

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI ATUL CHATURVEDI,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 249/9/JPR/2019

(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:

M/S LUXTURE SURFACE COATING PRIVATE LIMITED

...Operational Creditor

Versus

M/S DHANUKA REALITY LIMITED

...Corporate Debtor

MEMO OF PARTIES

M/s Luxture Surface Coating Private Limited

R/o H-114, Near Godrej Agro Vat,
New RIICO Industrial Area, Parbatpura By-Pass,
Makhupura, Ajmer-305001

...Applicant

VERSUS

M/s Dhanuka Reality Limited

R/o 5th Floor, The Solitaire,
C-212 & C-213, Gautam Marg,
Hanuman Nagar, Vaishali Nagar,
Jaipur, Rajasthan - 302021

...Respondent

For the Applicant : Nikhil Yadav, Adv.
Vishal Purohit, Adv.

For the Respondent : Prakul Khurana, Adv.
Ankit Sareen, Adv.
Yash Tondon, Adv.

Order Pronounced On: 01.06.2023

ORDER

Per: Shri Atul Chaturvedi, Technical Member

1. This Application is filed by M/s Luxture Surface Coatings Private Limited through its authorised signatory Mr. Mayank Bhagwati ('Operational Creditor' / 'Applicant'), seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Dhanuka Reality Limited ('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, M/s Luxture Surface Coatings Private Limited, has their registered office located at H-114, Near Godrej Agro Vat, New RIICO Industrial Area, Parbatpura By-Pass, Makhupura, Ajmer-305001. The Respondent's alleged default is for the non-payment of operational dues amounting to Rs. 6,95,855/- (Rupees Six Lakh Ninety-Five Thousand Eight Hundred Fifty-Five Only) inclusive of interest.

3. The Corporate Debtor, M/s Dhanuka Reality Limited, is a public limited company incorporated under the Companies Act, 1956, on 18.01.2008, having CIN: L45201RJ2008PLC025705. The Respondent has its office situated at 5th Floor, The Solitaire, C-212 & C-213, Gautam Marg, Hanuman Nagar, Vaishali Nagar, Jaipur, Rajasthan – 302021. The Corporate Debtor has an Authorised Share Capital of Rs. 8,00,00,000/- (Rupees Eight Crores Only) and Paid-Up Share Capital of Rs. 7,04,00,400/- (Rupees Seven Crore Four Lakh Four Hundred Only).
4. The details of the transactions leading to the filing of this Application are averred by the Applicant *vide* Diary No. – 1995/2019 dated 19.09.2019 are as follows:
 - a. The Corporate Debtor gave the Applicant a work order on 03.10.2016 for external paint on the residential complex named Sunshine Prime situated at Muhana Mandi Gate No. 3, Iskon Temple Road, Mansarovar, Jaipur.
 - b. The Applicant has performed the work and generated the invoices on 06.12.2016, 09.12.2016, 16.03.2017, 24.04.2017, and 12.06.2017. Subsequently, the Respondent made a payment of Rs. 1,00,000/- (Rupees One Lakh Only) on 06.01.2017 and further on 27.03.2017 made a payment of Rs. 1,03,716/- (Rupees One Lakh Three Thousand Seven Hundred Sixteen Only).

- c. Afterwards the Applicant made follow-ups however no payments were received from the Respondent. Thus, the Applicant sent a Demand Notice dated 25.06.2019 under Form-3 of Section 8 of the IBC, 2016 demanding Rs. 6,95,855/-(Rupees Six Lakh Ninety-Five Thousand Eight Hundred Fifty-Five Only) inclusive of interest @24% per annum to the Respondent and the Reply for the same was received on 06.07.2019. Copy of the Demand Notice and Reply are annexed as Annexure – 4 (Colly) and Annxeure-7 of the Application respectively.
- d. 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. 6,95,855/- (Rupees Six Lakh Ninety-Five Thousand Eight Hundred Fifty-Five Only)
2.	Amount claimed to be in default and the date on which the default occurred	Amount Claimed to be in default: Total Principal Amount: 5,46,968/- Total Interest Due: Rs.1,48,887/- Total amount of debt: Rs. 6,95,855/- Date from which Debt fell Due: 12.06.2017

5. Notices were issued in the aforesaid Application, and the Respondent filed a Reply *vide* Diary No.2920/2019 dated 11.12.2019 stating that: -

- a. The Applicant has not approached the Tribunal with clean hands and concealed material information to place itself as an Operational Creditor.
- b. The Respondent submitted that the Applicant approached in 2016 and offered to provide services, thereafter the Respondent issued a work order dated 03.10.2016 and was assigned to paint one of the project of the Corporate Debtor however the Applicant did not finish the entire work on the site.
- c. Thereafter the Respondent appointed another contractor M/s Ashish Decor to complete the remaining work. It is submitted that a work order dated 09.05.2017 was issued in favor of M/s Ashish Décor to complete the unfinished work @ 19 Rs. per Sq. Ft. whereas originally the work order has been given @ 15.50 Rs. per Sq. Ft. Copy of the work order is annexed as Annexure- R3 of the Reply.
- d. The Respondent states that the Applicant has raised five running invoices as follows:

- A. Invoice No. 24 RA-1*
- B. Invoice No. 34 RA-2*
- C. Invoice No. 43 RA-3*
- D. Invoice No. 50 RA-4*
- E. Invoice No. 58 RA-5*

As per the terms of the work order, performa invoices can be only be raised when measurement sheets attached and verified by the Corporate Debtor. Resultantly a copy of performa invoice has been shared by the Applicant *vide* E-mail dated 11.11.2016 and 06.12.2016 with respect to Invoice No. 24 RA-1.

- e. Further it is submitted that running invoices no. 24 and 34 are admittedly paid after due process and invoices No. 43, 50, and 58 were raised by the Applicant has no performa invoices and measurement sheets raised moreover the Applicant has not performed the work against the said invoices.
- f. It is pertinent to note that invoice no. 58 RA-5 is never sent to Respondent however the Applicant claims that one Mr. Kamal Kumar Prajapat had delivered invoice no. 58 to the office of the Respondent on 14.06.2018. Pursuant to the same an affidavit is also filed by Mr. Kamal Kumar Prajapat stating that the said invoice has been delivered on 14.06.2018.
- g. The Respondent has filed a criminal complaint regarding the same whereas it was found that no such invoice was delivered to the Respondent.
- h. It is pertinent to mention that the Applicant has also not availed Input Tax Credit on the alleged invoices No. 43,50, and 58, and in the audited

financials of the Corporate Debtor the Applicant is not reflected as Creditor.

6. The Respondent filed an affidavit vide Diary No. 12/2022 dated 03.01.2022, and placed on record the statement given by Mr. Kamal Kumar Prajapati. In the said affidavit it was stated the following:

“That Mr. Kamal Kumar Prajapat during the course of investigation, duly confessed that no such invoice no. 58 dated 12.06.2017 was delivered by him to Respondent and even otherwise it was not his duty/within his scope to deliver invoices.”

7. The Respondent filed its written submission vide Diary No. 1272/2023 dated 22.05.2023 reiterating the same as mentioned in its Reply and additionally relied on the following judgments:

- I. Kevin Process Technologies Private Limited Vs Swiss Gamier Genexiaa Sciences Private Limited NCLT, Chennai 2020 SCC Online NCLT 4101*
- II. Aalborg CSP A/S Vs Solar Atria Cleantech, NCLAT, New Delhi Company Appeal (AT)(Ins) No. 168 of 2019*
- III. Subhash Chandra Goyal Sole Proprietor of Goyal Enterprises Vs KB Ispat Private Limited NCLAT Company Appeal (AT)(Ins) No. 166 of 2022*
- IV. Mobilox Innovations Private Limited Vs Kirusa Software Private Limited Supreme Court MANU/SC/1196/2017*

V. *K Kishan Vs Vijay Nirman Co. (P) Ltd. NCLAT (2018) 17 SCC 662*

VI. *M/s S.S. Engineers Vs Hindustan Petroleum Corporation Ltd. Supreme Court CIVIL APPEAL NO. 4583 OF 2022*

VII. *Rajratan Babulal Agrawal Vs Solartex India Pvt. Ltd. Supreme Court Civil Appeal No. 2199 of 2021*

8. We have heard the Learned Counsels for the parties and perused the averments made in the Application, Reply, and the Documents enclosed with the Application.
9. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in Jaipur; therefore, this Adjudicating Authority has jurisdiction to entertain and try this Application. Further, this matter is within the purview of Laws of Limitation, as the cause of action arose in 2017, and the Application was filed before this Adjudicating Authority in 2019. Hence, the period of three years after the default occurred had not been exhausted at the time of filing this Application. Therefore, the present Application has been filed within the prescribed period of limitation.
10. Before we come to the facts of the present case, the statutory scheme with regard to the Application under Section 9 needs to be recapitulated. Section 8 of the Code requires the Operational Creditor on the occurrence of default to deliver a Demand Notice on unpaid Operational Debt. Section 8(2) provides

that Corporate Debtor within a period of 10 days of the receipt of the Demand Notice bring to the notice of the Operational Creditor existence of dispute if any.

11. We have a number of judgments showing light on the aspect of pre-existing dispute under Section 9 of the Code. Conjoint reading of Section 8 and Section 9 of the Code shows that an Operational Creditor can trigger the CIRP when there is an undisputed debt and a default in payment thereof. In the present case, the Corporate Debtor has raised a dispute about the non-delivery of invoice no. 58 dated 12.06.2017. In support of the same, the Respondent also filed a copy of a visitor register which shows that no person by the name of Mr. Kamal Prajapat visited the office of the Respondent on 14.06.2017 or 14.06.2018. However, the Applicant has filed an affidavit of Mr. Kamal Parjapat in support of the delivery of Invoice No. 58 dated 12.06.2017.
12. The Respondent also filed an affidavit *vide* Dairy No. 12/2022 dated 03.01.2022 stating that no such invoice no. 58 dated was delivered by Mr. Kamal Kumar Prajapat. The Respondent also filed a criminal complaint where it was found that no such invoice has been delivered by Mr. Prajapat.
13. From the documents available on record said disputed invoice was raised much prior to the issuance of the Demand Notice dated 25.06.2019 whereas the disputed invoice was raised way back in 2017, which is much before the sending of the demand notice under Section 8 of the Code.

14. Furthermore, it is seen from the records that the Respondent has issued a fresh work order dated 09.05.2017 in favour of one M/s Ashish Decor to complete the unfinished work of the Corporate Debtor. Thus, there is a dispute regarding the non-completion of the work which is prior to the issuance of Section 8 notice, henceforth there is a pre-existing dispute between the parties. Copy of the work order dated 09.05.2017 is annexed as Annexure-R 3 of the Reply.
15. In the above reference, we need to notice the judgment of the Hon'ble Supreme Court in the context of the pre-existing dispute. The classic case on the subject is the judgment of the Hon'ble Supreme Court in "*Mobilox Innovations Private Limited vs. Kirusa Software Private Limited- (2018) 1 SCC 353*". The Hon'ble Supreme Court in the above case had occasion to interpret Section 8 and Section 9 of the IBC. It was laid down that the dispute must exist before the receipt of the Demand Notice or invoice. The Hon'ble Supreme Court in the above case has noticed various judgments and enunciated the law, in para 51 of the judgment as follows: -

"51. 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.”

16. In view of the foregoing, inter-alia pre-existing disputes between the parties, we have no option but to reject the prayer of the Operational Creditor to initiate proceedings under Section 9 of IBC.

17. 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.

18. Accordingly, CP No. (IB)249/9/JPR/2019 is dismissed.

-Sd-

**DEEP CHANDRA JOSHI
(JUDICIAL MEMBER)**

-Sd-

**ATUL CHATURVEDI
(TECHNICAL MEMBER)**