IN THE NATIONAL COMPANY LAW TRIBUNAL,
NEW DELHI COURT III

Item No. 08
IB-1923(ND)/2019

IN THE MATTER OF:
M/s. Satkar Logistics pvt.Ltd .....**APPLICANT/OPERATIONAL CREDITOR**
VS
M/s. S.N.J Trade Link Pvt.Ltd ......**RESPONDENT/CORPORATE DEBTOR**

SECTION
U/s 9 of IBC, 2016 **Order Pronounced on 26.05.2023**

CORAM:
SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)
SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

PRESENT:
For the Applicant :
For the Respondent :

ORDER

Order pronounced in open court vide separate sheets. IB-1923(ND)/2019 is **dismissed**.

Sd/-
(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

Sd/-
(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH

COURT- III

IB-1923/ND/2019

U/S. 9 of the IBC, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule, 2016.

IN THE MATTER OF

M/S SATKAR LOGISTICS PRIVATE LIMITED
Registered Office at: -
B-72, 2nd Floor, Rohit House,
Vishwakarma Colony,
Tughlakabad, M.B. Road,
New Delhi – 110044 …Operational Creditor

Versus

M/S S.N.J TRADE LINK PRIVATE LIMITED
Registered Office at:
5593-5594, 3rd Floor,
Ward No. VII, Lahori Gate,
New Delhi - 110006

…Corporate Debtor

Delivered on: 26.05.2023

Coram:

Shri Bachu Venkat Balaram Das
Hon'ble Member (Judicial)

Shri Atul Chaturvedi
Hon'ble Member (Technical)

Appearances:

Operational Creditor : Mr. Rishab Kapur, Advocate
Corporate Debtor : Mr. Sukhbir Singh, Advocate

O R D E R

Per: Bachu Venkat Balaram Das, Member (Judicial)

1. The instant application bearing IB-1923/ND/2019 has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditor, M/s Satkar Logistics Private Limited is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s S.N.J Trade link Private Limited, to declare moratorium and to appoint Interim Resolution Professional (hereinafter referred as 'IRP'). The Corporate debtor is registered with ROC, NCT of Delhi & Haryana and is therefore, within the jurisdiction of this Adjudicating Authority.

2. The Operational Creditor/Petitioner has averred as follows: -

a. It is submitted that, The Operational Creditor provides overseas logistics/container services to its clients and the Corporate Debtor is engaged in the business of manufacture, distribution and export of basmati and non-basmati rice.

b. It is further submitted that, the Operational Creditor and the Corporate Debtor were in regular business transactions as the Operational Creditor had rendered management/logistics services such as ocean freight charges, B/L charges, IHC/THC charges etc. to the Corporate Debtor for which various invoices were raised from time to time as per the terms and conditions contained in the said invoices by the Operational Creditor.

c. It is averred that, over a period of time, the parties had maintained a regular running account. The Corporate Debtor has made some part payments against the said invoices which were adjusted by the Operational Creditor as "First in First out method" and an outstanding amount of Rs.3,40,529/- (Rupees Three Lakh Forty Thousand Five hundred twenty nine) became due and payable by the Corporate Debtor along with an agreed interest @ 24% per annum.

d. It is further averred that, despite promises and assurances made by the Corporate Debtor to make the abovementioned outstanding debt to the Operational Creditor, till date the said Operational debt has not been paid by the Corporate Debtor to the Operational Creditor in discharge of its admitted liability.

e. It is submitted that, therefore, the Corporate Debtor has remained indebted in a sum of Rs.3,40,529/- (Rupees Three Lakh Forty Thousand Five Hundred Twenty Nine Only), along with an agreed interest @ 24% per annum to the Operational Creditor with effect from 25.06.2016. The date of default as mentioned in Part – IV of this instant Application is 25.06.2016 and amount in default is Rs.3,40,529/-

f. It is also submitted that, notice u/s 8 of IBC, 2016 was issued on 27.02.2019.

3. Per contra, Corporate debtor has raised two contentions: -

I. The present Application is liable to be dismissed as it is barred by limitation as a matter of fact dispute arose between the parties on 21.05.2016, when the Corporate Debtor intimated that demurrage charges would be paid by the Applicant. The Applicant has filed this instant petition on 14.08.2019 so, this petition is barred by limitation.

II. There is a pre-existing dispute between the parties and the instant Petition is not maintainable before this Hon'ble Tribunal in light of Sections 8(2)(a) r/w 9(5)(ii)(d) of the Code. The dispute has been discussed between the parties in various emails, phone calls, reconciliations and legal notices between the parties.

4. We have heard the arguments advanced by Ld. Counsels appearing for Operational creditor as well as for the Corporate Debtor and also perused the record.

5. The Operational Creditor's claim is based on the facts that, the Operational Creditor has rendered its logistics services to the Corporate Debtor and raised the invoices of Rs.3,40,529/-. After giving several reminders to the Corporate Debtor to pay the disputed amount all the efforts of the Operational Creditor has fallen on deaf ears as till date Corporate Debtor has failed to reply regarding the alleged Operational Debt.

6. As regards to the issue of limitation it is observed that date of default mentioned in Part – IV in this instant application is 25.06.2016. While perusing the record, it is confirmed that this instant application was filed on 14.08.2019 which is filed after the 3 years. It is now well settled that the provisions of Limitation Act, 1963 are applicable to the IBC proceedings and that the period of Limitation in respect of Application u/s 7 or 9 of the Code will be governed by Article 137 of the Limitation Act which provides the period of Limitation as 3 years from the date of default as laid down by Hon'ble Supreme Court in ***B.K Educational Services Pvt. Ltd. vs. Parag Gupta & Associates (2019)11SCC663 in Para 42 as reproduced below: -***

> *42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the*

Limitation Act may be applied to condone the delay in filing such application.

7. In the light of the decisions referred to ***supra***, when we consider the submissions of the Operational Creditor for the claims towards the invoices raised by the Operational creditor issued on 25.06.2016 to the Corporate debtor we have no hesitation to hold that, this instant Application is not maintainable u/s section - 9 of IBC code. We are of the considered view that this Application under Section 9 is barred by limitation as it is filed beyond three years and on that reason it is barred by the limitation.

8. The Corporate Debtor has, inter alia, raised the second contention based on 'pre-existing' dispute. To support its contention, the Corporate Debtor has also placed on record certain correspondence through e-mails.

9. The word 'dispute' as defined under Code includes suit or arbitration proceedings relating to the existence of the amount of debt; the quality of goods or services; or the breach of a representation or warranty. It is true that the definition must fit under the parameters as defined under the code but at the same time it must stand on a test as laid down in the recent judgment of the Hon'ble Supreme Court in ***M/s S.S. Engineers Vs Hindustan Petroleum Corporation Ltd. & Ors., Civil Appeal No. 4583 of 2022*** whereby the following has been held:

"31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues

claimed by an operational creditor. 32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that 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 dishonesty 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."

10. However, in this matter, before deciding the issue of admission of the Corporate Debtor into CIRP on the basics of the instant application filed u/s 9 of the IBC, 2016 we are required to decide following question: -

"Whether a Section - 9 petition would still be maintainable if 'Corporate Debtor' has failed to raise the issue of 'Pre-Existing Dispute' in section – 8 notice?"

11. The Corporate Debtor can bring relevant materials before this Adjudicating Authority to establish 'pre-existing' dispute if it has failed to reply the notice u/s 8 of IBC, 2016. In the present case, the Corporate Debtor raised the issue of a pre-existing dispute as its main defence and placed on record, a series of email dated 21.05.2016 to 16.01.2018 marked as Annexure

– R3 in this instant petition. In the above mentioned emails the issue of demurrage charges payable as well as other issues between the parties regarding non-adjustment of credit notes, TDS payments are raised. The extracts of the above mentioned emails is reproduced below for reference: -

> ***Dear Sir,***
>
> ***1. You have not entered Credit Note which you have issued to us on dated 26.06.2016, Bill No. SLPL/16-17/793 of Rs. 2875.00***
>
> ***2. TDS we have deducted in F.Y 2015-16 on your bills which you have not entered.***
>
> ***Kindly, send us credit note of Rs. 288405.00 due to late delivery of B/I from Satkar logistics Jeddah shipment.***

It can be seen from these emails that there was some controversy on the debit note of shipping line, ground rent demurrage charge and port bills charges between the parties. It is clear from the correspondence between the parties that there is an undeniable discrepancy with respect to the dispute on the invoices. All these e-mails were sent prior to the issuance of demand notice u/s 8 (1) of the Code dated 27.02.2019 by the Operational Creditor. Considering the facts and circumstances as reflected from the record, we are of the considered opinion, that the dispute which existed between the Operational Creditor and the Corporate Debtor prior to issue of the demand notice u/s 8 (1) about the debit note of shipping line, ground rent demurrage charge and port bills requires a detailed inquiry and investigation by a proper forum and this Adjudicating Authority having a summary jurisdiction is not that forum.

12. It is pertinent as this stage to refer the decision of Hon'ble NCLAT given in the matter of ***Brandy Realty Services Ltd. v. Sir John Bakeries India (P) Ltd., 2022 SCC OnLine NCLAT 290***, where it was held that: -

"...mere fact that Reply to notice under Section 8(1) having not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there are pre-existing dispute which may lead to the rejection of Section 9 application."...

13. In view of the aforesaid factual and legal position, we are of the view that there is 'Pre-existence of dispute' which was raised by the Corporate Debtor time and again much prior to the service of demand notice under section 8 (1) of IBC. Therefore, we deem it appropriate to reject this application filed under section 9 of the IBC, 2016 by the Operational Creditor/Applicant herein.

14. Accordingly, the instant Application bearing IB-1923/ND/2019 is hereby ***dismissed***. No orders as to cost. A copy of this order is to be marked to the parties and also to IBBI for record.

SD/- **SD/-**

(Atul Chaturvedi)
Member (Technical)

(Bachu Venkat Balaram Das)
Member (Judicial)

IB-1923(ND)/2019
D.O.O – 26.05.2023