

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

Company Petition (IB) No. 1012/KB/2018

***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:

R C Trading, a proprietor firm
represented by its proprietor Mr.
Anup Kumar Saha carrying on
business from N.H. 37, near Durga
Weigh Bridge, Jawaharnagar,
Khanapara, Guwahati – 22, Assam.

... Applicant/ Operational Creditor.

Versus

Apeejay Tea Limited, having its
registered office at 15, Park Street,
Kolkata – 700 016.

... Respondent/ Corporate Debtor.

Date of Pronouncement: March 19, 2024.

CORAM:

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

APPEARANCE:

For the Applicant: **Mr. Jishnu Chowdhury, Adv.
Mr. Shaunak Mitra, Adv.
Mr. Patita Paban Bishwal, Adv.
Ms. Suranjana Chatterjee, Adv.**

For the Respondent: **Mr. Krishnaraj Thakker, Adv.
Ms. Urmila Chakraborty, Adv.
Mr. R. N. Ghose, Adv.
Ms. Shusna Santra, Adv.**

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ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Court congregated through hybrid mode.
2. Heard the Learned Counsels for both the parties.

Factual Matrix:

3. This instant application is preferred under Section 9 of the Insolvency and Bankruptcy Code, 2016, for brevity "I&B Code" by the **R C Trading**, hereinafter referred to as the **"Applicant"/ "Operational Creditor"** against **Apeejay Tea Limited**, (CIN: U27108WB1995PLC071253) hereinafter referred to as **"Respondent" / "Corporate Debtor"** seeking direction from this Adjudicating Authority to initiate Corporate Insolvency Resolution Process, (for brevity "CIRP") in respect of the Corporate Debtor.
4. The Corporate Debtor is a private limited company incorporated on April 24, 1995, having Paid-Up Share Capital of Rs. 5,00,000.00/- and Authorised Share Capital of Rs.16,00,00,000.00/-.
5. The principal amounts claimed to be in default are Rs.7,55,546/ become due and payable on **30.08.2016** and Rs. 41,97,030/-, become due and payable on **15.04.2016**, aggregating to an amount of **Rs. 49,52,576/-**. Further, the interest is calculated at the @18% i.e., is Rs.13,58,507/- up to May 01, 2018. **The total amount (Principal and Interest) is of Rs. 63,11,086/-.**

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Applicant's Submissions:

- 6.** The Learned Counsel for the Applicant submits that during the financial year of 2016-17, the Corporate Debtor issued purchase orders dated 17.03.2016 and 15.04.2016 towards the Operational Creditor and accordingly the operational creditor supplied coal at the various tea gardens of the corporate debtor as mentioned in the purchased order.

- 7.** Further it is submitted that the said supplied coal was duly accepted by the corporate debtor without demur. The Operational Creditor issued bills along with supporting documents and challans towards the corporate debtor.

- 8.** The Learned counsel for the Applicant claims that after the coal was duly delivered and accepted, the respondent ignored and failed the payments towards the operational creditors. Having no option left the applicant chose to issue the demand notices on 22.08.2017 and 09.05.2018. Further, the applicant also emailed the same on 24.01.2017 and 21.07.2017.

- 9.** It is submitted that Rs. 7,55,546/- is due on account of the supply of coal against the purchase order 17.03.2016 which became due on 30.08.2016. Further, Rs.41,97,030/- is due on account of the supply of coal against the purchase order dated 15.04.2016 which became due on diverse dates as supplied under the said purchase order.

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- 10.** The learned Counsel for the Applicant would contend that the amounts due and payable on different dates i.e., within 30 days from the date of submission of the bills or on the delivery of the materials at the tea gardens of the corporate debtor whichever is later.

- 11.** It is further submitted that under Purchase Orders placed by the Corporate Debtor on 17.3.2016 and 15.4.2016, the Operational Creditor sold and delivered coal to the Corporate Debtor. There was never any contemporaneous dispute or objection raised by the Corporate Debtor on any account.

- 12.** It is claimed that eight (8) Invoices were raised, between 30.7.2016 and 5.12.2016. Importantly, the receipt of goods and receipt of invoices by the Corporate Debtor have never been disputed, even in the present proceeding. There is also no allegation of quality issues. In other words, the supply of goods and raising of invoices, without any contemporaneous objection by the Corporate Debtor stands admitted.

Respondent's Submission:

- 13.** Per contra, the Learned Counsel for the Respondent would contend that the overall charge of affairs of the supply chain management department is the Senior Manager/General Manager, and they are answerable to the managing director and /or Board of Directors.

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- 14.** Further, it is contended that the business model of the respondent is such that once a bill is ratified by the Senior General Manager/Supply Chain Management and made over to the Accounts department, the same is no longer open for any further scrutiny. It is also a matter of the fact that vendors of the respondent are entirely dependent on the senior general manager of supply chain management for payments of the bills.
- 15.** It is submitted that one Partha Sarathy Chatterjee served as the General Manager of supply chain management of the respondent between the period August 01, 2012, and 31st March 2014 and his service was suspended with effect from 3rd August 2016.
- 16.** It is claimed that the transfer of a sum of Rs. 8 Lakh was made by one Dr. Naba Kumar Saha, the son of Dr. Nripen Kumar Saha who happens to be the brother of the proprietor of the applicant herein. Such transfer was made sometime in or around March 2014 immediately after disbursement was made by the respondent in favour of the applicant for services /supplies rendered by them.
- 17.** It is submitted that Mr. Partha Sarathy Chatterjee by way of a letter dated 2nd August, 2016, annexed as the letter "A" to the Reply Affidavit stated that during his tenure with the respondent was involved in the aforesaid criminal activities which has caused wrongful gain to him and wrongful loss to the respondent.

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- 18.** It is further submitted that a detailed complaint was lodged by the respondent against Mr. Partha Sarathy Chatterjee vide letter dated September 18, 2017, a copy of the said complaint is annexed hereto and marked with the letter "B".
- 19.** It is claimed that the respondent has, since, in compliance with the notice issued upon it under Section 91 of the Criminal Procedure Code made over relevant documents in support of allegations levelled against Mr. Chatterjee to the concerned police authorities including, inter alia, the letter issued by Mr. Bimal Modi on behalf of the respondent as would appear from serial no. 12 of the said letter dated September 21, 2017, addressed to the O/C, Park Street Police Station by the respondent. A copy of such letter dated September 21, 2017, is annexed hereto, and marked with the letter "D".
- 20.** It is further contended that the fraud perpetrated on the respondent by the applicant and or its partners in active collusion and connivance with Mr. Partha Sarathy Chatterjee there has been a complete failure for consideration.

Counter submissions by the Applicant to the Reply of Respondent:

- 21.** It is contended that the only defence sought to be taken by the Corporate Debtor is of alleged collusion between the Operational Creditor and the Corporate Debtor's then Supply Chain Manager namely one Partha Sarathi Chatterjee. The crux

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of the allegation is that Partha Chatterjee used to approve bills at inflated rates from vendors and receive kickbacks from the vendors. The Corporate Debtor had also filed a suit against several vendors including this Operational Creditor before the Calcutta High Court praying for a decree that no amount was due and payable by the Corporate Debtor on account of the alleged collusion.

22. Further it is claimed that in the instant case, such an allegation is ex-facie incorrect and purely invented with mala fide purpose to defeat the genuine claims of the Operational Creditor. This is evident from the following facts:

a) The suit filed against Operational Creditor was unconditionally withdrawn and was dismissed as withdrawn as recorded in the order dated August 2022 passed by the Hon'ble High Court at Calcutta. Thus, the Corporate Debtor is barred by law from making any contention as taken in the suit under Order 23 of the Code of Civil Procedure, 1908 and is also precluded from agitating any of the grounds in the withdrawn/dismissed suit as a defence to Operational Creditor's claims.

b) The entire purported defence in the present Section 9 proceeding is identical to the grounds taken in the withdrawn/dismissed suit alleged collusion between the Operational Creditor and Partha Chatterjee for

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approval of inflated bills. In other words, since the suit has been dismissed as withdrawn, the purported defence in the instant proceeding should also be struck out and disregarded.

- c)** Even factually, the allegations made by the Corporate Debtor are bogus and falsified by the records. The entire basis of the alleged defence is that Partha Chatterjee of the Corporate Debtor used to approve bills of OC at inflated rates. In the present case, this is ex-facie an impossibility, because the Corporate Debtor contends that an internal investigation was initiated in July 2016 and Partha Chatterjee was suspended on 03.08.2016.
- d)** That out of the Eight (8) invoices in the present petition, six were submitted on and after 10.8.2016 i.e., after Partha Chatterjee's suspension. The other two invoices were submitted on 30.7.2016 after the investigation was started against Partha Chatterjee and only three days before his suspension.
- e)** All the Purchase Orders since 2012 including the Purchase Orders in question, which contain the negotiated approved rates, have been countersigned and approved by the General Manager (Finance) of the Corporate Debtor namely, Soumitra Pal.

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- 23.** We have considered the rival contentions of the Learned Counsels for both parties.
- 24.** We would note that the petition under Section 9 of the I&B Code was filed on 14-08-2018 and the same was disposed of for non-prosecution of the Operational Creditor on 28.08.2019. Further, a Restoration Application of the Company petition, being Rst.A (IBC)/47/KB/2022 of the Company Petition was filed on 24-12-2021 and the same was registered after clearing its defects on 21-10-2022. We would note that Rst.A (IBC)/47/KB/2022 was allowed on 04.01.2023 upon payment of the cost of Rs. 10,000/-.

Analysis and Findings:

25. The discernible facts are as follows:

- i.** The Operational Creditor raised and issued Bills from 30.07.2016 to 03.12.2016.
- ii.** The applicant issued Form-3 Demand Notice under Section 8 of the Code on 06.06.2018.
- iii.** The Reply to the Form -3 notice was issued and emailed on 09.07.2018 by the Corporate Debtor, raising the dispute regarding the conduct of Mr. Partha Sarathy Chatterjee, General Manager of the Supply chain Management of the Corporate Debtor Company indulging in large scale fraudulent practice within the Corporate Debtor Company. Further that a suit being C.S. 242 of 2017 has been preferred by the Corporate Debtor against Mr. Chatterjee seeking damages for such fraudulent acts.

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- 26.** We would note that the Corporate Debtor has alleged that the Operational Creditor along with some other vendors had actively participated in a fraud as perpetrated by one Mr. Partha Sarathy Chatterjee, who was the Supply Chain Manager of the Corporate Debtor. It is averred that as the said Mr. Partha Sarathy Chatterjee was involved in a criminal activity by approving the bills at inflated rate from the vendors including the applicant and received inducement from those vendors during his tenure that caused a wrongful loss to the Corporate Debtor. The Respondent Company subsequently took action against the said Mr. Partha Sarathy Chatterjee by lodging an F.I.R at Park Street Police Station on 19.09.2017 being F.I.R No. 141 of 2017.
- 27.** The Corporate Debtor filed a civil suit being C.S. No. 242 of 2017 before the Hon'ble High Court at Calcutta against the said Mr. Partha Sarathy Chatterjee and the alleged vendors including the Operational Creditor herein praying leave under Clause 12 of the Letters Patent, 1865 and under Order II, Rule 2 of the Code of Civil Procedure, 1908 (C.P.C.) as under:
- a.** A decree for a sum of Rs. 2 Crore as damages;
 - b.** Pendente lite and post decree interest on the aforesaid sum at the rate of 18% per annum;
 - c.** An enquiry be made as to the losses, injury and damages suffered by the Plaintiff;

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- d. A decree for declaration that the claims made by the defendants by way of the letters are illegal, null and void;
- e. Cost.

Therefore, a dispute prior to the Section 8 Demand notice existed.

28. However, in the course of argument, the Learned Counsel for the Applicant takes us through the Order dated 11.08.2022 passed by the Hon'ble High Court at Calcutta in the said civil suit being C.S. No. 242 of 2017 wherein the Hon'ble High Court at Calcutta has noted that:

“The Court: Counsel for the plaintiff and Counsel for the defendant Nos. 14 and 17 are present.

Counsel for the plaintiff has handed over the communication dated 15th July, 2022 wherein the plaintiff has requested the Advocate on record of the plaintiff for taking appropriate steps for withdrawal of the instant suit.

On the basis of communication dated 15th July, 2022 Counsel for the plaintiff prays for withdrawal of the suit.

*In view of the submission made on behalf of the plaintiff and communication dated 15th July, 2022, **CS No. 242 of 2017 is dismissed as withdrawn.***

*Consequently, **GA No. 2504 of 2019 is dismissed.**”*

29. That being the case at hand, it would be appropriate to go through the provisions of Section 9 of the Code as under:

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Section 9: Application for initiation of corporate insolvency resolution process by operational creditor.

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

xxx

xxx

xxx

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

xxx

xxx

xxx

(ii) **reject the application** and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been 3[payment] of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) **notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility;** or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect

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in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

- 30.** We have noted that this petition under Section 9 of the I&B Code was filed on 14-08-2018 and prior to filing the petition, i.e., on 09.07.2018, the reply to the Demand Notice dated 06.06.2018, was issued by the Corporate Debtor raising dispute as Section 9(5)(ii)(d) of the Code envisages and that was duly received by the Operational Creditor.
- 31.** Section 5(6) of the Code defines a "dispute" as inclusive of 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**. The Hon'ble Apex Court in *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited* reported at **MANU/SC/1196/2017: (2018)1SCC353**, held that:

*“40. It is clear, therefore, **that once the operational creditor 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 operational creditor or there is a record of dispute in the information utility.** It is clear that **such notice must bring to the notice of the operational creditor 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*

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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 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."

(Emphasis Added)

There is nothing to show that the suit that was pending when the notice of dispute by the Corporate Debtor, if withdrawn later, after the Application under Section 9 of the Code is filed, will cure the defect that existed at the time of filing, leading to a notice of dispute under Section 9(5)(ii)(d) of the I&B Code, 2016.

- 32.** In terms of the foregoing discussions, we are of the considered opinion that there was a "Pre-existing Dispute" as on the date of filing of this application and so long as a dispute exists in fact relating to payment between the parties that would fall within the **inclusive** definition contained in Section 5(6) of the Code the application is liable to be rejected.

- 33.** Hence, we **dismiss** this Application sans further probe in the mechanics and merits of the dispute.

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- 34.** The **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (ROC), to whom the company(ies) are registered with, by all available means. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- 35.** Urgent certified copy of this order, if applied or, be supplied to the parties, subject to compliance with all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

This order is signed on 19th Day of March, 2024.

Bose, R. K. [LRA]/ Tiwari, V. [LRA]