BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT- III

IB-322/ND/2020

U/S. 9 of the IBC, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule, 2016

IN THE MATTER OF

M/s DSV Air & Sea Private Limited
Registered office at:
The Qube, B-201, B-204,
M. V. Road, Off International Airport Approach Road,
Marol, Andheri East
Mumbai-400059 ...Operational Creditor

Versus

M/s Beoworld Private Limited
Regd. Office:
30/1, East Patel Nagar
New Delhi-110008

...Corporate Debtor

Delivered on 07.06.2022

ND

Coram:

Shri BachuVenkatBalaram Das
Hon'ble Member (Judicial)

Shri Narender Kumar Bhola
Hon'ble Member (Technical)

Appearances:

Operational Creditor : Adv. Abhay Raj Varma, Ms. Priyanka Ghosh, Ms. Vidhi Jain & Adv Arjun Rekhi

Corporate Debtor: Adv. Nikhil Kohli

ORDER

Per: Narender Kumar Bhola, Member (Technical)

1. This is IB-322/ND/2020 filed under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as 'IBC, 2016') R/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Operational Creditors, M/s DSV Air & Sea Private Limited is seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s Beoworld Private Limited, declare moratorium and appoint Interim Resolution Professional (hereinafter referred as 'IRP').

2. The Operational Creditor/Petitioner has averred as follows: -

a. It is the case of the Operational Creditors that the Corporate Debtor engaged the services of the Operational Creditor to act as Air Transportation Freight Forwarding and Custom House Agent for Import of certain consignments which were to be transported, handled and brought from Billund, Denmark, from Amsterdam, Netherlands and from Paris, France to Delhi, India on behalf of Itself and its associate companies. The terms and conditions agreed between the parties also find a mention in the invoices raised by the operational creditor, STC of operational creditors and Credit Application signed by the corporate debtor. As per the terms, the Corporate Debtor, agreed to pay transportation, freight forwarding, custom clearance and other incidental charges for transporting, handling and taking the said consignments from the respective places as mentioned aforesaid to Delhi, India, for and on behalf of the Corporate Debtor and its associated companies. Further, as per the mutually agreed payment terms as also mentioned in the respective invoices, payment was to be made within the due date of each invoice as mentioned therein and late payment would be subject to interest @ 18% per annum calculated from the date of overdue period till actual payment by the corporate debtor. The payment terms were duly agreed and accepted by the CD and its affiliates without notifying the OC of any discrepancy

b. It is submitted that on the basis of the agreement between the Corporate Debtor and the Operational Creditor, Operational Creditor successfully completed all its obligations by providing its services, at the request of the Corporate Debtor and to its complete satisfaction.

Operational Creditor prepaid the transportation, freight forwarding, custom clearance and other Incidental charges to the liner, carrier and CFS etc. and the concerned authorities/department. In this regard, believing that the Corporate Debtor would honor the agreement between the Corporate Debtor and the Operational Creditor and pay the Operational Creditor for, Inter alia, such expenses arising out of the agreement. It is stated that the Operational Creditor started providing its services to the Corporate Debtor on the aforesaid mutually agreed terms from March, 2018. The total value of services provided by the Operational Creditor to the Corporate Debtor was for Rs. 72,07,084/- (Rs. Seventy-Two Lacs Seven Thousand Eighty-Four Only) for which invoices were raised upon the Corporate Debtor.

c. It is further submitted that Corporate Debtor has duly acknowledged its aforesaid liability to pay Operational Creditor which is evident from the part payments made by the Corporate Debtor on 22nd April 2019 amounting to Rs. 10,00,000/- towards part discharge of its liability during the course of business, as per terms of aforesaid agreement and after adjusting the aforesaid part payments made by the Corporate Debtor towards part discharge of its liability, an amount of Rs. 40,74,831.30/- remains due and payable by it against the pending Invoices raised by the Operational Creditor. The OC requested the CD several times to discharge its liability, however, CD kept on delaying the matter. Subsequent thereto the Operational Creditor issued a legal notice to the Corporate Debtor by way of Its email dated 26.02.2019 calling upon the Corporate Debtor to clear the outstanding amounts as due and payable by it along with interest. Thereafter, the Corporate Debtor contacted the Operational Creditor expressing its desire to settle the matter by clearing the dues of the Operational Creditor. On that basis, the Corporate Debtor requested the Operational Creditor to not Initiate legal action.

d. It is averred that frivolous invoice dated 09.05.2019 vide same email dated was raised by the corporate debtor instead of clearing the dues and said email was duly responded. It is stated that the Operational Creditor maintains and prepares Statement of Accounts in the regular course of its business and on running account basis. As per the running Statement of Accounts, which has been provided to the Corporate Debtor at the relevant time, the Corporate Debtor has an outstanding due of Rs. 40,74,831.30/-, however, despite admitting its liability and of its assurances, no payment has been made by the Corporate Debtor till date. As a result, Corporate Debtor is liable to pay the aforesaid Principal Debt along with interest at the rate of 18% per annum, calculated from the respective due dates of each of the aforesaid invoices till the date the amounts are paid.

e. It is further averred that the aforesaid Principal Debt and Interest have become due on the basis of agreement between the parties herein and on the basis of invoices raised as per the terms of aforementioned agreements. Further, the Corporate Debtor has admitted its aforesaid liability as also evident from email communication(s) dated 20.02.2019 between the parties as well by making part payments as mentioned above and duly reflected in the Ledger Accounts of the Corporate Debtor prepare and maintained by the Operational Creditor in the regular course of business. Therefore, statutory notice was issued on 30.05.2019. Despite admitting the liability, the corporate debtor neither paid the outstanding amount no replied within 10 days as required under law rather then that the corporate debtor sent frivolous reply dated 15.07.2019. Corporate debtor, further issued a demand notice dated 18.09.2019 on basis of some false and frivolous invoices dated 09.05.2019 and same was replied on 30.09.2019 by the operational creditor.

f. It is further averred that the Operational Creditor has thereafter issued a Statutory Notice/Invoice dated 24.12.2019 through Speed Post and Registered AD, demanding payment under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority)

Rules, 2016 to the Corporate Debtor and the said notice was received by the Corporate Debtor on 26.12.2019. However, corporate debtor neither raised any dispute nor paid the outstanding amount, despite admitting the liability in the various communication. Thus, the present petition may be admitted as the corporate debtor failed to pay the outstanding amount of Rs.48,81,822.30/- (including interest).

3. The Corporate Debtor has also filed reply to the captioned petition and submitted that present petition is not maintainable as there is pre-existing dispute, which was raised by the corporate debtor prior to the issuance of statutory demand notice in Form 3. The corporate debtor relied on the Hon'ble Supreme Court judgment in the matter of **Mobilox Innovations Private Limited v. Kirusa Software Private Limited (Civil Appeal No.9405/2017)**. The relevant extract of the said judgment is reproduced below:

> *"It is clear, therefore, that once the Applicant 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 Applicant or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the Applicant 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 eject 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."

It is submitted that the corporate debtor raised the statutory demand notice on operational creditor on 18.09.2019 on the basis of invoice dated 09.05.2019 and the same was replied by the operational creditor vide email dated 28.09.2019. Therefore, such dispute is well within the knowledge of operational creditor before the issuance of statutory demand notice dated 24.12.2019. Therefore, the petition is not maintainable in light of the judgment of Hon'ble Apex Court as quoted above. Other defence raised by the corporate debtor are suppression of material facts, invalid claim.

4. The Operational Creditor also filed the rejoinder and denied all the contentions and averments raised by the corporate debtor and further submitted that the there is no dispute between the parties as contended by the Corporate Debtor. It is averred that the said invoice dated 09.05.2019 is not based on any agreement between the parties and in fact the basis of Invoice appears to be alleged claims for damages in relation to just one of the several shipments transported by the Operational Creditor for and on behalf of the Corporate Debtor in the manner stated in the Application filed by the Operational Creditor. Thus, it is apparent that the unpaid invoices for services rendered by the Operational Creditor and received by the Corporate

Debtor, which constitute the Operational Debt remains uncontroverted and undisputed. It is submitted that the said operational debt pertains to admitted amounts payable to the Operational Creditor for shipments admittedly transported for the Corporate Debtor. The Operational Debt is independent and distinct from the alleged Invoice dated 09.05.2019 issued by the Corporate Debtor which is in the nature of a claim for damage for the value of an alleged shipment which the Operational Creditor allegedly delayed.

5. The Corporate Debtor also filed its Written Submission reiterated all the contentions already raised in the reply. In short, the corporate debtor raised objection regarding existence of pre-existing dispute in terms of section 5(6) of IBC, 2016 as the operational creditor withhold the consignment of goods, worth more than Rs.1 crore and same is evident from email exchanged between the parties. It is argued that the invoices of the two separate entities namely; Brompton Private Limited and Berkeley Beauty Brands Private Limited are included in computation of alleged claim by the operational creditor. It is further stated that petition u/s 9 of IBC, 2016 is merely a tool for recovery.

6. We have perused the Pleadings and arguments advanced by the Operational Creditor and Corporate Debtor. The Corporate Debtor has raised the

objection regarding existence of pre-existing dispute. This Adjudicating Authority has to look whether there is pre-existing dispute actually existing or not. Dispute is defined under section 5(6) of IBC, 2016, which is reproduced below:

> *"dispute" includes a suit or arbitration proceedings relating to–*
> *(a) the existence of the amount of debt;*
> *(b) the quality of goods or service; or*
> *(c) the breach of a representation or warranty;"*

Now, the question before this Adjudicating Authority is whether the corporate debtor has raised any issue that comes within the ambit of dispute as discussed above. The Corporate Debtor has relied on the statutory demand notice dated 18.09.2019. It is pertinent to discuss the content of the said statutory notice issued by the corporate debtor. On perusal of the said demand notice, it is clear that the said notice was issued because of delay in the transportation of shipments from Netherlands and loss suffered by the Corporate Debtor due to such withholding. Here, it is also important to go through the terms and condition agreed between the parties, if any dispute arises. As far as dispute with respect to any discrepancies of the goods are concerned, the same shall be raised within 7 days as provided in the invoices. Admittedly, no such issue was raised by the corporate debtor in the said period. The invoices were raised from march, 2018 to April, 2019. Furthermore, the corporate debtor has agreed to pay the outstanding amount by issuing two cheques as evident from the email dated 20.02.2019. Further, the corporate debtor has made the part payment on 22.04.2019 towards part discharge of its liability during the course of the business. The Statutory demand notice issued on 18th September, 2019 is on the basis of invoice dated 09.05.2019. The said demand notice was issued by Corporate Debtor only after issuance of demand notice dated 30.05.2019 by Operational Creditor. Hence, we believe that the said notice dated 18.09.2019 is counterblast and afterthought by corporate debtor in order to escape its liability. It is also important to mention that the Corporate Debtor has not instituted any proceeding against the Operational Creditor on the basis of the notice dated 18.09.2019. Therefore, this Adjudicating Authority is of the opinion that such argument in not maintainable in the eyes of law as corporate debtor has failed to produce any satisfactory evidence to show he existence of pre-existing dispute. Hence, this tribunal is inclined to initiate the CIRP of Corporate Debtor as a result the Petition is **admitted**.

7. The Operational Creditor has not proposed any name of the IRP, therefore, this Adjudicating Authority appoints Mr. Ankit Gupta having Regn. No.- IBBI/IPA-001/IP-P02304/2021-22/13704 (Email ID – CAANKITGUPTA2009@GMAIL.COM) as IRP from the list provided by IBBI. The IRP is directed to take charge of the said project of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days

from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

8. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all the following, namely:
    a. The institution of suits or continuation of pending suits or proceedings against the corporate debtor 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 Corporate Debtor's assets or any legal right or beneficial interest therein;
    c. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
    d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
9. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during

moratorium period. The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

10. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.
11. The Operational Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., with respect to said project and make compliance with this order as per the provisions of IBC, 2016.
12. The Operational Creditors are directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect.
13. Further operational creditor shall provide initial finance to tune of Rs. 2,00,000/- to the aforesaid Interim Resolution Professional within a weeks' time from the date of this order as advance towards initial cost and expenses of CIRP process. The said advance of Rs. 2,00,000/- shall be adjustable as CIRP cost by the Committee of Creditors immediately its constitution by the IRP.

14. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.

15. The order is pronounced by this Adjudicating Authority in virtual Hearing.

-Sd-

(Bachu Venkat Balaram Das)
Member (Judicial)

-Sd-

(Narender Kumar Bhola)
Member (Technical)