



NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

IN

Company Petition No. (IB) – 181/(ND)/2023

IN THE MATTER OF:

Shashi Beriwal & Company Pvt. Ltd.

Reg. Office at: Flat C-13 Plot No. 12
Varun Apartment Cooperative Society,
Sector-9, Rohini, Delhi - 110085

**... Petitioner/
Operational Creditor**

VERSUS

Laxmi Foils Pvt. Ltd.

Reg Office: Shop No. G-22C (UGF),
D-1 (K-84), Green Park Main, Delhi - 110016

**... Respondent/
Corporate Debtor**

Section: 9 of IBC, 2016

Order Delivered on: 05.12.2023

CORAM

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Dr. Atul Singh, Advocate

For the Respondent : Adv. Kunal Tandon, Adv. Richa Sandilya



ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

As can be gathered from Part IV of the petition filed under Section 9 of the IBC, 2016, read with Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Petitioner (hereinafter referred to as Operational Creditor), entered into an understanding/ agreement with the Respondent (hereinafter referred to as Corporate Debtor), on 01.04.2021, in terms of which the Operational Creditor was to introduce customers to the Corporate Debtor for the sale of latter's material on a commission basis. The Corporate Debtor agreed to pay commission @ 3% on the total invoice value, at the end of the financial year i.e., 31.03.2022, or as per the mutual understating of the parties.

2. It is the case of the Operational Creditor that it procured and introduced customers to the Corporate Debtor, pursuant to which, goods were supplied to them by the Corporate Debtor. As has been stated in Part IV (2) of the petition, the Operational Creditor raised the following invoices upon the Corporate Debtor.

| Invoice No. | Date | Amount |
|--------------------|-------------|---------------|
| 120 | 10.01.2022 | ₹ 67,34,901/- |
| 121 | 20.01.2022 | ₹ 39,06,297/- |
| 122 | 28.01.2022 | ₹ 28,51,929/- |
| 128 | 07.02.2022 | ₹ 39,33,517/- |



3. In terms of the averments made in Part IV (2) of the application, the confirmation and reiteration of the outstanding payment by the Operational Creditors vide e-mails dated 24.02.2022 and 24.04.2022 were admitted by the Corporate Debtor by issuing letter dated 25.02.2022. As the Corporate Debtor failed to make the payment of an amount of Rs. 1,66,88,228/- (Rupees One Crore Sixty-Six Lakh Eighty-Eight Thousand Two Hundred Twenty-Eight only) less GST to the Operational Creditor and specifically resiled to pay the same by writing letter dated 06.07.2022, the Operational Creditor wrote him back vide letter dated 21.07.2022 and served Demand Notice dated 02.08.2022.

4. The notice was responded to by the Corporate Debtor by missive dated 18.08.2022. Thereafter, the Operational Creditor wrote a letter dated 03.11.2022 to the erstwhile management of the Corporate Debtor on 21.11.2022 stating that the current management did not make the payment of the amounts, despite due provisions qua the same being made at the time of sale purchase transaction. According to the Operational Creditor, the debt could fell due on 01.04.2022 and the cause of action to file the present application arose with reply dated 18.08.2022 given by the Corporate Debtor to Demand Notice dated 02.08.2022. As has been mentioned in Part IV of the petition, the total amount defaulted to be paid by the Corporate Debtor to Operational Creditor is Rs.1,76,92,265/-. Though, no specific date of default is mentioned, but from the tenor of the contents of Part IV of the petition it appears that according to the Petitioner the dates of default are 01.04.2022 and 18.08.2022.



5. In the reply filed by it, the CD has pleaded that: - (i) the defects qua the application were not removed within 07 days from 23.05.2023 and were removed only on 18.07.2023, thus the provisions of the proviso to Section 9(5)(ii) are violated; (ii) the Corporate Debtor was previously controlled by the individuals mentioned in para 7 of the reply, but in terms of the Share Purchase Agreement dated 03.02.2022, the current management i.e. Omat Business Pvt. Ltd. took over the Corporate Debtor, thereby making it a wholly owned subsidiary of the Omat Business Pvt. Ltd. The erstwhile management is resorting to tactics and strategies to extort money from the present management and previously it got an application under Section 7 of IBC, 2016, filed against CD through Mr. Vijay Jain viz. CP (IB) No. 742 of 2022, which was rejected with cost of Rs. 75,000/-; (iii) there is no agreement between the Operational Creditor and the Corporate Debtor for any services required to be rendered by the Operational Creditor. The invoices and ledger relied upon by the Operational Creditor are concocted one; (iv) the letter dated 25.02.2022 signed by Mr. Rajesh Jain cannot be considered as acknowledgment by the Corporate Debtor as the letter is a clear evidence of conspiracy hatched between the Operational Creditor and the erstwhile Director to extort the money from the present management of the Corporate Debtor by resorting to the proceedings under IBC, 2016.

6. In para 18 of the reply, the CD has cited chronology and instances to show that the Operational Creditor is hand in gloves with the erstwhile management. Para 18 and 19 of the reply reads thus: -



“18. Before putting forth the facts in detail, brief list of date is succinctly stated below to evidence that the Operational Creditor is hand in glove with the erstwhile directors and the present proceeding is a sham proceeding:

| S.No. | Date | Particulars | | | | | | | | | | | | |
|-------------|---|--|-------------|------|--------------|-----|------------|-----------|-----|------------|-----------|-----|------------|-----------|
| 1. | 25.11.2021 | A Memorandum of Understanding was entered into between the erstwhile management of the Corporate Debtor and OMAT Business Pvt.(current management of the Corporate Debtor) | | | | | | | | | | | | |
| 2. | 10.01.2022, 20.01.2022 & 28.01.2022 | Operational Creditor raised following invoices: <table border="1"><thead><tr><th>Invoice no.</th><th>Date</th><th>Amount (Rs.)</th></tr></thead><tbody><tr><td>120</td><td>10.01.2022</td><td>67,34,901</td></tr><tr><td>121</td><td>20.01.2022</td><td>39,06,297</td></tr><tr><td>122</td><td>28.01.2022</td><td>28,51,929</td></tr></tbody></table> | Invoice no. | Date | Amount (Rs.) | 120 | 10.01.2022 | 67,34,901 | 121 | 20.01.2022 | 39,06,297 | 122 | 28.01.2022 | 28,51,929 |
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| 121 | 20.01.2022 | 39,06,297 | | | | | | | | | | | | |
| 122 | 28.01.2022 | 28,51,929 | | | | | | | | | | | | |
| | | It is stated that the above invoices were raised by the Operational Creditor pursuant to the execution of MOU between the erstwhile management of the Corporate Debtor and OMAT Business Pvt.(current management of the Corporate Debtor). | | | | | | | | | | | | |
| 3. | 03.02.2022 | The erstwhile Shareholders executed a Share Purchase Agreement with OMAT Business, becoming the current management of the Corporate Debtor, then being its wholly owned subsidiary. | | | | | | | | | | | | |
| 4. | 07.02.2022 | Invoice no. 128 dated 07.02.2022, for an amount of Rs. 39,33,517/- was issued by the Operational Creditor upon the present management of the Corporate Debtor. From the date of the invoices itself, it is evident that the Operational Creditor has fabricated these invoices only with an intent to extort money in sheer collusion and conspiracy with the erstwhile management from the Corporate Debtor under the garb of IBC, as all invoices are raised between 10.01.2022 to 07.02.2022. It is also pertinent to note that the last invoice, i.e. 07.02.2022 was allegedly issued post execution of the Share Purchase Agreement, i.e. on 03.02.2022, however, from the records of the Corporate Debtor, it is stated that no such invoice was ever received by the present management of the Corporate Debtor as the present management never engaged into any business with the Operational Creditor. | | | | | | | | | | | | |



| | | |
|----|---------------------------|---|
| 5. | 24.02.2022 | Email was issued by the Operational Creditor seeking payment of the alleged invoices. |
| 6. | 25.02.2022 | The email dated 24.02.2022 was acknowledged by the erstwhile director of the Corporate Debtor, when |
| | | the erstwhile directors had clearly executed a Share Purchase Agreement dated 03.02.2022 |
| 7. | 06.07.2022 | Since no documentary evidence of any contract/ evidence was available with the Corporate Debtor neither did the erstwhile management of the Corporate Debtor provide any record of any agreement oral or written, the present management issued a letter dated 06.07.2023, seeking documents or any correspondence that might have been done between the Corporate Debtor and the Operational Creditor, to prove its claim. |
| 8. | 21.07.2023 &11.08.2023 | Instead of providing documents in support. Of the claim as alleged in the email dated 06.07.2023, the operational Creditor with an intent to extort money from the Corporate Debtor issued frivolous demand notice under section 8 of the IB Code, seeking payment of the alleged invoices issued by the operational creditor. |
| 9. | 18.08.2022 | Reply to the frivolous demand notice was issued by the present management of the Corporate Debtor refuting all allegations alleged by the operational Creditor. |

19. *It is alleged by the Operational Creditor that the Corporate Debtor had agreed for commission to introduce customer for the business of the Corporate Debtor, however, the entire records provided by the erstwhile management of the Corporate Debtor does not indicate or even any ledger, books of accounts, financial statements indicates that the Operational Creditor was hired on commission basis by the Corporate Debtor. Not even a single correspondence has been filed by the Operational Creditor indicating payment due and payable by the Corporate*



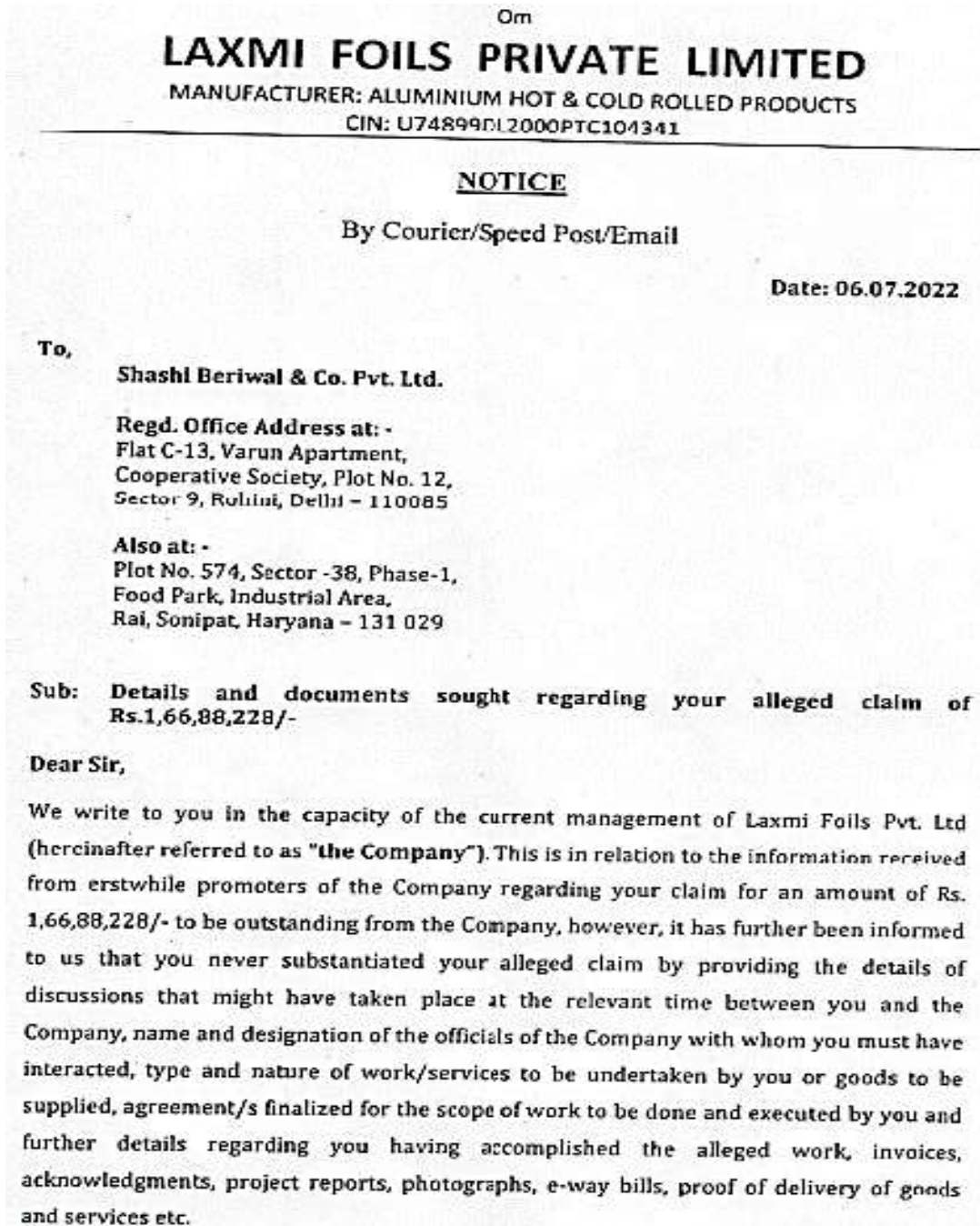
Debtor to the Operational Creditor. Rather it is stated that the alleged invoice issued by the Operational Creditor is bogus and manipulated and is also obvious from the absence of relevant details in the same. No name of any client or customer or any other detail has been provided in the invoice, for which, alleged commission was to be provided by the Corporate Debtor.”

7. In the rejoinder filed by it, the Operational Creditor has tried to raise the plea that the debt defaulted to be paid by the Corporate Debtor arose from non-gratuitous services rendered by it to the Corporate Debtor, by facilitating the buyers for goods at an agreed rate of commission. The debt was admitted in terms of the letter dated 25.02.2022.

8. We have heard the counsels for the parties and perused the record. As can be seen from the contents of the petition itself, before Demand Notice dated 02.08.2022 could be served by the Operational Creditor upon the Respondent, the Corporate Debtor had raised the dispute regarding the service rendered by Operational Creditor to the Corporate Debtor by writing letter dated 06.07.2022. In the said communication, the Corporate Debtor had specifically alleged that the Operational Creditor failed to provide the details of discussion regarding the service allegedly rendered by it and the discussion to provide such services. In terms of the letter, the Corporate Debtor had disputed the claim of the Operational Creditor for the principal amount. As can be seen from Section 5(6) of the IBC, 2016, the dispute includes the one related to the existence of the amount of debt. In the present case, the Corporate Debtor had disputed the existence of debt on the ground that the Operational Creditor never substantiated its alleged claims by



providing the details of discussion that might have taken place at the relevant time between the Operational Creditor and the Corporate Debtor. The Notice dated 06.07.2022 reads thus: -



9. Indubitably, the aforementioned Notice has been relied upon by the Operational Creditor himself and has been enclosed as Annexure-8 to the petition. The Operational Creditor has also not placed on record any



agreement/ understanding, in terms of which the commission @ 3% on the total invoice value payable to him. Page 29-32 of the Petition are the invoices raised by the Operational Creditor with reference to certain goods supplied at Uttarakhand. In the invoice he has not mentioned even the details of the customers, who were introduced by him to CD. The invoices should essentially contain such details. The Operational Creditor could also not place on record the details of the customers and the manner and circumstances in which he could persuade them to purchase goods from the Corporate Debtor. In para 4 of the reply, the Corporate Debtor could specifically aver that there is no privity of contract in existence between the Corporate Debtor and Operational Creditor and no amount as sought by the Operational Creditor is payable by the Corporate Debtor to the Operational Creditor. Para 4 of the reply reads thus: -

“4. Further, the present application has been preferred by the Operational Creditor only with an intent to extort money from the Corporate Debtor under the garb of the Insolvency and Bankruptcy Code, 2016. There is no privity of contract in existence between the Corporate Debtor and the Operational Creditor and as such, no amount as sought by the Operational Creditor are payable by the Corporate Debtor to the Operational Creditor.”

10. Regarding the letter dated 25.02.2022 (Annexure A-6), the Corporate Debtor has alleged that the letter is signed by Mr. Rajesh Jain, the part of erstwhile management, who had colluded with the Operational Creditor to strong arm it to extort money.



11. Without going deep into the facts, we are of the view that as before issuance of Demand Notice by Operational Creditor to the Corporate Debtor, the Corporate Debtor had raised a dispute regarding the existence of amount of debt, the present petition is hit by Section 9(5)(ii)(d) of IBC, 2016. As can be seen from the judgment of Hon'ble Supreme Court in **Mobilox Innovation (P) Ltd. vs. Kirusa Software (P) Ltd.** [(2018) 1 SCC 353], while examining the issue of the pre-existing dispute, all that the Adjudicating Authority is to see, whether there is a plausible contention which requires further investigation and that the dispute is not a patently feeble legal arguments or an assertion of facts unsupported by the evidence. In the present case, apparently, the amount of debt alleged by the Operational Creditor is not supported by any details. Even, the invoices do not contain the details of customers introduced by the Operational Creditors and the specification and quantities of the goods the customer bought on his persuasion. No specific agreement regarding the service allegedly rendered by the Applicant could be placed on record. There being sufficient material on record to indicate the pre-existing dispute, regarding which the Corporate Debtor had written a letter to Petitioner on 06.07.2022 itself, we are not inclined to order commencement of CIRP qua the CD. The Petition is devoid of merits and is accordingly rejected.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)