporate Debtor has an outstanding debt amount of Rs. 9,31,290/- (Rupees Nine Lacs Thirty-One Thousand Two Hundred Ninety only), which has not been paid for the professional services rendered by the

Operational Creditor. The aforesaid debt amount includes Rs. 9,00,000/- as the principal debt amount and Rs. 31,290/- as the interest amount (at 18% p.a. from the due date of payment upto 30.09.2019).

3.4. The Operational Creditor sent a legal/demand notice to the Corporate Debtor on 04.10.2019 seeking payment of the aforesaid outstanding amount. The said legal/demand notice was duly delivered to the Corporate Debtor. Despite receipt of the legal/demand notice, there has been no payment of the operational debt by the Corporate Debtor to the Operational Creditor.

3.5. On the basis of the above, it is clear that the dues of the Operational Creditor have the necessary ingredients as required under Section 5(21) of the Insolvency and Bankruptcy Code, 2016 so as to qualify as an operational debt. And, as the Corporate Debtor has not been able to make any payments towards settling its dues, it is subject to Corporate Insolvency Resolution process under the Insolvency and Bankruptcy Code, 2016. In these circumstances, the Operational Creditor is constrained to prefer this Application before this Hon'ble Tribunal.

4. The Corporate Debtor filed its reply dated 04.02.2020 raising a ground of pre-existing dispute. It is submitted that there is no dispute till April, 2019, i.e. the month when Corporate Debtor accepted the termination, all the invoices are duly paid by the Corporate Debtor. Subsequent to that since the said Engagement Letter stood terminated and that the Operational Creditor was not working for the Corporate Debtor in any manner, more particularly because of the serious allegations made by IST Limited in its letter dated February 8, 2019, no amount was due and payable to the Operational Creditor by the Corporate Debtor. Even in the letter dated April 25, 2019, which was addressed by the Corporate Debtor to Operational Creditor it was categorically mentioned that no amount is due and pending to the

Operational Creditor. This is the first letter that will demonstrate that there was an existing dispute between the parties regarding the alleged outstanding operational debt. On this ground itself, the present Petition is liable to be rejected. The disputes raised in the present matter involve interpretation of contractual terms in the said Engagement Letter, which involves leading of evidence and therefore, beyond jurisdiction of this Hon'ble Tribunal. There are other issues that require adjudication, set out in detail in para 4 (G) of the Affidavit in Reply of Corporate Debtor and therefore, the only remedy available to the Operational Creditor was to approach the civil court. Letter dated April 25, 2019, email dated June 5, 2019, reply to demand notice dated October 12, 2019 and Affidavit in reply filed to the present Petition are sufficient to show that there were bona fide disputes existing between the parties and therefore, the present case shall be squarely covered by the decision of the Hon'ble Supreme Court "Mobilox Innovations (P) Ltd. V/s Kirusa Software (P) Ltd. decided on 21/09/2017.

5. We have heard the Ld. Counsel for both the sides and perused the records.

5.1. We find from the clause 6(2) of the Engagement Letter that the Corporate Debtor had engaged the Operational Creditor for a minimum period of 12 months beginning from 1st January 2019 and the Corporate Debtor could not terminate the agreement for this Period of 12 months for which there was payment obligation for the whole period of 12 months even if agreement is terminated by the Corporate Debtor prior to expiry of this Period. The Corporate Debtor has taken the plea that the Applicant send email dated 04.02.2019 stating that "*I want to inform you, that I will not be able to continue on above contract due to my sudden illness problem and advice of doctor to restrict my traveling. I hereby would like to inform and request you to terminate above contract with immediate effect*". However, we find that vide email dated 05.02.2019, the Applicant had informed to ignore email dated 04.02.2019. Further, the email correspondences between two parties suggest that there have been exchange of few mails in relation to ticket booking of Mr. Kohli, in the month of February 2019. We also find that the Corporate Debtor vide letter dated April 25, 2019 informed the Applicant that *the desire of Mr. Kohli to discontinue from the engagement had been accepted by the Respondent. Though the said letter, the Respondent him about the letter received from IST limited and stated that the engagement of Mr. Kohli and the Respondent would invariably come to an end considering the fact that he himself had desired to terminate his engagement with the Respondent w.e.f. 04.02.2019*. We also find that the Applicant has not disputed the allegation about his association with IST Limited and their grievance.

5.2. We are unable to comprehend when the Operational Creditor has claimed that Corporate Debtor was liable to make payment for whole of 12 months beginning from 01.01.2019, why he chose to make claim for only period upto 31.10.2019 and not for the month of November and December 2019. All these facts lead us to a conclusion that "whether agreement could have been terminated by the Corporate Debtor without being liable to pay professional fees for the remainder lock-in period" is a matter requiring adjudication which is not permissible in the proceeding u/s 9 of Code.

6. In view of this, the CP (IB)4448(MB)/2019 is liable to be dismissed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)