

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. 1)
KOLKATA**

C.P (IB) No. 511/KB/2020

*An application 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:

KCO Aluminium LLP[LLPIN U45205WB2009PTC139100]

...Operational Creditor

Versus

Elhard Marketing Limited[CIN U51909WB1993PLC058461], a company
incorporate under the Companies Act, 1956, having its registered office at14
Pollock Street, 3rd Floor, Kolkata – 700001.

...Corporate Debtor

Date of Hearing: 25.08.2022

Date of pronouncing the order: 19.09.2022

Coram:

Shri Rohit Kapoor : **Member (Judicial)**

Shri Balraj Joshi : **Member (Technical)**

Appearances (through Video Conferencing/physical hearing)

For the Operational Creditor : Mr. Kuldip Mallik, Adv.

: Mr. Diptomoy Talukder, Adv.

: Mr. Ashok Bhowmick, Adv.

For the Corporate Debtor : Mr. Sidhartha Sharma, Adv.

: Mr. Arjun Asthana, Adv.

: Mr. Aman Kataruka, Adv.

ORDER

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*‘the Code’*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Aniruddh Binnany, Senior Manager (Finance & Treasury), KCO Aluminium LLP (*‘Operational Creditor’*), duly authorised *vide* resolution dated 04 November, 2019¹ for initiation of Corporate Insolvency Resolution Process (*‘CIRP’*) against Elhard Marketing Limited (*‘Corporate Debtor’*).
3. The present Petition was filed on **18 February, 2020** before this Adjudicating Authority. The total amount claimed in default is Rs.37,06,940/- (Rupees Thirty Seven Lakh Six Thousand Nine Hundred Forty only) [*Principal – Rs.30,26,074/- and Interest – Rs.6,80,866 @ 18 % p.a.*]. The **date of default** is stated to be sixty days from the date of the invoice i.e., 23 July, 2018 [*at page 18 of the Petition*]
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs. 1,25,00,000/- (Rupees One Crore Twenty Five Lakh only) with subscribed share capital of Rs.51,72,000/- (Rupees Fifty One Lakh Seventy Two Thousand only).
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Operational Creditor is engaged in the business of export and import and also as suppliers of goods. The Corporate Debtor is engaged in the business of Aluminum Cables.
 - 5.2 Between 01 April, 2018 to 31 March, 2019, the Corporate Debtor from time to time placed orders with the Operational Creditor for the supply of Aluminum

¹Annexure – C, at page 17 of the Petition.

XLPE Cables (*'Cables'*). Subsequently, the Operational Creditor supplied the cables and raised an invoice dated 23 May, 2018 for a sum of Rs.30,26,074/- (Rupees Thirty Lakh Twenty Six Thousand Seventy Four only).

5.3 The cables were duly accepted and utilized by the Corporate Debtor without raising any objection. The Operational Creditor had running account with the Corporate Debtor and the Operational Creditor raised several invoices, however, the Corporate Debtor failed to clear the invoice raised on 23 May, 2018.

5.4 Thereafter, the Operational Creditor issued a statutory notice dated 14 November, 2019 under section 8 of the Code, to which reply was issued by the Corporate Debtor to the Operational Creditor.

6. *Submissions by the Ld. Advocate appearing on behalf of the Corporate Debtor.*

6.1 This instant application suffers from gross suppression of material facts. The Operational Creditor is not entitled to receive any alleged amount from the Corporate Debtor.

6.2 The Corporate Debtor was having business transaction with one Crystal Cable Industries Limited (*'CCIL'*) and during the course of such business transaction, the Corporate Debtor had ordered cables by placing purchase order dated 14 May, 2018 for a total sum of Rs.2,98,63,000/- (Rupees Two Crore Ninety Eight Lakh Sixty Three Thousand only) with CCIL.

6.3 Thereafter, CCIL appointed the Operational Creditor as its dealer/financer to deliver such goods to the Corporate Debtor. The Corporate Debtor was never a party to such understanding between CCIL and the Operational Creditor; the Corporate Debtor came to know of the same when the Operational Creditor stated raising invoices in the name of the Corporate Debtor.

6.4 The invoices raised by the Operational Creditor [*Annexure C of the Petition*] also bear the reference number, which indicated that these invoices have been issued at the behest of CCIL and the Operation Creditor was acting as the

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dealer of CCIL. It was CCIL who took the responsibility of supplying quality goods and transporting the same to the Corporate Debtor.

- 6.5 Further, there are instances where the Corporate Debtor wrote several letters dated 09 July, 2018 (*Page 61 of the Reply*), 10 September, 2018 (*Page 62 of the Reply*) and 09 November, 2018 (*Page 63 of the Reply*) to CCIL and made complaints about the quality of materials supplied against the invoice no.KCOGST1819/0292 dated 23 May, 2018.
- 6.6 It is pertinent to mention that Corporate Debtor had always placed purchase orders before CCIL, as it never had any intention to get into business with Operational Creditor and thus there was never any contractual relation and/ or obligation between the parties to the present application.
- 6.7 It is trite law that a person, not being a party to a deed is not bound by the covenants in the deed nor could it enforce the covenants and has further held that it is settled law that a person not a party to a contract subject to certain well recognized exceptions cannot enforce the terms of the contract. It is undisputed that the case of the parties does not fall within the ambit of these exceptions. Accordingly, the doctrine of privity of contract applies to the present case and consequently, the Operational Creditor does not have any locus standi to maintain the present petition in as much as there is no contractual/ jural relation between the parties (**refer Tirumulu Subbu ChettiArunachalam Chettiar (AIR) 1930 Mad 382 followed by Supreme Court in M.C. Chacko v.State Bank of Travancore, Trivandrum (1969) 2 SCC 343**).
- 6.8 Further, while examining an application under Section 9 of the Code this Adjudicating Authority will have to determine amongst other parameters, documentary evidence furnished with application which shows that the claimed operational debt is due and payable and has not yet been paid (*refer Mobilox Innovations (P) Lid. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353: 2017 SCC OnLine SC 1154 : (2018) 1 SCC (Civ) 311 at page 394*).

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- 6.9 In light of the aforesaid, the Operational Creditor has failed to show any contract, agreement or any Purchase Order issued by the Corporate Debtor in its favour for supply of goods, there is no contractual obligation of the Corporate Debtor to make any payment to the Operational Creditor. For that matter of fact, the invoice of Operational Creditor dated 23 May 2018 (*pg. 28 of the Petition*) has not even been acknowledged by the Corporate Debtor in as much as it was not the obligation of the Corporate Debtor to make any payment to the Operational Creditor pertaining to the goods supplied by them as a dealer of CCIL.,i.e., the party with which the Corporate Debtor had a contractual relation by virtue of the issuance of Purchase Order dated 14th May 2018(*pg. 21 of reply*).
- 6.10 Further, the balance confirmation as issued by Operational Creditor and purported to have been accepted by the Corporate Debtor(*Pg. 39 of petition*) has been fabricated by Operational Creditor with a mala fide intentto mislead this Adjudicating Authority. Operational Creditor has forged the signature of Corporate Debtor and affixed a forged seal in order to establish his alleged claim against Corporate Debtor, whereas, the matter of fact is that the goods supplied by the Operational Creditor, being a dealer of CCIL, are not even in the possession of the Corporate Debtor in as much as the same were lifted by CCIL on 19th July 2018 (*refer letter of CCIL dated 19July 2019 at pg. 71 of reply*).
- 6.11 There is also a clear admission of pre-existence of dispute between the contracting parties, i.e., the Corporate Debtor and CCIL, pursuant to receipt of the aluminum cables in pursuance to the Purchase Order issued by the Corporate Debtor to CCIL dated 14th May 2018 (refer Purchase Order @ pg. 41 of reply), the Corporate Debtor duly notified CCIL, about the poor, substandard and inferior quality of goods by the following communications:
- (a) Letter dated 09 July 2018 (pg. 61 of reply) where the Corporate Debtor duly notified CCIL regarding the quality complaints including damages

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in transit with respect to the goods supplied by CCIL's dealer/ financier, i.e., the Operational Creditor herein;

- (b) Letter dated 10 September 2018 (pg. 62 of reply) where the Corporate Debtor issued a reminder letter to CCIL, with respect to the quality complains including damages to the goods in transit:
- (c) Letter dated 10 January 2019 (pg. 64 of reply) where the Corporate Debtor duly apprised CCIL that it shall not take any responsibility for payments with respect to the poor, substandard and inferior quality of goods;
- (d) Letter dated 18 January 2019 (pg. 65 of reply) issued by CCIL, wherein CCIL, admitted to look into the complaints of Corporate Debtor;
- (e) Letter dated 09 March 2019 (pg. 66 of reply) where the Corporate Debtor asked CCIL. to lift the poor, substandard and inferior quality of goods supplied by their dealer/ financier, i.e, the Operational Creditor;
- (f) Letter dated 22 March 2019 (pg. 67 of reply) issued by CCIL, wherein CCIL, accepted that Corporate Debtor is entitled to hold payment towards the poor, substandard and inferior quality of goods supplied. CCIL, in the said communication further admitted that the said fact has been duly notified to the Dealer, i.e., the Operational Creditor;
- (g) Letter dated 09 April 2019 (pg. 68 of reply) where the Corporate Debtor duly informed CCIL that it shall not bear any Damage/ Loading/ Unloading/ Detention or any claims whatsoever and the same shall be borne by CCIL. *Vide* the said communication it was also informed that Corporate Debtor shall not settle herein, who supplied goods on behalf of CCIL, and called upon CCIL, to take back thematerials and pay the Operational Creditor directly;

- (h) Letter dated 17 April 2019 (pg. 69 of reply) issued by CCIL, wherein CCIL admitted that it shall organize to take back materials are their cost;
- (i) Letter dated 10 July 2019 (pg. 70 of reply) where the Corporate Debtor confirmed lifting of goods by CCIL. *Vide* the said communication, it was expressly stated that CCIL shall pay the dues of its dealer directly;
- (j) Letter dated 19 July 2021 (pg. 71 of reply) issued by CCIL, wherein, CCIL informed that they have lifted the materials and are in the process of issuance of credit/ debit notes. CCIL, expressly stated in the said letter that the Corporate Debtor shall have no liability with the dealer.

7. **Issues**

- 7.1 Is there any Pre-existing dispute?
- 7.2 Is there any jural relationship between the parties?

Analysis & Findings

- 8. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.
- 9. With respect to the pre-existing dispute, we rely on ***Innovative Industries Ltd. v. ICICI Bank and Anr.***,² where the Hon'ble Supreme Court while explaining the provisions of Sections 7 or 9 observed and held:

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the

² (2018) 1 SCC 407

*pendency of a suit or arbitration proceedings, which is preexisting- i.e. before such notice or invoice was received by the corporate debtor. **The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.***”

10. Further, in *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited*³ it was opined by the Hon’ble Apex Court that;

*“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on nonpayment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). **What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.**”*

11. The Hon’ble Supreme Court in *Mobilox (Supra)* has also observed that all that the Adjudicating Authority has to see at ‘the stage of Admission’ 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 or a moonshine defence unsupported by tangible materials/evidence.***

³2017 (1) SCC onLine SC 353

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- 12.** Since, the pre-existing dispute has been established; we will not delve further into the second issue. Hence, the Petition being C.P. *(IB) No. 511 /KB/2020* is *dismissed*.
- 13.** Needless to say that the Corporate Debtor is at liberty to resort to other remedies that may be available to it under any other law.
- 14.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 19 day of September, 2022

SA, [LRA]