

**THE NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
AT NEW DELHI**

Company Petition No. (IB)-87 (PB)/2019

**Under Section 9 of the Insolvency and Bankruptcy Code,
2016**

In the matter of:

M/s Duke Sponge and Iron Private Limited

Applicant/Operational Creditor

Vs.

M/s Laxmi Foils Private Limited

Respondent/Corporate Debtor

Judgment delivered on: 06.08.2019

CORAM

CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT

S. K. MOHAPATRA, MEMBER (TECHNICAL)

For Applicant/Petitioner

Mr. A.K. Vali, Mr. A. S. Narang,
Mr. Rajat Jain, Advocates

For the Respondent

Mr. K. Datta, Mr. Ashish Verma,
Ms. Prachi Johri, Mr. Rahul Gupta, Advocates



ORDER

S. K. Mohapatra, Member

1. M/s Duke Sponge and Iron Private Limited, claiming as the operational creditor has filed this application 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') for initiation of Corporate Insolvency Resolution Process in respect of respondent company M/s Laxmi Foils Private Limited, claimed to be the corporate debtor.
2. The Respondent Company M/s Laxmi Foils Private Limited (CIN No. U 74899 DL 2000 PTC 104341) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 10.03.2000 having its registered office situated at 8638, East Park Road Karol Bagh, New Delhi – 110 005. Since the registered office of the respondent corporate debtor is in New Delhi, this



Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. It is the case of the applicant that the corporate debtor has been a regular purchaser of goods from the applicant operational creditor since 2012. The corporate debtor had a running account with the operational creditor for the same. Following the standard practice of running accounts, the operational creditor would regularly fulfill orders made by the corporate debtor and raise invoices. The corporate debtor on the other hand would make lump sum payments for the goods supplied on account, with the understanding that the payments would be adjusted against the first outstanding invoices and then towards any remaining bills.
4. It is stated in the application that in due Course of business the Operational Creditor had supplied goods vide invoices numbered 0243, 0244, 0337 and 0338



dated 10.01.2015 and 30.03.2015 respectively. There after no orders were received. It is further stated that the final payment amounting to Rs.1,14,882/- was received on 02.01.2016. The unpaid balance in the financial year 2015-16 stood at Rs. 84,85,505/- in the account of the Operational Creditor.

5. It is further alleged that the Corporate Debtor has failed to provide the C-Forms for supplies worth Rs.7,59,72,649/- made in the Financial Year 2014-15, thereby exposing the Operational Creditor to liability of Rs. 98, 43, 928/- in the form of increased tax liability, penalty and interest.
6. Applicant has claimed that a true reflection of the transactions between the applicant and the respondent has been reflected in the Ledger of the applicant, showing the sales and receipts on account of those sales. A further 18% interest compounded bi-annually, has been added to the principal operational debt in terms of the invoice and thus, bringing the total operational debt due and payable for an amount of Rs. 2, 59,63,546/-.



7. It is submitted that the applicant through its advocates served on the respondent a demand notice, dated 12.12.2018, under Section 8 of the Insolvency and Bankruptcy Act, 2016. It is alleged that in the reply to the demand notice dated 28.12.2018 respondent raised various false and unfounded claims of settlement with the help of various forged and fabricated documents.
8. It is the case of the applicant that the respondent has failed to pay the operational debt or any part hereof in response to the demand notice and as respondent corporate debtor has committed default in repayment of the operational debt, it is prayed for initiation of corporate insolvency resolution process against the respondent company by admitting the present application.
9. Respondent corporate debtor has filed reply on 15.02.2019 with the main contention that there has been pre-existing dispute between the petitioner and the respondent.



10. It is argued that since the operational debt is disputed and the dispute has been raised much prior to the Section 8 notice, the present application filed under Section 9 of the Code is liable to be rejected.
11. Respondent has submitted that a dispute was raised first in May 2015 and subsequently on 15.04.2016 by raising two debit notes. It is claimed that debit note bearing dated 31.03.2015 (generated in May 2015) and debit note dated 15.04.2016 have been duly received by the Petitioner prior to the issuance of Section 8 notice. It is claimed that the two debit notes were duly acknowledged by the petitioner at that time and bear a stamp of the petitioner company evidencing receipt.
12. It is further alleged that the operational debt claimed by way of the present petition stands extinguished since 15.04.2016 and therefore the present petition is liable to be dismissed.
13. Learned counsel for the respondent also pointed out that though the invoices pertain to the year 2015 but not a single communication has been made from



the petitioner to the respondent seeking payment of the balance till December 2018. It is submitted that the petitioner had issued emails to the respondent on 28.12.2015 seeking for C Form details. However, no mention of any amount left outstanding between the parties is mentioned therein. It is claimed that any prudent businessperson would take this opportunity to ask for any amount he believed to be outstanding.

14. It is further emphasized that vide email dated 03.09.2015 the respondent had requested for the accounts of the petitioner to confirm the balance. However, the petitioner did not oblige and consequently never issued any copy of the accounts to the Respondent.

15. Precisely respondent has claimed that no operational debt exists as the value of both the debit notes combined covers the alleged operational debt.

16. In response petitioner has alleged that the debit notes are forged and fabricated and was received for the first time with the reply dated 28.12.2018. It is submitted that petitioner has never used a stamp like



the one affixed on the debit notes and the signatures on the debit notes are undecipherable scribbles which don't match any other admitted signatures made on behalf of the petitioner. It is submitted that the respondent has not placed any proof of dispatch /delivery of debit notes to the petitioner by any mode of communication. Accordingly, it is contended that the claim of debit notes made by the respondent is nothing but moonshine.

17. Heard learned counsels for the parties and perused the case records.

18. Before discussing the merits of the elaborate contentions of the parties, it is relevant to point out certain provisions and precedents applicable to the applications filed under Section 9 of the Code.

19. The relevant sub-section 5 of Section 9 of the Code runs as under:

Section 9 (5)

“The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order-



(i) *Admit the application and communicate such decision to the operational creditor and the corporate debtor if,-*

(a)

(b)

(c)

(d) *No notice of dispute has been received by the operational creditor or*
.....
.....

(ii) **Reject the application** and communicate such decision to the operational creditor and the corporate debtor, **if-**

(a).....

(b).....

(c)

(d) **Notice of dispute has been received by the operational creditor** or there is a record of dispute in the information utility; or

(e)"

(Emphasis given)

20. In terms of Section 9(5)(ii)(d) of the Code Adjudicating Authority shall reject the application if notice of dispute has been received by the operational



creditor. Section 9(5)(ii)(d) refers to the notice of an *existing dispute* that has been received, as it has to be read with Section 8(2)(a) of the Code. The moment there is existence of a pre-existing dispute, the operational debtor gets out of the clutches of the rigors of the Code.

21. “Dispute” has been defined under the Code in Section 5 (6) which envisages that:

“(6) “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.”

22. It is no longer *Res-Integra* that the definition of dispute is inclusive and not exhaustive. Dispute has been given wide meaning so as to cover all disputes on debt, default etc. and not be limited to only pending suit or a record of a pending arbitration.

23. Needless to say, that it is always open to the ‘Corporate Debtor’ to take the plea of ‘existence of dispute’ before the Adjudicating Authority, which



alone can be a ground to reject the application filed under Section 9 of the Code.

24. It is now a settled proposition of law that where there is “*existence of dispute*” prior to the issuance of notice under Section 8, the petition under Section 9 preferred by the Operational Creditor is not maintainable.

25. It is pertinent to refer to the case of Mobilox Innovations Private Limited reported in 2017 (11) SCALE 754 wherein at para 40 Hon’ble Supreme Court has held 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.”

26. Therefore, there is also no dispute that this is not the forum to examine and adjudicate as to what extent the claim of the petitioner is admissible as due and recoverable. Neither the Tribunal in the proceedings

under Section 9 will examine the merits of the respective disputes. Moreover, even the adequacy of dispute is not to be seen. It is only to be seen whether the dispute raised by the corporate debtor qualifies as a 'dispute' as defined under sub-section (6) of Section 5 of the Code.

27. Therefore, the only issue before us is *whether there is an existence of a dispute between the parties that would fall within the inclusive definition contained in Section 5(6) of the Code.*

28. In the present case admittedly, respondent has relied upon its reply to the demand notice issued on 28.12.2018 under Section 8 (2) of the Code bringing to the notice of the petitioner the existence of dispute in respect of the claimed operational debt.

29. Besides respondent has placed on record various correspondences and debit notes to prove that the dispute in the reply to the demand notice was not raised for the first time but pre-existed much prior to the Section 8 notice.



30. Respondent has claimed that debit notes bearing dated 31.03.2015 and dated 15.04.2016 have been duly received and acknowledged by the petitioner by affixing the stamp of the petitioner company.

31. The main contention of the respondent is that these unpaid debit notes combined covers the alleged operational debt, and therefore the present claim stands extinguished long before in the year 2016.

32. In response petitioner has claimed that the debit notes are forged and fabricated and was received for the first time with the reply dated 28.12.2018.

33. Ordinarily acknowledgements bearing signature and seal of a company are sufficient evidence of receipt. On one hand respondent has not placed any proof of dispatch /delivery of debit notes to the petitioner and on the other hand the petitioner could not confirm whether any FIR was filed or any action was initiated when the alleged unauthorized and illegal use of the seal of the company came to their knowledge. No FIR in this respect has been placed on record.



34. These are matters of trial and enquiry. Tribunal in the present proceeding cannot go into roving enquiry into the disputed claims made by the parties. This is not the forum to examine and adjudicate as to which portion of the claims or counter claims are admissible. At this stage it is immaterial to consider who will succeed. Tribunal will not examine the merits of the dispute other than to see if there is in fact exists a real dispute having some substance.

35. With regard to the contention of the petitioner that the supplies have been accepted and debt in that respect is due, it is pertinent to refer to the case of K. Kishan Vs M/s Vijay Nirman Company Pvt. Ltd. where Hon'ble Supreme Court has observed that:

“Even if it be clear that there be a record of an operational debt, it is important that the said debt be not disputed. If disputed within the parameters laid down in Mobilox Innovations (supra), an insolvency petition cannot be proceeded with further.” (Emphasis given)



36. In the factual background it is seen that there is pre-existing dispute and there is also a confusion on the actual amount of default. Though the invoices pertain to the year 2015, there was no effective pursuance for a long period from 2015 till end of 2018. The various correspondences placed on record show that dispute was not raised for the first time to evade liability but certainly preexisted much prior to the issuance of notice under Section 8 of the Code. The email dated 03.09.2015 reveals that the respondent requested for the accounts of the petitioner to confirm the balance which was never issued. There are allegations of non-conciliation of accounts despite request.

37. These are dealings between the parties long since the year 2012 and the claims and allegations of both sides' *prima facie* suggest the need for elaborate enquiry. Once there is material to believe that dispute exists, it is right to have the matter tried out before the axe, in the form of corporate insolvency resolution process falls.



38. Existence of an undisputed operational debt is *sine qua non* for initiating CIRP under Section 9 of the Code. The Code is not intended to be substitute to a recovery forum. The moment there is existence of a dispute, the corporate debtor gets out of the clutches of the Code. In the factual background of this case '*existence of real dispute*' cannot be totally overruled.
39. The provisions of Section 9 (5) (ii) (d) of the Code clearly mandates that Adjudicating Authority shall reject the application when notice of dispute has been received by the applicant operational creditor.
40. In the factual scenario it is reiterated that in the present case notice under Section 8 was duly replied within the period prescribed by bringing to the notice of the operational creditor the existence of dispute. Materials placed before us show that dispute was raised prior to the issuance of notice under Section 8 of the Code. The claim of operational debt in question is not free from dispute. There is substance and plausible contention in the pleadings of both sides, which necessitates investigation.



41. Respondent has raised dispute with enough particulars to qualify as a dispute as defined under sub-section (6) of Section 5 of the Code.
42. For the reasons stated above the application fails and therefore the same is rejected.
43. It is made 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 applicant before any other forum shall not be prejudiced on account of dismissal of instant application.
44. Let the copy of the order be communicated to the parties in terms of the provisions of Section 9 (5) (ii) of the Code.



06.08.2019
(M.M. KUMAR)
PRESIDENT



(S. K. MOHAPATRA)
MEMBER (T)

Deepak Kumar