THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"
(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)

CP (IB) No. 656/Chd/Hry/2019
Under Section 9 of Insolvency and Bankruptcy Code, 2016

In the matter of:

Nitin Sharma
Partner,
Accurate Corrugation Industries
027 Ashiana Palm Court P-5,
Raj Nagar Extn., Ghaziabad,
U.P. 201017 …Petitioner-Operational Creditor

Vs.

M/s Hindustan Spirits Limited
having its registered office at
402, 4th Floor, Solitaire Plaza,
M.G. Road, Gurgaon, Haryana-122002
CIN No. U15531HR2005PLC076165
…Respondent-Corporate Debtor

Judgment delivered on: 04.07.2023

Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)

For the Petitioner-Operational Creditor : Ms. Arshita Raina, Advocate

For the Respondent-Corporate Debtor : Mr. Manoj Kumar Ahuja, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**for brevity 'IBC' / 'Code'**), by **Nitin Sharma, Partner, Accurate Corrugation Industries** (**for brevity 'Operational Creditor' / 'Petitioner'**), with a prayer to initiate Corporate Insolvency

Resolution Process (**CIRP**) in case of **M/s Hindustan Spirits Limited** (**for brevity 'Corporate Debtor' / 'Respondent'**).

2. The Corporate Debtor, namely, **M/s Hindustan Spirits Limited**, is a Company incorporated on 07.02.2005 under the provisions of the Companies Act, 1956 with CIN No. CIN No. U15531HR2005PLC076165 with its registered office at 402, 4th Floor, Solitaire Plaza, M.G. Road, Gurgaon, Haryana-122002, India. Hence, the territorial jurisdiction lies with this Adjudicating Authority. Copy of the master data of the corporate debtor is attached with the main petition and marked as Annexure A-9.

3. The facts of the case, briefly, as stated in the petition are that Operational Creditor is a partnership concern consisting of partners, namely, Mr. Dharampal Sharma, and Nitin Sharma. The Corporate Debtor is a selling and commission agent. In 2016, the Corporate Debtor approached Operational Creditor to appoint Operational Creditor as a supplier agent to provide corrugation boxes. The Operational Creditor maintained a running account for Corporate Debtor recording all transactions. As on 24.04.2018 total principal amount of Rs. 10,50,950/- (Rupees ten lakh fifty thousand and nine hundred fifty only) and interest amount of Rs. 8,06,100/- (Rupees eight lakh six thousand one hundred only) till 31.07.2019 @ 24% PA till payments were reflecting in the statement of account of the operational creditor against the corporate debtor. The Corporate debtor failed to make payments for the invoices dated 14.12.2016 to 22.03.2017. Despite the repeated reminder, the Corporate Debtor refused to clear their outstanding.

4. It is submitted by the petitioner in Form 5, Part IV that the amount claimed to be in default is Rs. 10,50,950/- (Rupees ten lakh fifty

thousand and nine hundred fifty only) and interest amount of Rs. 8,06,100/- (Rupees eight lakh six thousand one hundred only) till 31.07.2019 @ 24% PA. The default occurred on 24.04.2018 i.e. the date of the invoice raised by the Operational Creditor on Corporate Debtor. Copy of Statement of bank account (Annexure-A-1), Invoice (Annexure-A-2), Form-C dated 23.02.2017 (Annexure-A-3), Ledger Account (Annexure-A-4), ITR for the assessment year 2016-17 (Annexure-A-6), Partnership deed/GST Registration Certificate of Operational Creditor (Annexure-A-7) are attached with the main petition.

5. A demand notice in Form 3 dated 05.08.2019 is stated to be issued by the operational creditor. The demand notice had been delivered to the corporate debtor vide registered post as the delivery report and postal receipts are attached at Annexure-A-5. The corporate debtor The Corporate Debtor gave a reply dated 04.10.2019 sent on 07.10.2019 to the demand notice.

6. The notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The affidavit of service was filed by Operational Creditor vide Diary No. 1120 dated 11.02.2020. The corporate debtor has filed a reply vide diary No.1819 dated 06.03.2020, wherein it is stated that the Operational Creditor has failed to supply a copy of the partnership deed. The bills attached are not genuine bills as they do not properly stand after checking the quality and quantity purchased. The Operational Creditor has created duplicate copies of bills. The Operational Creditor relied on two bills i.e. Bill No. 158 of Book No. 04 dated 22.01.2012 of Rs. 2,23,500/- for the supply of C.C. Boxes and Bill No. 161 of Book No. 04 dated 05.02.2017 of Rs. 2,32,500/- for the supply of C.C.

Boxes that are forged bills as Corporate Debtor never ordered any good. The Operational Creditor approached Corporate Debtor for settlement of its account, Corporate Debtor requested the petitioner to come up with proper bills after deducting the amount according to the shortage of goods and adjustment of defective goods. The Corporate Debtor gave a reply dated 04.10.2019 sent on 07.10.2019 to the demand notice. The Operational Creditor has manipulated his accounts. The Operational Creditor did not mention the transaction between the parties regarding material supplied against Bill No. 150 of Book No. 03 dated 14.12.2016 of Rs. 2,32,500/- and also did not account for the payment of Rs. 2,00,000/- received through RTGS dated 13.09.2017. The invoices referred to have a specific clause printed that in case of any dispute between the parties then “All disputes are subject G.B. Nagar jurisdiction only”**.**

7. The rejoinder was filed by Operational Creditor vide Diary No. 00398/4 dated 08.08.2022 wherein it is stated that the Operational Creditor made regular supplies of boxes to the satisfaction of the Corporate Debtor and raised invoices. The Operational Creditor inadvertently missed to appropriate the receipt of Rs. 2,00,000/- in its books of account. The Corporate Debtor failed to prove the existence of any dispute before receiving the demand notice. The Corporate debtor failed to raise any objections within 10 days from receipt of the said notice. The reply was made much after 10 days time period. The Corporate Debtor failed to place on record the tracking report showing the delivery of the reply. The sale invoices are original and are not false documents. The petitioner filed the first complaint with the police with Fire Insurance Policy/Claim No.

31130011130100000826. The part payment amount against sale invoices No. 158 and 161 have not been considered and accepted by the Corporate Debtor. The Corporate Debtor approached the Operational Creditor for the settlement of accounts. As per Section 60 of Insolvency and Bankruptcy Code, 2016 in relation to the Insolvency Resolutions proceedings shall be the National Company Law Tribunal where the registered office of Corporate Debtor is situated and in the present case, it is Gurgaon, Haryana. The quality and quantity of the goods were checked and affirmed by Corporate Debtor. Due to irregular payments, Operational Creditor started running the account. Goods worth Rs. 14,50,950/- were supplied whereas Corporate Debtor has made payment of Rs. 6,00,000/- till date.

8. The short written submissions have been filed by the petitioner vide Diary No.00398/10 dated 23.02.2023 which was refiled on 01.03.2023 and by the respondent corporate debtor vide diary No.00398/7 dated 31.10.2022.

9. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

10. The first issue for consideration is whether the demand notice in Form 3 was properly served. The demand notice in Form 3 dated 05.08.2019 is stated to be issued by the operational creditor. The demand notice had been delivered to the corporate debtor vide registered post as the delivery report and postal receipts are attached at Annexure-A-5. The corporate debtor gave a reply dated 04.10.2019 sent on 07.10.2019 to the demand notice. Therefore, the demand notice was duly served upon the corporate debtor.

11. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is deposed by way of the affidavit under section 9(3)(b) by learned counsel for the operational creditor that no substantive dispute has been raised by Corporate Debtor prior to the date of the statutory demand notice dated 05.08.2019 and the notice was never replied (Annexure A-11). However, there is suppression of material fact as the Corporate Debtor gave a reply dated 04.10.2019 sent on 07.10.2019 to the demand notice. The suppression of facts is further evident, as the Operational Creditor has admitted that he inadvertently missed to appropriate the receipt of Rs. 2,00,000/- in its books of account received from the corporate debtor.

The Memorandum of Understanding dated 01.11.2021 between the parties filed vide IA No. 106/2022 provides that, "*.....the dealing between the First Party and the Second Party were smoothly running and in the year 2018 there arose a dispute in relation to the making of payment between the parties, as Second Party did not reconcile the receiving of payment from the First Party and which resultantly the relation between the parties become sour with regard to settlement of accounts*".

Therefore, the above clause shows that the dispute existed between the parties since year 2018 which is much before the issuance of the demand notice dated 05.08.2019. The reliance can be placed upon the judgment of Hon'ble Supreme Court, ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353*** wherein it was held that:

"***40**. It is clear, therefore, 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.*

***43.** …………..We have seen that a "dispute" is said to exist, so long as there is a real dispute as to payment between the parties that would fall within the inclusive definition contained in Section 5(6).*

***45.** Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability"*.

(Emphasis Supplied)

The definition of a 'dispute' as provided in the Insolvency and Bankruptcy Code,2016 is as follows-

"5. Definitions. – In this Part, unless the context otherwise requires, –
(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;"

Although, It is alleged by the petitioner that a fraud has been committed by Corporate Debtor, but there is no specific plea or instance of fraud so alleged. Moreover, there is no denial of signatures on Memorandum of

Understanding which is taken on record vide IA No. 106/2022. It is pleaded that Petitioner was not knowing English language but this plea is not much convincing because petitioner was under legal advice. If at all, some amount is left to be paid then the petitioner is at liberty to approach the appropriate forum for the adjudication of the said claim but, the corporate debtor cannot be subject to Corporate Insolvency Resolution Process.

12. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 05.08.2019 in Form 3 attached as (Annexure A-5) was duly served on the corporate debtor. However, the period of limitation would begin from the date of default i.e. 24.04.2018 i.e. the date of the invoice raised by the Operational Creditor on Corporate Debtor. This application was filed vide Diary No. 6724 on 02.12.2019. Therefore, this Adjudicating Authority finds that this application is filed within limitation.

13. As a sequel to the above discussion and the facts as well as circumstances since there is a pre-existing dispute between the parties regarding the amount claimed by the petitioner, the petition is liable to be rejected, in terms of Section 9 of IBC, 2016. The petition consequently stands dismissed, however, with no order as to costs.

Sd/-
(Subrata Kumar Dash)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

July 04, 2023
PKA/TB