



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-2183/(ND)/2019

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. SKB Infracon Private Limited

Registered Office At: 211, Ansal Bhawan,
16, K.G. Marg, New Delhi-110001

...Applicant/Operational Creditor

Versus

M/s. Innovative Aviation Private Limited

Registered Office At: A-80,Ground Floor,
Palam Extension, Sector-7, Dwarka,
New Delhi-110075

...Respondent/Corporate Debtor

Coram:

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

SHRI.RAHUL BHATNAGAR, MEMBER (TECHNICAL)



Counsel for Applicant: Adv. Rishi Sood

Counsel for Respondent: Adv. Udit Singh

ORDER

PER: RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date: 17.05.2023

1. This is an application filed by the Applicant M/s. SKB Infracon Private Limited seeking to initiate corporate insolvency resolution process (“CIRP”) under Section 9 of the Insolvency and Bankruptcy Code 2016 (“the Code”) of the Respondent M/s. Innovative Aviation Private Limited for the alleged default on the part of the Respondent in clearing the debt of Rs. 3,81,53,613/- (Rupees Three Crores Eighty One Lacs Fifty Three Thousand Six Hundred And Thirteen). The details of transactions leading to the filing of this application as averred by the Applicant/Operational Creditor are as follows:

- i. That in year 2014, the Corporate Debtor Company i.e. M/s. Innovative Aviation Private Limited had approached the Operational Creditor for leasing of the aircraft owned by



the Operational Creditor and entered into Memorandum of Understanding cum Lease Agreement dated 11.11.2014. The lease agreement was for a period of two years from 15.11.2014 to 14.11.2016.

- ii. That in furtherance of the Agreement, the Corporate Debtor had given an interest free security deposit of Rs. 21,00,000/- (Rupees Twenty One Lacs) to the Operational Creditor. It was further agreed that the Corporate Debtor shall pay an amount of Rs. 5,00,000/- per month for a period commencing from November 2014 till 14.11.2015, thereafter the Corporate Debtor shall pay an amount of Rs. 12,00,000/- per month commencing from 15.11.2015 to 14.11.2016.
- iii. That the aircraft leased out by the Operational Creditor was being used by the Corporate Debtor and against the same, the Operational Creditor only received an amount of Rs. 49,76,640/- and no Service Tax for an amount



of Rs. 7,58,000/- was paid by the Corporate Debtor and an amount of Rs. 17,81,360/- was due and subsisting for the said period.

- iv. That in terms of the lease agreement dated 11.11.2014, the Corporate debtor was to pay an annual rent of Rs. 1,44,00,000/- excluding GST & TDS for the period commencing from 15.11.2015 to 14.11.2016 calculated @ Rs. 12,00,000/- per month. The Operational Creditor only received an amount of Rs. 72,25,000/- and the Corporate debtor failed to deposit the TDS & Service tax amounting to Rs. 21,60,000/- & Rs. 1,68,000/- respectively. An amount of Rs. 95,03,000/- was due and subsisting for the said period commencing from 2015-2016.
- v. That the Operational Creditor relying upon the promise of payment of past dues, made by the Corporate Debtor, executed the lease agreement dated 14.11.2016, in terms of the lease agreement, against the lease of the



aircraft, the Corporate Debtor was to make a monthly payment of Rs. 12,25,000/- to the Operational Creditor. The Corporate debtor again failed to make the payment.

- vi. That the Corporate Debtor further sought extension of the earlier lease deed dated 14.11.2016 executed amongst the parties which had expired. The Corporate debtor further categorically admitted that it will clear the outstanding dues within a period of 90 days. In terms of the acknowledgement, the agreement was renewed and extended for a period of 12 months commencing from 15.11.2017 to 14.11.2018. The Corporate Debtor again failed to adhere to the terms and conditions under the lease agreement. A total amount of Rs. 1,36,98,950/- was due and outstanding for the period commencing from 15.11.2017 to 14.11.2018.
- vii. That the Corporate Debtor on account of default of non-payment of the lease amount



and on account of delay in payment of lease amount and other defaults is liable to pay an amount of Rs. 3,81,53,613/- (Rupees Three Crores Eighty One Lacs Fifty Three Thousand Six Hundred And Thirteen).

2. Consequent to the notice issued by this Tribunal, the Counsel for the Corporate Debtor filed its reply on behalf of the Corporate Debtor stating as below:
 - i. That the amounts claimed under first agreement dated 11.11.2014 are disputed since the same have been paid and the remaining claim is time barred.
 - ii. That the amounts claimed under the second agreement dated 14.11.2016 are disputed since the agreement was never executed and rate of lease rental was never agreed upon.
 - iii. That the amounts claimed under the third agreement dated 15.11.2017 are disputed since the agreement was never executed and rate of lease rental was never agreed upon.
 - iv. That in order to trigger the Corporate Insolvency Resolution Process under the Code, the amount of



debt should be clearly crystallized which has nowhere been set forth by the Petitioner in its Company Petition.

3. The Counsel for the Operational Creditor has further contended as follows:

i. That no email/letters were placed on record by the Corporate Debtor to substantiate that the monthly lease rental was reworked to Rs. 3,00,000/- from Rs. 5,00,000/- . Moreover, the invoices were raised by the Operational Creditor at the request of the Corporate Debtor as the Operational Creditor is under no obligation to raise the invoices as the lease amount was already fixed in the agreement duly acknowledged and signed by the Corporate Debtor.

ii. That there is no documentary evidence placed on record by the Respondent to substantiate that the agreements were redrawn.

4. The Counsel for the Corporate Debtor has further contended as follows:



- i. That no second & third agreement executed between parties. The last page of the alleged agreement does not bear the signature or stamp of the Respondent unlike the first agreement and neither has signature of any witnesses on behalf of the Respondent since it was never executed by the Respondent in the first place.
- ii. That e-mail dated 12.11.2016 issued by Respondent clearly states "we want to continue after 14.11.16 on the mutually agreed terms and conditions".
- iii. That e-mail dated 06.09.2017 by Respondent clearly states as follows "Due to uncertainty of agreement between SKB and Innovative the functioning of both the organization is not smooth." This makes it evident that neither were any agreements executed after 11.11.2016 between the parties, neither could they arrive at a fixed rental rate.

5. We have heard the Ld. Counsels for the Operational Creditor and Corporate Debtor and perused the averments made in the application as well as the documents enclosed with the application. The



Respondent has prayed for dismissal of the present Application. The Respondent has alleged that the Agreements dated 14.11.2016 and 15.11.2017 were not executed by the Respondent and the amount of debt is disputed.

- 6.** On perusal of the Agreement dated 14.11.2016, it appears that the Agreement does not bear the stamp of the Corporate Debtor. Further, the Applicant has failed to produce Agreement dated 15.11.2017. The dispute with respect to the Agreements being forged cannot be decided by this Adjudicating Authority. This Adjudicating Authority is not expected to ascertain the veracity of documents produced.
- 7.** However, the existence of dispute with respect to the terms of the Agreement between the parties prior to issuance of notice u/s 8 IBC, 2016 is evident from e-mail dated 06.09.2017 wherein the Respondent had raised concerns with regards to functioning of the organisation not being smooth due to uncertainty of agreement between the Applicant and the Respondent.



The e-mail dated 06.09.2017 is reproduced herein below:

Forwarded message -----
Subject: AUDIT OF SKB BY DGCA FOI DATED 6/9/2017
Date: Wed, 6 Sep 2017 14:52:02 +0530
From: SKR <skr@innovativeaviation.in>
To: D. S. Chauhan <chauhan@bedarwals.com>, CMD <sushilbaderwal@bedarwals.com>, CMD
II <sushilbaderwal@yahoo.com>
CC: Harish Srivastav <harish_poonam@yahoo.com>

Dear Chauhan Ji

DGCA FOI audited SKB ops department today and they will send the findings of the inspection.

I have informed you about the audit last night when I came to know. Due to the uncertainty of agreement between SKB and Innovative the functioning of both the organisation is not smooth.

DGCA auditor will visit us again in 10/15 days time to check the improvement of the organisation functioning.

They have also pointed out that your website still shows the name and number of your old employee who left the company, they tried calling on the number mention on your website of SKB with no result. They have taken this point very seriously as information mention is not correct.

I have mark this mail to QM of SKB Infracons if you wish you may contact him and take the detail.

Once again I request you to solve the issue on top priority else I have to inform the regulatory body that we are no longer responsible.

Thanks

--
SANJEEV ROY
INNOVATIVE AVIATION PVT LTD
D-501/502, PALAM EXTENSION
CTOR 7, DWARKA
NEW DELHI-110077

- 8.** The Corporate Debtor has also raised a disputed with respect to the amount of debt due and has raised a contention that the lease amount as claimed by the Applicant as per the alleged Agreement dated 14.11.2016 was never agreed upon by the Respondent. The e-mail dated 08.09.2017 by the Corporate Debtor to



the Operational Creditor raising dispute w.r.t the lease amount is reproduced as under:

----- Forwarded Message -----
Subject:Re: DETAILS OF RENTAL PAYMENT.
Date:Fri, 8 Sep 2017 07:46:05 +0530
From:Sanjeev Roy <skr@innovativeaviation.in>
To:D. S. Chauhan <chauhan@bedarwais.com>
CC:Sanjeev Roy <cmd@innovativeaviation.in>, CMD <sushilbaderwal@baderwais.com>, CMD II <sushilbaderwal@yahoo.com>, CMD-III <sushilbedarwal@yahoo.com>

Dear Chauhan Ji,

All point wise claim in your mail is false and wrong. This is you are doing only to harass me.


We can involve DGCA which is regulatory body in India for clarification of your word [To stop the operation] what it means.

I have come several time in the past also to solve all our issues which you are well aware.

Aircraft has not flown because you ask us to stop the operation
And also fail to provide us GST no on time so we can renew the insurance.

Also I never ask you to give me permission to fly on this terms and condition. I have very clearly written Innovative will pay only 8 Lakh as rental if you want to continue the operation with us.

It was me who is chasing always now and then to solve the issue and it can be verified by my several emails whatup msg.

 Innovative is no longer responsible for any whatsoever charges after you ask us to stop the operation.

Thanks

Sanjeev Roy
Innovative Aviation Pvt Ltd

9. The Hon'ble Supreme Court in "***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited- 2017 1 SCC On Line SC 353***", analyzed the meaning of dispute with respect to Operational Creditors and observed:

"33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on



non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is 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, as the case may be.”

“34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?”

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”



10. At this juncture, reliance is placed on the judgement of Hon'ble Supreme Court in the matter of *M/s. S.S. Engineers V/s Hindustan Petroleum Corporation Ltd. & Ors. Civil Appeal No. 4583 of 2022* wherein the Hon'ble Supreme Court has held as follows:

"On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonestly or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed."

11. From the aforesaid decisions, it is clear that an Application filed under Section 9, IBC, 2016 cannot be admitted if there are disputes existing between the parties before the issuance of notice u/s 8, IBC, 2016 and also if the amount of debt is disputed. Be that as it may, on appraisal of the arguments advanced by the Ld. Counsels and the documents produced, it emerges that there were disputes existing prior to the issuance of the Demand Notice.



12. For the reasons discussed above, since there is a pre-existing dispute between the parties, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC, 2016.

13. Accordingly, we hereby **dismiss** the present application filed under Section 9, IBC, 2016.

SD/-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

SD/-

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