IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IBA/978/2019

(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016)

In the matter of ***M/s. ETA Engineering Pvt. Ltd.***

Bajaj Electricals Limited
45/47, Veer Nariman Road,
Mumbai – 400 001

... *Operational Creditor*

-Vs-

ETA Engineering Private Limited
CIN: U28920TN1994PTC029091
Reg. Off:-
No.5, Moores Road,
Chennai – 600 006

... *Corporate Debtor*

Order Pronounced on 2nd March 2021

CORAM :

R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor : Aparajitha Vishwanath, Advocate

For Corporate Debtor : M. Narendran, Advocate for M/s. King & Partridge

ORDER

***Per:* ANIL KUMAR B, MEMBER (TECHNICAL)**

1. The IBA/978/2019 has been filed by the **Bajaj Electricals Limited** (hereinafter referred to as *"Operational Creditor"*) against **M/s. ETA Engineering Private Limited** (hereinafter referred to as *"Corporate Debtor"*) under Section 9 of the

Insolvency & Bankruptcy Code 2016 (in short, 'IBC, 2016') r/w Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, to initiate Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor.

2. A perusal of Part I of the Application shows that the Petitioner is a Limited Company. In relation to the Corporate Debtor, the particulars of the Corporate Debtor are given in Part – II from which it is seen that the date of incorporation of the Corporate Debtor is given as 31.10.1994 and the Authorized Share Capital of the Company is Rs.1,66,00,00,000/- and Paid-up Capital is Rs.42,58,42,570/-. The Registered office of the Corporate Debtor as per the Application is stated to be situated at No.6, Moores Road, Chennai – 600 006.

3. In relation to Part III of the Application it discloses that the Operational Creditor has not proposed any "Interim Resolution Professional" (IRP) and left it to the discretion of this Tribunal to appoint the IRP. Part IV details the transaction between the Operational Creditor and the Corporate Debtor leading to the debt and default and the amount which is being claimed is Rs.58,63,825/- including interest.

4. Part V in the prescribed Application discloses the documents based on which the claim is sought to be substantiated by the Operational Creditor as against the Corporate Debtor and the Operational Creditor has attached list of Purchase Order, invoices and Debit Memo raised by both the parties on various dates.

5. The Operational Creditor in Part – IV of the Application has made their claim in respect to two projects (i) Bajaj Electricals, Delhi Branch and (ii) Bajaj Electricals, Bhubaneswar Branch. In respect of the project at Bhubaneswar Branch, it is stated in the Application that the date of default as against the two Invoices are on 23.02.2014 and 09.07.2014. The present Application is filed before this Tribunal on 19.07.2019 and as such *prima facie*, it is seen that the claim in respect of the Bhubaneswar Branch is barred by limitation in view of the decision of the Hon'ble Supreme Court in **Babulal Vardharji Gurjar –Vs- Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr.** in Civil Appeal No. 6347 of 2019 dated 14.08.2020, wherein it has been held that the parties have to specifically plead in the Application itself as to how the claim is within limitation. In the present case, in relation to the Bhubaneswar Branch, the Operational Creditor has not pleaded in the Application as to how the present Claim as against the Bhubaneswar Branch is well within the period of

limitation. However, the Learned Counsel for the Operational Creditor has referred to a Confirmation of balance dated 28.02.2019 given by the Corporate Debtor and sought to contend that the claim in relation to Bhubaneswar Branch is saved by limitation. The said Acknowledgment given by the Corporate Debtor is captured herewith.

BAJA
Bajaj Electric
Inspiring Tru

Customer :- M/s ETA Engineering Pvt Ltd;
88-A, Saratbose Road,
4^{th} Floor, Kolkata-700 026

Dear Sirs/Madam,

Re: **Confirmation of balances as on February 28 ,2019**

As per our books of account , an amount sum of Rs.21,83,063/-(Rs.Twenty one lacs eighty three thousand sixty three only) is collectable from you against your purchase order number :- K145/111 dated 29/05/2013, In case the amount shown above is not correct ,please provide us complete details for the same addressed undersigned.

Kindly send your acknowledgement as token of your acceptance within 07 days from the receipt of this letter.

Thanking You,

For & on Behalf of
Bajaj Electricals Limited

Constituted Attorney

Dharmendra Kumar Singh

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(For use of Customer)

We hereby certify you that my books of accounts is completely matching with you & an amount sum of Rs.21,83,063/-(Rs.Twenty one lacs eighty three thousand sixty three only) is payable to Bajaj Electricals Ltd against Our purchase order number :- K145/111 dated 29/05/2013.

ETA Engineering Pvt Ltd

Signature
Name of Signing authority :
Designation of signing authority
Rubber stamp

Received Copy without verification.

ETA ENGINEERING PVT LTD. KOLKATA

DN-18, Salfee Tech Park, 13th Floor, Salt Lake, Sector-V, (Near College More), Kolkata 700 091, India
Tel: 033-6645 7571 / 6645 7511

Regd. Office: 45/47, Veer Nariman Road, Mumbai 400 001. India | www.bajajelectricals.com
Email : legal@bajajelectricals.com | CIN : L31500MH1938PLC009887

BAJAJ ELECTRICALS LIMITED 45/47 V.N. Rd. MUMBAI-01.

6. A perusal of the said acknowledgment posits the following facts;

(i) The said acknowledgment has been obtained after the expiry of three years as prescribed under Section 18 of the Limitation Act, 1963

(ii) The Corporate Debtor has not acknowledged the said confirmation of balance and has stated in the bottom as “Received copy without verification” and has signed the same, which would not amount to an acknowledgment.

Thus, the claim made by the Operational Creditor in respect of the Bhubaneswar Branch in view of the reasons stated *supra* is hopelessly barred by limitation.

7. For the claims made in respect of the Delhi Branch, it is seen that the Corporate Debtor has provided a Letter of Intent (LOI) in favour of the Operational Creditor on 14.06.2014 in relation to the works to be executed to the Delhi Metro Rail Corporation (DMRC) for Arjornda and Kalindikunj Depot. Based upon the said LOI, the Corporate Debtor raised a Purchase Order on 27.02.2016. Thereafter, as against the said Purchase Order, the Operational Creditor has raised a total of 6 Invoices on 26.08.2016, 27.08.2016, 23.09.2016, 02.11.2016 and

30.12.2016. The Learned Counsel for Operational Creditor sought to contend that the Corporate Debtor had failed to repay the dues arising out of the said Invoices. It was also submitted by the Learned Counsel for the Operational Creditor that the Operational Creditor served a Demand Notice to the Corporate Debtor on 27.05.2019 which was received by the Corporate Debtor on 31.05.2019 and has filed an Affidavit under Section 9(3)(b) of IBC, 2016 to the said effect and has stated that the Corporate Debtor has not responded to the said Demand Notice, nor paid the outstanding dues to the Operational Creditor.

8. The Corporate Debtor has filed counter and the Learned Counsel for the Corporate Debtor submitted that as per the Letter of Intent, the Operational Creditor was required to deliver the 1st lot of internal light fittings within 4 to 5 weeks from the date of manufacturing clearance and the external / high mast lights were to be delivered within 5 to 6 weeks, however the Operational Creditor had delayed in delivering the said goods. Further, it was submitted that the Operational Creditor's Scope of Work includes assistance during installation, testing and commissioning and since the Operational Creditor had delayed in providing the said services, the Corporate Debtor was forced to engage the services of one M/s. Sky Force Security to complete the work and therefore incurred additional expenses for a sum of

Rs.2,02,000/- and the same was intimated to the Operational Creditor by email dated 06.10.2016.

9. It was further submitted by the Learned Counsel for the Corporate Debtor that before the issuance of the Demand Notice, the Corporate Debtor on 14.02.2017 had send an email to the Operational Creditor to complete the snag works as required to be completed under Clause 3 of the Letter of Intent. Since the Operational Creditor had not replied to the said e-mail, the Corporate Debtor sent another e-mail on 27.09.2018 and 05.12.2018 for non-compliance of the works and it is also submitted that the Corporate Debtor vide their e-mail dated 27.09.2018 submitted their claim for liquidated damages due to the delay in delivery of goods, requested for completing of snag works. Hence, it was submitted that the Operational Creditor has breached clauses 5, 12, 14 and 15 of the Letter of Intent and also there exists a dispute between the parties, before the issuance of the Demand Notice and under such circumstances, prayed for the dismissal of the present Application.

10. Heard the submissions made by the Learned Counsel for both the parties. As already stated, the Operational Creditor in Part – IV of the Application has made their claim in respect to two projects (i) Bajaj Electricals, Delhi Branch and (ii) Bajaj

Electricals, Bhubaneswar Branch. The claim made in respect of Bajaj Electricals, Bhubaneswar Branch, for the reasons stated in paragraph *supra* is not sustainable in view of the fact that the claim is hopelessly barred by limitation. In relation to the claim made in respect of Bajaj Electricals, Delhi Branch, it is seen that the Corporate Debtor before the issuance of the Demand Notice by the Operational Creditor, had raised certain issues in relation to the delay in completion of certain issues and in this regard had also raised a Debit note, which fact is evident from the email dated 05.12.2018.

11. Further, from the email dated 27.09.2018 it is seen that the Corporate Debtor has pointed out the lapses on the part of the Operational Creditor in non – cooperation in Installation, testing and commissioning of Pole and High Mast as per Clause 15 of LOI and has raised a debit note to this effect. Thus, a conjoint reading of all the e-mails exchanged between the parties, it comes to the fore that there exist a dispute between the parties before the issuance of the Demand Notice and the said dispute is still in existence.

12. The Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited;** *2017 1 SCC Online SC 353* held that the 'existence of 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 and observed as follows;

> "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 non-payment 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.."

At paragraph 51 it is held:

> "51. ......<u>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</u>."

13. Thus, it is evident that there is a genuine dispute between the parties and the defence raised by the Corporate Debtor on the grounds of existence of a dispute is real and not spurious, hypothetical, illusory or misconceived.

14. Under the circumstances, by taking into consideration the reasoning as set out *supra*, we are constrained to **dismiss** this petition, however without costs.

-Sd-	-Sd-
ANIL KUMAR B	**R. VARADHARAJAN**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Raymond