

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II**

CP No. 1713/IBC/MB/2018

Under Section 9 of the Insolvency and
Bankruptcy Code, 2016 read with Rule 6
of the Insolvency and Bankruptcy
(Application to Adjudication Authority) Rule
2016)

In the matter of

Hubergroup India Pvt. Ltd.

Having address at: Plot No. 808/E, Phase-
II, G.I.D.C., Vapi, Gujarat – 396195.

.....Operational Creditor

V/s

Jalaram Flexo Laminates Ltd.

(CIN: U24220GJ1991PTC016598) Having
Registered Office at : 185/1, Modi Kutir,
Jawahar Nagar, Road No. 11, Goregaon
(W), Mumbai – 400062Khasra No. 201/1,
Mouza Waddhamna, Higna Road, Nagpur
– 440023.

.....Corporate Debtor

Order delivered on:- 03.06.2022

Coram:

Hon'ble Member (Judicial)	:	Justice P.N. Deshmukh (Retd.)
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor	:	Mr. Zacarias Joseph, Advocate
For the Corporate Debtor	:	Ms. Jaymala Ostwal, Advocate

ORDER

Per :-Shyam Babu Gautam, Member Technical

1. This Company Petition is filed by *Hubergroup India Pvt. Ltd.* (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *Jalaram Flexo Laminates Ltd.* (hereinafter called “Corporate Debtor”) alleging that the Corporate debtor committed default in making payment to the Operational Creditor. This petition has been filed by invoking the provisions of Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called “the Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 1,17,65,049/- (Rupees One Crore Seventeen lakhs Sixty Five Thousand and Forty Nine Only) plus interest @ 24% p.a.
3. **Facts :-**
 - a. The Operational Creditor had sold, supplied and delivered printing inks of various descriptions (Goods) to the Corporate Debtor. The Outstanding pending sales amounted to Rs. 1,07,87,937/- (Rupees One Crore Seven Lakh Eighty-Seven Thousand Nine Hundred and Thirty-Seven Only). The overdue interest amounted to Rs. 9,67,723/- (Rupees Nine Lakh Sixty-Seven Thousand Seven Hundred and Twenty-Three Only). The pending Sales Tax Forms “C” Liability of Rs. 9,389/- (Rupees nine Thousand Three Hundred and Eighty-Nine Only).

- b. Operational Creditor's said claim is based on the invoices raised on the Corporate Debtor. The amount mentioned in the invoices fell due on different dates. The Particulars of Debt along with the date of each invoices amounts thereunder and their respective due date is enumerated as under:-

Invoice/Credit no.	Invoice Date	Invoice Amount	Due Date
600003745 (Note)	24-Apr-17	1,68,932	23-Jul-17
100003418	25-Apr-17	5,45,292	24-Jul-17
100004098	29-Apr-17	2,65,073	28-Jul-17
600005737	6-May-17	6,27,543	4-Aug-17
600005738	6-May-17	22,089	4-Aug-17
600006281	10-May-17	4,08,066	8-Aug-17
600006282	10-May-17	86,254	8-Aug-17
600006838	13-May-17	3,32,499	11-Aug-17
600007275	17-May-17	1,82,283	15-Aug-17
600009885	3-Jun-17	9,36,896	1-Sep-17
600010344	6-Jun-17	3,16,465	4-Sep-17
600010500	7-Jun-17	1,63,148	5-Sep-17
100011540	23-Jun-17	8,10,365	21-Sep-17
600013348	24-Jun-17	10,02,690	22-Sep-17
600013349	24-Jun-17	9,225	22-Sep-17
600013531	25-Jun-17	2,21,670	23-Sep-17
MR1710101451	15-Jul-17	8,06,259	13-Oct-17
MR1710101452	15-Jul-17	2,65,075	13-Oct-17
MR1710101762	18-Jul-17	1,80,540	16-Oct-17
DM1710101932	20-Jul-17	8,33,316	18-Oct-17
DM1710103979	5-Aug-17	4,19,844	3-Nov-17
MR1710104011	5-Aug-17	3,90,858	3-Nov-17
MR1710104015	5-Aug-17	85,363	3-Nov-17
MR1710107002	28-Aug-17	85,363	26-Nov-17
MR1710107003	28-Aug-17	5,46,250	26-Nov-17
MR1710107004	28-Aug-17	1,90,122	26-Nov-17
MR1710107005	28-Aug-17	1,22,193	26-Nov-17
MR1710107006	28-Aug-17	97,586	26-Nov-17
MR1710107007	28-Aug-17	1,53,494	26-Nov-17
MR1710107008	28-Aug-17	5,75,094	26-Nov-17
MR1710107009	28-Aug-17	1,92,970	26-Nov-17
DM1740100218	23-Jan-18	-82,836*	23-Apr-18
DM1740100219	23-Jan-18	-1,72,044*	23-Apr-18
		1,07,87,937	

Invoice No. 60003745 amount Rs. 5,66,280/- Part amount is paid Rs. 3,97,348/- unpaid Rs. 1,68,932/-.

- c. The Operational Creditor states that each invoice had certain standard terms and conditions. Each invoice was payable within 30 days of the date of the invoice and the interest @ 24% p.a. was to be charged in case of default in payment of the invoice. The Corporate Debtor was to make arrangement to test the goods within 48 hours of the delivery supplied and also satisfy about the suitability of such goods before putting them to use. If the goods were not found satisfactory, the same was to be informed in writing within 5 working days of delivery of goods.
- d. The Operational Creditor sent Demand Notice under Form 3 dated 08.02.2018 to the Corporate Debtor thereby demanding the amount. The said Demand Notice was delivered to and received by the Corporate Debtor via Speed Post on 19.02.2018. Corporate Debtor issued a response to the said Demand Notice dated 22.02.2018 i.e. after the expiry of the ten days period as stipulated under section 8 (2) of “the Code”.
- e. The Corporate Debtor in its reply to the Demand Notice, denied any liability to pay to the Operational Creditor. The Corporate Debtor stated that two years ago, Corporate Debtor had claimed amount from the Operational Creditor towards rate difference and quality problem and the same was accepted by concerned sales person of the Operational Creditor who also assured to give discount to the Corporate Debtor. The Corporate Debtor stated that, yet they had not received any credit discount. The Corporate Debtor alleged an amount of Rs. 1.30 crores of which no calculation has been given by the Corporate Debtor. The Corporate Debtor also threatened to initiate Civil, Criminal, Suit for recovery, Insolvency Proceedings against the Operational

Creditor and requested to withdraw the Demand Notice and pay an amount of Rs. 1.30 crores.

- f. The Operational Creditor states that this was the first time when the Corporate Debtor made such a claim. There is no prior suit or arbitration proceeding initiated by the Corporate Debtor. The claim is un-particularized and vague. Further, no pre-existing dispute within the meaning of the Code exists between the parties. The only letter prior to the issuance of the Demand Notice itself admits liability of the Corporate Debtor to make payment to the Operational Creditor by way of postdated Cheques.
- g. The OC has relied upon the Judgement in the case of *Mobilox Innovation Vs. Kirusa Software Private Limited (Civil Appeal No. 9405 of 2017)* wherein the Hon'ble Supreme Court in para 34 of the said Order observed as under:

“34. Therefore the adjudicating authority, when examining an application under Section 9 of the Act will have to determine :

- (i) Whether there is an “operational debt” as defined exceeding Rs. 1 lakh? (See Section 4 of the Act)
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid ? And
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the

demand notice of the unpaid operational debt in relation to such dispute ?

If any one of the aforesaid conditions is lacking, the application would have to be rejected.”

- h. Operational Creditor submits that there is an Operational Debt exceeding 1 lakh due and payable by the Corporate Debtor, all supporting documents have been provided in support of claim and that there was no pre-existing dispute or pendency of any proceedings relating to the dispute as on the date of receipt of Demand Notice by the Corporate Debtor. Further the conduct of the Corporate Debtor is evasive and dilatory. The Corporate Debtor did not appear on at least 5 occasions when the Petition was listed before the Hon'ble Tribunal. Therefore, the Petition deserves to be admitted.

4. **The Submissions of the Corporate Debtor are as follows :**

- i. The Corporate Debtor filed its reply dated 07.07.2018 to the said Petition. The Corporate Debtor stated that the present petition is not maintainable as the Operational Creditor had received 'notice of dispute' from the Corporate Debtor and the petition needs to be rejected. The Corporate Debtor stated that the reply cum notice of dispute dated 22.02.2018 reveal that the Corporate Debtor has brought to the notice of the Operational Creditor the existence of dispute since more than last two years. The said dispute was related to quality and rate difference which was accepted by the sales person of the Operational Creditor who had also assured to give discount.

- j. The Corporate Debtor states that the Operational Creditor vide its letter dated 12.03.2018 has admitted that the Corporate Debtor had raised its concern with the Operational Creditor regarding the rate difference. This itself epitomize about the existing dispute between the parties. The part of the letter sent by the Operational Creditor to the Corporate Debtor sets out as under: -

“ In the past, you have only once raised concern over the rates and requested for the rate difference credit note and the same was out rightly rejected mentioning that we are always supplying high quality products at a competitive price and after our rejection of your rate difference claim, you had continuously purchased materials and made payments, thus your action is deemed acceptance.

Regarding quality problem, we would like to mention that in past, we never ever received any complaint on quality from your side, in fact, this is invented and raised in response of our demand notice only with a malafide intention to avoid payment of our outstanding dues.

Therefore, a statement of verbal acceptance of your claim towards rate difference and quality problem by our sales person is pretended.”

- k. Further, in response to the said letter the Corporate Debtor brought to the notice of the Operational Creditor the existence of the dispute between the parties. The dispute between the parties relate to the rate difference, quality problems etc. The existence

of such dispute can be observed from copy of emails and other communications between the parties. Vide an email dated 16.01.2018, the Corporate Debtor stated that for 20 years they were in business but during such period they faced so many problems regarding quality and rate difference but did not say anything due to long standing business relations between the parties. The Corporate Debtor also stated that two officials of the Operational Creditor visited the Corporate Debtor office and acknowledged the problems faced by the Corporate Debtor regarding the poor quality and high rates and assured that Rs. 20 lakhs will be credited to the Corporate Debtor account after which the remaining amount will be paid by the Corporate Debtor by 12 months postdated cheques. Hence, the Corporate Debtor states that there existed an existing dispute before the issuance of the Demand Notice which is evident from the letter of the Corporate Debtor dated 16.01.2018. The said dispute being complex in nature affords a plausible contention which requires further investigation.

1. The Operational Creditor makes a point that mere pendency of any suit or arbitration proceeding amounts to dispute under the Code. But it is a settled position of law that the word 'includes' as mentioned in sub-section (6) of section 5 of the Code is not an exhaustive one but an illustrative one. The Legislature used the words dispute includes a suit or arbitration proceedings. If this is read with section (2) of section 8 of the Code, where words used are existence of a dispute, if any and record of the pendency of the suit or arbitration proceedings, the result is disputes, if any, applies to all kinds of disputes in relation to debt and default.

m. Further, the Corporate Debtor has also cited the Judgment passed by Hon'ble Supreme Court of India in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (supra)* wherein the Hon'ble Supreme Court clarified the interpretation of the term dispute under the Code and observed to include dispute raised by the Corporate Debtor prior to the issue of Demand Notice, even though no suit or arbitration is pending in respect of such dispute. The Corporate Debtor quotes the following para 45 of the Judgement....

“45. Going by the aforesaid test of “existence of a dispute”, it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability.”

n. Hence, the Corporate Debtor states that the adjudicating authority only has to examine at the stage of admitting or rejecting an application, whether there is a plausible contention which requires further investigation. However, the adjudicating authority is not required to satisfy whether the dispute would ultimately succeed or not. So long as the dispute truly exists in fact and is not spurious, hypothetical or illusory, the NCLT has to reject the Application.

- o. The Corporate Debtor states that the Corporate Debtor is financially sound and healthy and gives an employment to 100 families. The Corporate Debtor Company is regular in filing its all legal obligations and the Corporate Debtor Company is fully solvent Company. Hence the Corporate Debtor prays to reject the present Application.

FINDINGS

5. We have heard the submissions of the Counsel appearing for the Operational Creditor and Counsel appearing for the Corporate Debtor. It is very much clear from the email dated 16.01.2018 and other emails exchanged between the parties that there existed a pre-existing dispute between the parties. The Corporate Debtor had also claimed an amount from the Operational Creditor for bad quality of goods and also with regard to rate difference of the goods. It is also pertinent to note that the email dated 16.01.2018 of the Corporate Debtor is well before the issuance of the Demand Notice. The Corporate Debtor has also claimed certain amount from the Operational Creditor towards damages as mentioned in the email dated 16.01.2018. The defense of the Corporate Debtor is not spurious to escape the liability from payment but also requires investigation.
6. As per the settled law laid down by the *Hon'ble Apex Court in Mobilox Innovations Private Limited V/s Kirusa Software Private Limited*, the Adjudicating Authority is to see at this stage whether there is 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 thus 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.

7. Therefore, applying the above analogy laid down by the Hon'ble Supreme Court to the present case in hand, this Bench has no option except to hold that there is no merit in the above Company Petition and the same deserves to be dismissed.
8. Accordingly, the above **Company Petition No. (IB) – 1713 of 2018 is dismissed on the ground of “Pre-existing dispute” between both the parties.**

Sd/-

**SHYAM BABU GAUTAM
(MEMBER TECHNICAL)**

Sd/-

**JUSTICE P.N. DESHMUKH
(MEMBER JUDICIAL)**