

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB-271/(ND)/2019

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

In the matter of:

Budge Budge Company Ltd.
Registered office at:
16A, Brabourne Road, 9th Floor
Kolkata - 01, West Bengal.

...Applicant

Versus

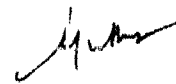
UTM Packaging (India) Ltd.
Registered office at:
532/2, First Floor,
Lahori Gate, Naya Bazar,
New Delhi - 06.

...Respondent

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Budge Budge Company Ltd. vs. UTM Packaging (India) Pvt. Ltd.

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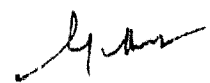
Coram:

DR. P.S.N. PRASAD
Hon'ble Member (Judicial)

DR. V.K. SUBBURAJ
Hon'ble Member (Technical)

Counsel for Applicant: Soumya Dutta, Advocate
Counsel for Respondent: Avirup Benjamin, Brijesh Kumar Tamber,
Advocates

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ORDER

Per Dr. V. K. Subburaj (Member Technical)

Date: 28.08.2019

1. This is an application filed by the Applicant Budge Budge Company seeking to initiate corporate insolvency resolution process ("CIRP") of the Respondent UTM Packaging (India) Pvt. Ltd., under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") for the alleged default on the part of the Respondent in clearing the debt of Rs. 42,14,376/- owed to the Applicant. The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- i. The Applicant is a public limited company carrying on the business of manufacturing and selling jute products. In May, 2016 the Respondent verbally requested the Applicant to supply hessian cloths and jute products.
- ii. The Applicant duly supplied the products to the Respondent. Upon supply of the said goods the Applicant raised its four tax invoices/bills on several dates. The Respondent duly accepted the above tax invoices/bills without any protest and/or demure.
- iii. The Respondent issued four cheques in favour of the Applicant upon presentation of the said cheques, all the cheques got



dishonored on the ground that payment was stopped by the drawer.

- iv. Subsequently, the Applicant initiated proceedings under Negotiable Instruments Act, 1881 ("NI Act") against the Respondent before the appropriate court of law in Kolkata due to dishonor of the said cheques.
- v. Thereafter, the Applicant on 24.09.2018 issued demand notice under Section 8 of the Code for a principle debt of Rs.31.89.271/-. In spite of the receipt of the demand notice, the Respondent neither replied to the said notice nor made payments as per demand notice in the said notice.

2. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions are made:

- i. The Applicant has concealed the fact that the cheques in question and the amount concerned are subject matter of adjudication in the court of Ld. 18th MM, Calcutta in Complaint No. 99606/16 titled Budge Budge Company Ltd. vs UTM Packaging (India) Ltd. & Ors. The Applicant has further concealed that the said Applicant vide order dated 17.01.2019 before the said court of the MM, Calcutta has withdrawn its affidavit tendered on record.

- ii. The application is also defective on account of the non-compliance of and non-service of demand notice in accordance with the Code and Rule 5(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("AAA Rules"). The notice has been served only through speed post without any acknowledgment due. The Applicant has not placed on record any acknowledgment received by it and further the tracking report itself is prima facie erroneous and manipulated as the same shows delivery of the consignment at the registered office of the Respondent at 8 pm on a Saturday whereas the office of the Respondent is closed on Saturdays and even on working days the office is closed after 6 pm. The application is liable to be dismissed on account of non-service of the notice under Section 8 of the Code.
- iii. The application is liable to be dismissed as there is clearly a pre-existing dispute between the parties qua which the present application has been filed. Admittedly the cheques issued were dishonored with the remarks "payment stopped" on account of deficiency in the goods provided. The said fact has been concealed in the application.



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3. On 02.04.2019 the Applicant was granted the statutory period of 7 days to cure certain technical defects in the application. In pursuance of this order, on 15.05.2019, the Applicant filed certain additional documents namely, a fresh affidavit to the present application, board resolution dated 11.08.2019 showing authorization of Niladri Khanra for issuing the demand notice, and the bank account statement of the Applicant updated till 31.01.2019. The Respondent filed a reply to this application for filing additional documents, which states as follows:

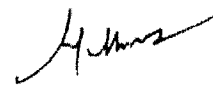
- i. The proviso to Section 9(5) expressly provides for a time of 7 days for rectification of defects. The Applicant has violated this mandatory provision by not rectifying the defects within 7 days from the date of the order of the Tribunal and in absence of any further extension being granted by this Tribunal.
- ii. The proviso to Section 9(5) applies to the defects in the application, not the demand notice under Section 8 of the Code. The failure to disclose the relationship with the operational creditor is a significant and material defect, as pointed out by the Hon'ble Supreme Court in *Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd.*
- iii. The hessian clothes and jute products supplied by the Applicant were defective and of unacceptable quality against which no amount can be claimed.

4. We have gone through the documents filed by both the parties and heard the arguments made by the counsels. The issues to be decided for adjudication of the present application are as follows.

- i. Whether the application is not maintainable due to non-compliance with Rule 5 of the AAA Rules in serving of the demand notice?
- ii. Whether the demand notice issued under Section 8 of the Code was not valid as it failed to disclose the relationship of the signatory with the Applicant?
- iii. Whether the proceedings under Section 138 of the NI Act constitute a pre-existing dispute between the parties?

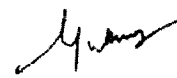
5. The Hon'ble NCLAT in *Alloyism Industries vs. Ramar Casting Pvt. Ltd.* held that service of the demand notice at the corporate office instead of the registered office (as required by Rule 5 of the AAA Rules) will be deemed to sufficient notice under Section 8. Thus, the aim of Section 8 of the Code and Rule 5 of the AAA Rules is to notify/inform the corporate debtor of the pending dues and give it a chance to repay the dues to avoid insolvency proceedings or point out a pre-existing dispute regarding the dues, by duly serving a notice to this effect. The letter of law as prescribed in Rule 5 is not to be so

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strictly followed as to defeat the aim of the provision. In the present case the Applicant has enclosed the tracking report showing that the Section 8 demand notice was delivered on 29.09.2018. There is nothing in the documents filed by the parties which show that the tracking report has been manipulated or that such service was actually not made. A bald statement made by the Respondent that his office was not open at the time of service of the letter is not strong enough to refute the veracity of the tracking report filed by the Applicant. Thus, the first issue is answered in favour of the Applicant and the present application is maintainable.

6. A perusal of the demand notice shows that it has been signed by Niladri Khanna, Advocate. Although the exact format specified in the model Form 3 of the Code has not been followed in relation to the signing of the demand notice, it is not difficult to infer from a perusal of the demand notice that the signatory is an advocate acting on behalf of the Applicant. The relationship as required to be disclosed by Form 3 as well as the Hon'ble Supreme Court, is sufficiently disclosed in the present demand notice. Thus, the demand notice as issued by the Applicant is valid.



7. The Respondent has contended in the reply to the main application as well as in the reply to the application for filing additional documents that there is a pre-existing dispute between the parties as the goods supplied by the Applicant were defective and the Respondent had stopped the encashment of the cheques issued to the Applicant due to the supply of such goods. However, the Respondent has failed to file any document to show that the Respondent has raised the issue of defective supply prior to the present proceedings, either in relation to the proceedings under the NI Act or otherwise. The mere pendency of the proceedings under the NI Act will not amount to a dispute. Merely alleging that quality issues exist and that such issues were raised in the previous proceedings will not be enough, if no documents are filed to show that such issues have been raised previously.
8. The Applicant has filed the invoices issued by it to the Respondent and the return memos of the dishonored cheques. It has been clearly established that there is existence of debt and its default on the part of the Respondent. In the above circumstances this Tribunal initiates CIRP of the Respondent company.
7. A moratorium in terms of Section 14 of the Code is imposed forthwith in following terms:



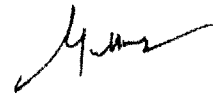
“(a) the institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;


(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Respondent.


- (2) The supply of essential goods or services to the Respondent as may be specified shall not be terminated or suspended or interrupted during moratorium period.
- (3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central



Government in consultation with any financial sector regulator.

- (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.”
8. From the list of interim resolution professionals (“IRP”) made available by IBBI vide File No. 25/02/2019-NCLT, Mr. Rajan Das Gupta (email id: rajandgupta@gmail.com ; phone number: 9810404086) is being confirmed by this Bench as the IRP in the present matter. He shall take such further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench.
9. The Applicant shall deposit a sum of Rs. 2 lakhs to enable the IRP to meet the immediate expenses. The same shall be accounted for by the IRP and shall be reimbursed to the Applicant to be recovered as costs of the CIRP.
10. Renotify this case for report of the IRP on 30.09.2019.


(Dr. V.K. SUBBURAJ)
MEMBER (TECHNICAL)


(Dr. P.S.N. PRASAD)
MEMBER (JUDICIAL)