

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT No. V, MUMBAI BENCH

C.P. (IB) No. 4605/NCLT/MB/2019

Under Section 9 of the I&B Code, 2016

In the matter of:

Jai International Pvt. Ltd.

75, Mittal Chambers, Nariman Point,
Mumbai – 400 021.

... Petitioner

V/s

Jaroli Agro Private Limited

1008 10th Floor, Hubtown Viva,
Shankarwadi, Western Express
Highway, Jogeshwari (E), Mumbai 400
060.

...Corporate Debtor

Order Dated: 15.07.2020

Coram:

Hon'ble Member (Judicial), Smt. Suchitra Kanuparthi

Hon'ble Member (Technical), Shri V. Nallasenapathy

For the Petitioner: Adv. Tejas Deshpande a/w Adv. Dinesh Masurkar

For the Respondent: Adv. Rahul Dev i/b Augus partners

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. This Petition is filed by M/s Jai International Pvt. Ltd. ("Petitioner") for initiation Corporate Insolvency Resolution Process ("CIRP") against M/s Jaroli Agro Private Limited ("Corporate Debtor") as provided under section 9 of the Insolvency & Bankruptcy Code, 2016 ("Code") read with rule 6 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 ("Rules") alleging that the Corporate debtor defaulted in making payment to the extent of Rs. 30,75,408/-.
2. The petition reveals that the petitioner has paid an advance of Rs. 40,00,000/- on 31/12/2014 to the Corporate Debtor for availing consultancy services in export of agricultural products. One Mr. Prajendra Jaroli and his son have formed the Corporate debtor company for providing consultancy services in the field of trading and export of agricultural products. The said Mr. Prajendra Jaroli was previously employed with the petitioner since 2000 and managed the trading and export of agricultural products for the petitioner company and was heading the Bombay operation. Subsequently the said Mr. Prajendra Jaroli was privately engaged in the consultancy work in trading and export of agricultural products. Mr. Prajendra Jaroli introduced the corporate debtor to the petitioner and the petitioner paid Rs. 40,00,000/- to the Corporate debtor at the instance of Mr. Prajendra Jaroli. The understanding is that the commission payable to the corporate debtor by the petitioner for the services of the corporate debtor will be adjusted against the advance of Rs. 40,00,000/- paid by the petitioner. The

petitioner submits that approximately Rs. 10,00,000/- out of Rs. 40,00,000/- was adjusted against the commission/ brokerage payable by the petitioner to the corporate debtor and still there is a balance of Rs. 30,75,408/- is unadjusted out of the advance and the petitioner stopped using the services of the corporate debtor, parted ways and seeks for the repayment of the unadjusted advance.

3. It is to be noted that Mr. Prajendra Jaroli who was an employee of the petitioner previously filed an Insolvency and Bankruptcy petition No. 1706/2019 on the file of NCLT Mumbai for initiation of Corporate Insolvency Resolution Process ("CIRP") against the petitioner herein alleging that the petitioner herein defaulted in making payment to the extent of Rs. 7,50,77,317/- as provided under the Memorandum of Understanding (MoU) dated 24/08/2013 entered into between the petitioner herein and Mr. Prajendra Jaroli. The said petition was dismissed on 28/11/2019 and an appeal was preferred by Mr. Prajendra Jaroli before the National Company Law Appellate Tribunal wherein notice was issued by Hon'ble NCLAT to the petitioner herein on 7/1/2020 and the same is pending.
4. Since the Corporate Debtor failed to refund the alleged advance amount, the petitioner on 14/11/2019 issued a demand notice under section 8 of the Code to the corporate debtor demanding the said sum of Rs. 30,75,408/-.
5. It is submitted that Mr. Prajendra Jaroli, in his pleadings in the above said C.P. No. 1706/2019 enclosed the Ledger account for the period from 1/4/2014 to 31/3/2019 of the petitioner herein in the books of account of the Corporate Debtor, wherein it was shown

that the Corporate debtor herein is liable to pay a sum of Rs. 30,00,000/- to the petitioner.

6. The corporate debtor by its reply dated 23/11/2019 to the demand notice, enclosed the pleadings filed in Company Petition No. 1706/2019 filed by Mr. Prajendra Jaroli against the petitioner herein, and submitted that: there is a bonafide pre-existing dispute in respect of the operational debt claimed in the notice; the demand notice was issued merely as a counter blast to the CP No. 1706/2019 filed by Mr. Prajendra Jaroli; the understanding between the petitioner and the Corporate debtor was to the effect that corporate debtor shall carry on its business while simultaneously providing the consultancy services to the petitioner on commission/brokerage basis; by the services provided by the corporate debtor, the petitioner expanded its business during 2014-2015; post 2015, the petitioner started dealing with the purchasers directly who were introduced to the petitioner by the corporate debtor; Mr. Prajendra Jaroli was an employee of the petitioner till 2008, handling the trade and export of agro commodities for the petitioner and post 2008 began to work as an external consultant to the petitioner for which he was remunerated by way of sales commission, out of pocket expense, etc.; a Memorandum of Understanding (MoU) was entered into between the petitioner and Mr. Prajendra Jaroli on 24/08/2013 wherein the petitioner inter alia agreed that Mr. Prajendra Jaroli shall be entitled to a sum of Rs. 4,50,00,000/- as full and final settlement of his account net of the amounts standing debit to Mr. Prajendra Jaroli and his family members and associates in the books of the petitioner as on

31/7/2013; thereafter Mr. Prajendra Jaroli continue to provide his consultancy services on the terms agreed in the Memorandum of Understanding (MoU) and advance payment was made to Mr. Prajendra Jaroli / his family/ associate entities for the service provided him; as part payment towards amount payable under Memorandum of Understanding (MoU), a sum of Rs. 30,00,000/- was paid by the petitioner on 31/12/2014 to the corporate debtor; the said payment of Rs. 30,00,000/- is not towards loan; the said amount was treated as advance since Mr. Prajendra Jaroli was obligated to raise invoices upon receipt of the entire outstanding amount payable under the Memorandum of Understanding (MoU); since the petitioner failed to honour the Memorandum of Understanding (MoU), left with no other alternative Mr. Prajendra Jaroli filed CP No. 1706/2019 against the petitioner on the file of NCLT, Mumbai; in the said petition Mr. Prajendra Jaroli specifically acknowledged the amount of Rs. 30,00,000/- paid by the petitioner in part satisfaction of the amount payable under Memorandum of Understanding (MoU); the debit notes raised by the petitioner for courier expenses were not received by the Corporate debtor and the same was ever accepted and authorised by the Corporate debtor; the DHL courier invoices were issued in the name of the petitioner and hence payable by the petitioner only and the corporate debtor is not liable to make payment for those invoices; the courier invoices were signed by Mr. Prajendra Jaroli as a consultant and authorised representative of the petitioner and hence the corporate debtor is liable for those courier charges; the petitioner has not addressed even a single communication from

31/12/2014 interalia demanding repayment of the purported advance given by the petitioner till the issue of demand notice; the last invoice raised by the corporate debtor was cleared by the petitioner on 7/9/2015; post which, there has been no demand from the petitioner; there is no explanation as to why the invoices raised by the Corporate debtor were cleared by the petitioner from time to time when the amount of Rs. 30,00,000/- is till payable by the Corporate debtor as claimed in the demand notice; the demand notices relates to a claim which ex facie barred by law of limitation; in view of the above the corporate debtor denied the liability.

7. The corporate debtor filed reply to the petition and reiterated the contentions made in the reply to the demand notice and denied liability.
8. On hearing the counsels on both sides and on going to the pleadings the followings are the observations of this Bench:
 - a. The petitioner solely based its claim in this petition on the basis of the Ledger account.
 - b. The ledger account statement produced by the petitioner annexed at page No. 45 of this petition reveals that the petitioner made payment of Rs. 10,00,000/- to the Corporate debtor as commission / brokerage and sum of Rs. 1,00,000/- was deducted as TDS on the commission / brokerage. Subsequently on 31/12/2014 itself another payment of Rs. 30,00,000/- was made by the petitioner to the Corporate debtor. The Ledger account further reveals that till the end of 31/3/2015 a sum of Rs. 9,87,325/- was accounted as

commission paid by the petitioner and there is a balance of Rs. 30,12,675/- as payable by the Corporate debtor.

- c. The Ledger account further reveals that up to 2/11/2015 the petitioner issued credit notes for the commission/brokerage and subsequent to 2/11/2015 the petitioner issued several debit notes for postage and courier charges from 29/2/2016 to 24/11/2017 and finally the account shows that the corporate debtor is liable to pay a sum of Rs. 30,75,408/-.
- d. The ledger shows that Rs. 30,00,000/- was given as loan to the corporate debtor, hence the contention that it is advance towards commission is falsified. It is to be noted that for another sum of Rs. 10,00,000/- paid as commission advance on the same day, TDS of Rs.1,00,000 is deducted, whereas Rs.30,00,000 has been accounted as loan and no TDS has been deducted. Had it been an advance commission as contended by the petitioner, TDS of Rs.4,00,000 would have been deducted. Hence the amount of Rs.30 lacs paid is clearly a loan as depicted in the ledger. Hence the contention of the petitioner that Rs. 30,00,000/- is an advance towards commission payable to the corporate debtor is falsified. When the amount paid is a loan, the same does not fall under the definition of the Operational debt as provided under Section 5 (21) of the code which provides that *“operational debt” means a claim in respect of provision of goods or services including employment or debt in respect of the payment of dues arising under any law for the time being enforce and payable to the central government, any state*

government or any local authority". Hence we hold that the amount claimed is not an operational debt and the petition is not maintainable.

- e. The petitioner herein, in the CP No. 1706/2019 filed by Mr. Prajendra Jaroli against this petitioner, filed their reply wherein in para "J" (page 237 of this petition) stated as below:

"In September 2018, the Corporate creditor was removed and asked to settle accounts. At this time he started asking for absurd amounts of money. On the contrary, on examination of the Bombay office books it appeared that not only were there cash withdrawals made by him but also that corporate debtor has made an excess payment of Rs. 1,15,83,132/- to him and his related parties as enumerated below:-

<i>Sr. No.</i>	<i>Name of related party</i>	<i>Excess Amount</i>
1.	PRAJENDRA JAROLI	Rs. 41,22,500/-
2.	PRAJENDRA JAROLI HUF	Rs. 1,42,724/-
3.	MRS. JAYASHREE JAROLI	Rs. 20,00,000/-
4.	PRIYANSHU JAROLI	Rs. 12,42,500/-
5.	HONEY JAROLI	Rs. 10,00,000/-
6.	JAROLI AGRO PVT LTD	Rs. 30,75,408/-
	TOTAL	Rs. 1,15,83,132/-

This petition of the Operational Creditor is nothing but a ploy to avoid any action by the corporate debtor to recover this outstanding amount of Rs. 1,15,83,132/-". The above averments which is shown as a part of the pleadings in this petition clearly shows that the petitioner herein filed this petition only for recovery of money as if the IBC proceedings are recovery proceedings. Hence

the proceedings under Section 9 of IBC, 2016 is not maintainable.

- f.* Assuming without admitting that the debt is an operational debt, the amount was paid on 31/12/2014 and this petition was filed on 6/12/2019 and there being neither payment nor acknowledgement of liability within the period of limitation the claim is clearly barred by limitation. The petitioner submitted that since there are credit notes and debit notes accounted for in their accounts, the claim is not barred by limitation. However, the credit notes relates to the commission credited by the petitioner to the corporate debtor and adjusted towards the advance commission of Rs.10 lacs. The postage and courier charges debited to the account of the corporate debtor on various dates from 29/2/2016 to 24/11/2017 by the petitioner is disputed by the corporate debtor as payable by the petitioner only and the same cannot be debited to its account and hence we feel that the debit notes in respect of postage and courier charges are only self serving entries made by the petitioner.
- g.* Lastly since the corporate debtor submitted that this payment of Rs. 30,00,000/- is towards part satisfaction of the Memorandum of Understanding (MoU) dated 24/08/2013, both in this proceedings as well as the proceedings in CP No. 1706/2019 which was initiated well before the present petition, there is a pre-existing dispute in respect of the claim and hence the dispute raised by the Corporate debtor will squarely fall under the definition of dispute as defined under

Section 5 (6) of the code which provides that "*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."

9. In view of the above discussion this petition is dismissed. No Cost.

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V. Nallasenapathy
Member (Technical)

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Suchitra Kanuparthi
Member (Judicial)