



IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER
SHRI PRASANTA KUMAR MOHANTY
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 53/9/JPR/2020

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016, Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

IN THE MATTER OF:

RAJESH AGRAWAL

... Operational Creditor/Applicant

Versus

DANGAYACH HOTELS PRIVATE LIMITED

... Corporate Debtor/Respondent

MEMO OF PARTIES

RAJESH AGRAWAL

E-205, (LGF), Greater Kailash-II
New Delhi – 110048

... Applicant

VERSUS

DANGYACH HOTELS PRIVATE LIMITED

B-6B, Sterling Apartment, Prithviraj Road,
C-Scheme, Jaipur, Rajasthan – 302004

Also at:

1st Avenue, Govind Marg, Raja Park,
Adarsh Nagar, Jaipur, Rajasthan- 302004

... Respondent

For the Applicant : Divanshu Mittal, PCS
For the Respondent : Mohit Khandelwal, Adv.



Order Pronounced On: 13.01.2023

ORDER

Per: Shri Prasanta Kumar Mohanty, Technical Member

1. The present application has been filed by Mr. Rajesh Agrawal ('Operational Creditor'/ 'Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Dangayach Hotels Pvt. Ltd. ('Corporate Debtor'/ 'Respondent') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC' / 'Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Rules').
2. The Applicant, Mr. Rajesh Agrawal, is an advocate and alleges default by the Corporate Debtor for the non-payment of professional dues amounts to Rs. 3,06,058/- (Rupees Three Lakh Six Thousand Four and Fifty-Eight Only) along with interest payable @ 18% per annum.
3. The Corporate Debtor, M/s Dangayach Hotels Private Limited, is a private company incorporated under the Companies Act, 1956, on 22.01.2002, having CIN: U55101RJ2002PTC017387. The Respondent has its registered office at – Hotel Marriott, First Floor, Ramdas Agarwal Marg, Near Jawahar Circle, Jaipur – 302015; and has an Authorised Share Capital of Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) and Paid-Up Share Capital of Rs. 11,52,50,900/- (Rupees Eleven Crores Fifty-Two Lakhs Fifty Thousand and Nine Hundred Only).



4. The details of the transactions leading to the filing of this application averred by the Applicant *vide* Diary No. 264/2020 dated 05.02.2020 are as follows:
- a. The Respondent approached the Applicant to avail his professional legal services, and professional fees were to be decided mutually by the parties. Consequently, the Operational Creditor raised invoices for the professional service rendered by him as per mutually agreed consideration to be paid within a reasonable time of thirty days.
 - b. The Corporate Debtor not only delayed professional fees on the pretext of not bills/ accounts but also failed to consider clearing the remaining dues of seventeen unpaid invoices. The copy of the invoices raised from 03.02.2015 to 20.11.2017 is annexed as Annexure A – 3 (Colly) of the Application. The Applicant sent reminders for pending professional fees, telephonically and through e-mails. The Respondent has failed to make the balance payment for other invoices. The copy of the e-mails exchanged between the parties is annexed as Annexure A – 4 (Colly) of the Application.
 - c. The Applicant issued and served a Demand Notice dated 12.11.2019 to the Respondent under Section 8 of the Code as per Form 3 as prescribed under Rule 5 of the Rules at its registered office, demanding a sum of Rs. 3,06,058/- along with interest @18% per annum on the invoices. The Respondent neither paid the outstanding debt nor raised a dispute regarding the outstanding debt till the filing of the present petition. The



demand notice was accompanied by a computation of interest, details of invoices, and relevant dates of default. Copy of Demand Notice dated 12.11.2019 and postal receipt sent to the Respondent are annexed at Annexures A – 5 (Colly) of the Application.

- d. The Applicant has further attached the copy of the bank statement and ledger account of the Operational Creditor in the books of the Corporate Debtor reflecting non-receipts of the pending dues, and the same is annexed as Annexure A – 6 and 7 of the Application, respectively. The aforementioned details, as reflected in Part IV of the Application, are as follows:

Part IV

Particulars of Operational Debt

| | | |
|----|--|--|
| 1. | Total Amount of Debt, Details of Transactions on account of which debt fell due, and the Date from which such debt fell due. | Total amount of debt: Rs. 3,06,058/- (Rupees Three Lakhs Six Thousand and Fifty-Eight Only) |
| 2. | Amount claimed to be in default and the date on which the default occurred | Amount Claimed to be in default: Rs. 3,06,058/-# Total Principal Amount: Rs. 1,99,500/- Total Interest Due: Rs. 1,06,558/-* Date from which Debt fell Due: 09.03.2015 |

* Calculated the Interest Amount @18% p.a. from the period of 09.03.2015 to 10.11.2019.

Computation of Amount to be claimed from Corporate Debtor is annexed at Annexure A – 2 of the application.



5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply *vide* Dairy No. 2067/2022 dated 12.07.2022, stating as follows:
- a. The Respondent contended that the Applicant/Operational Creditor has not approached with clean hands and suppressed various material facts. There exists a pre-existence of the dispute between the parties as the Applicant failed to fulfil his part of duties, including failure to provide appropriate professional service and pending civil dispute. Thus, the present application is liable to be dismissed.
 - b. The Respondent approached the Applicant for representing it in a civil suit filed by one Mr. Ramesh Sharma before the courts of Delhi for alleged recovery of Rs. 10,00,000/- approximately in respect of the material supplied to the Corporate Debtor. The Applicant agreed to represent the Corporate Debtor for a consideration amounting to Rs. 1,00,000/- as the cumulative amount for the entire case.
 - c. The Applicant had put up his appearance in the case; thereafter, he kept raising the bills on an appearance basis and for each event of drafting and filing. The Respondent adhered to its promises and kept making payments against such invoices under the *bonafide* belief that the total cumulative amount to be paid to the Applicant would come at Rs. 1,00,000/- as it would be adjusted against raised invoices.



- d. Given the inadequate representation, the civil suit ended in a settlement with Mr. Ramesh Sharma. The settlement was placed on record before the Hon'ble Delhi High Court, which was recorded in the Order dated 07.03.2018. The copy of the Order dated 07.03.2018 is annexed as Annexure – 2 of the reply. Further, the Corporate Debtor had already paid approximately Rs. 90,000/- for the professional services. A copy of the Applicant's ledger account in the Respondent's books is annexed as Annexure – 3 of the reply.
- e. Mere sending the e-mails does not create any right in favour of the Applicant *vis-à-vis* the Respondent never accepted any claims or admitted any liability. A substantial payment has already been made for the Applicant's professional dues. Furthermore, some of the invoices raised by the Applicant for professional fees are sham in nature, and the same is elaborated in the following tabular format:

| Sr. No. | Date of appearance/ drafting, etc. | Date of Bill | Amount of Invoiced raised | Reason of dispute |
|---------|------------------------------------|--------------|---------------------------|---|
| 1. | 04.03.2014 | 09.02.2015 | Rs. 11,000/- | The Applicant did not appear. |
| 2. | 19.01.2016 | 20.07.2016 | Rs. 15,000/- | The matter was transferred to another court, and no effective proceedings occurred. |
| 3. | 06.01.2017 | 15.06.2017 | Rs. 11,000/- | The Applicant did not appear himself, |



| | | | | |
|----|------------|------------|-----------------|---|
| | | | | and no effective proceeding took place. |
| 4. | 04.03.2017 | 16.06.2017 | Rs. 11,000/- | The Applicant did not appear himself, and no effective proceeding took place. |
| 5. | 07.07.2017 | 11.09.2017 | Rs. 11,000/- | No effective proceeding took place. |
| 6. | 09.10.2017 | 09.10.2017 | Rs. 11,000/- | The matter was adjourned, and no effective proceedings took place. |
| 7. | 10.01.2018 | 23.02.2018 | Rs. 11,000/- | The Applicant did not appear. |

- f. Moreover, the Applicant had already filed a suit under Section 26 and Order VII of the Code of Civil Procedure, 1908, pending with the District & Sessions Judge (New Delhi District), Patiala House Courts, Delhi. The copy of the Orders passed in the proceedings is annexed as Annexures – 1, 4 and 5 of the reply, respectively. Thus, when the issue of the outstanding amount is already pending with the Court, filing a further case before this Adjudicating Authority is incorrect and improper.
- g. The Applicant claims payment against the purported services rendered on 17.09.2013, 04.03.2014, 27.08.2014, 09.02.2015, 11.02.2015, 28.07.2015, 19.01.2016, 21.07.2016, 19.10.2016, 06.01.2017 are



barred by limitation. The last date of Limitation to file an application for the default regarding the aforementioned debt is three years, which has already lapsed before this application's filing date. The Applicant did not file a claim before this Adjudicating during the limitation period; hence, the lawsuit is barred by Limitation. The present application was filed in February 2020, i.e., after three years from the date of default.

h. For the reasons mentioned above, while submitting the written arguments, the Respondent emphasised these cases;

- i. *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407.
- ii. *Mobilox Innovative Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*, (2018) 1 SCC 353.
- iii. *S.S. Engineers v. HPCL*, 2022 SCC Online SC 1385.
- iv. *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*, 2019 SCC Online SC 73.
- v. *Dena Bank (now Bank of Baroda) v. C. Shivakumar Reddy & Anr.*, (2021) 10 SCC 330.
- vi. *Krishna Lal Chawla v. State of U.P.*, (2021) 5 SCC 435.
- vii. *R.S. Cottmark (India) Pvt. Ltd. v. Rajvir Industries Ltd.*, 2019 SCC Online NCLAT 436.

6. In *Mobilox Innovative Pvt. Ltd., Innoventive Industries (supra)*, which the Respondent mentions, deals in the matter of pre-existence dispute, wherein the adjudicating authority must see 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, as the Code defines ‘dispute’ as:

Section 5(6) - “dispute” includes a suit or arbitration proceedings relating to-

(a) The existence of the amount of debt;

(b) The quality of goods and services; or

(c) The breach of a representation or warranty;

7. The Hon’ble Supreme Court, in the case of S. S. Engineers (*Supra*), has stated that *on a reading of Section 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 if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.* Supplementarily, in *Swiss Ribbons (Supra)*, it held that *‘Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law.’*



8. In the case of Dena Bank (*Supra*), the Hon'ble Apex Court held that the IBC is not just another statute for recovering debts. The Hon'ble NCLAT follows this ratio in R. S. Cottmark (*Supra*). In addition, *it is the litigant's bounden duty to make a full and true disclosure of facts. It is a matter of trite law, and yet bears repetition, that suppression of material facts before a court amount to abuse of the process of the Court, and shall be dealt with a heavy hand*, as held by the Hon'ble Supreme Court in the case of Krishna Lal Chawla (*Supra*).
9. We have heard the Learned Counsels for the parties and perused the averments made in the application, reply, written submissions and the documents enclosed with the application.
10. In the instant case, the Applicant sent a Demand Notice dated 12.11.2019 *via* registered post and e-mail on 13.11.2019 to the Respondent in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, wherein the aggregate amount of Rs. 3,06,058/- has been claimed.
11. We have closely gone through the facts of the case. As per Section 8(2)(a) of the Code, *'existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoices in relation to such dispute'* can interdict Section 9 proceedings under the Code. There is a pending civil suit filed by the Operational Creditor before the Patiala House Court, New Delhi, for adjudicating the



same amount, which is the pivot for the present application and is an indicator of prior contentious issues.

12. It is seen that the Operational Creditor has placed heavy reliance on the invoices raised, but such invoices purported services which were rendered before the period of limitation. In the absence of any confirmation/acknowledgement by the Corporate Debtor, such invoices cannot be deliberated as it is barred by limitation. Consequently, the same cannot be considered an indicator of the operational debt being due and defaulted in the current set of circumstances of the case. An application under Section 9 of the Code is only maintainable when the contention of the defendant is rejected in its entirety in the civil matter and goes past the appellate stage; it can be presumed that there is no cause of dispute between the parties.
13. The action of the Operational Creditor reflects recovery as the motive for filing the instant application as a dual chance to recover dues. The pendency of a civil suit falls under Section 5 (6) of the Code. The pre-existence of a pending dispute is an undeniable fact, whatever may be the outcome of the *lis* between parties. Therefore, there is a pre-existing dispute whose merits need not be examined by this Adjudicating Authority, and the claim of the Operational Debt cannot be raised before this Adjudicating Authority for CIRP of the Respondent Company.



14. Furthermore, the Hon'ble Supreme Court of India, in the matter of 'Mobilox Innovative Private Limited v. Kirusa Software Private Limited, (2018) 1 SCC 353', held as follows:

“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.”

15. In view of the foregoing, *inter-alia* including pending civil dispute and time-barred claim, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of the IBC.



16. Hence, the Application is Dismissed. The Order in the present matter is made in terms of Section 9 (5) (ii) of IBC, 2016 and based on the facts and pleadings submitted by the parties in the instant case and shall not prejudice any matter or proceedings between the parties, if any, before any other Court, Tribunal or any judicial or other authority.
17. Let the copy of the Order be served to the parties and IBBI.

DEEP
CHANDRA
JOSHI

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**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

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**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**