IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

CP No. (IB)- 217/9/JPR/2020

(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:

TCI Express Limited
R/o: 1-1-8-201-203, 3rd Floor, Ashoka Bhoopal Chambers, SP Road Secunderabad, Telangana- 500003

Corporate Office : TCI House, 69, Institutional Area, Sector-32, Gurugram-122001, Haryana, India

…Applicant / Operational Creditor

VERSUS

Vinayak Manutrade Private Limited
R/o: 31-A Industrial Area, Jhotwara, Jaipur- 302012 Rajasthan

…Respondent / Corporate Debtor

For Petitioner (s) : Mr. Jatin Chawla, Adv.

For Respondent (s) : Mr. Harsh Tikoo, Adv.

ORDER PRONOUNCED ON: 19.10.2022

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. This Application is filed by M/s TCI Express Limited through its authorised representative ('Operational Creditor'/'Applicant') seeking to initiate Corporate Insolvency Resolution Process ('CIRP') against M/s Vinayak Manutrade Private Limited ('Corporate Debtor'/'Respondent'), under Section 9 of the Insolvency and Bankruptcy Code ('IBC'/'Code'), 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for the alleged default of outstanding operational debt amounting to Rs. 2,25,012/- (Rupees Two Lakhs Twenty-Five Thousand and Twelve).
2. The Applicant is a company incorporated under the Companies Act, 1956 and is engaged in business of providing logistics services. As per the website of the Ministry of Corporate Affairs, the Applicant is a public company incorporated on 10.11.2008 having CIN L62200TG2008PLC061781 and the Registered address of the Applicant is: Flat No. 306 & 307, 1-8-271 To 273, 3rd Floor Ashoka Bhoopal Chambers, S. P. Road Secunderabad, Hyderabad,Telangana- 500003.
3. The Respondent, is a private company incorporated on 26.06.1996 holding CIN No: U27203RJ1996PTC012256 engaged in the business of manufacturing cotton, acid and various hospital equipment on tender basis across various hospitals in the south of India and majorly Kerala. The

registered address of the Corporate Debtor is at 31-A, Industrial Area Jhotwara, Jaipur, Rajasthan-302012.

4. The Applicant has filed the present petition alleging the following set of facts:

   a. The Corporate Debtor approached the Applicant for transportation of the consignments to various destinations on day-to-day basis. An agreement was entered into between the Operational Creditor and the Corporate Debtor in May, 2018 which was valid till 10.05.2019. The same has been annexed as Annexure 3 of the Application.

   b. Pursuant to the performance of the services by the Operational Creditor, invoices were raised from time to time in proportion to the work carried out which were duly accepted by the Corporate Debtor without any disputes. The payment of the following invoices is due on part of the Corporate Debtor:

Bill No.	***Bill Date***	***Bill Submission Date***	***Date from which debt fell due***	***Outstanding Amount (in Rs.)***
1080039296	31.01.2019	15.02.2019	18.03.2019	84838
1080041618	28.02.2019	15.03.2019	15.04.2019	25880
1080041741	28.02.2019	15.04.2019	15.04.2019	63626
1080044642	31.03.2019	16.05.2019	16.05.2019	11362
Total Principal Outstanding				***185706***

   c. The Corporate Debtor neglected to pay the aforementioned dues despite continuous reminders by the Operational Creditor. Finally, the

Operational Creditor issued demand notice under Section 8 of the Code on 26.11.2019. Despite the delivery of the demand notice, the Corporate Debtor failed to make payment of the outstanding dues.

d. The aforementioned details as reflected in Part IV of the Application are as follows:

Part IV
PARTICULARS OF OPERATIONAL DEBT

1.	Total amount of debt, Details of transactions on account of which debt fell due, and the date from which such debt fell due.	Amount of Rs. 1,85,706/- (Rupees One Lakh Eighty-Five Thousand Seven Hundred and Six Only) is due on part of the Corporate Debtor towards Principal and as per terms of the agreement amount of Rs. 39,306/- as on 20.02.2020 towards interest @24% is due and outstanding on part of the Corporate Debtor. As such amount of Rs. 2,25,012/- as on 20.02.2020 is due on part of Corporate Debtor.
2.	Amount claimed to be in default and the date on which the default occurred	The amount claimed to be in default is Rs. 2,25,012/- as on 20.02.2020 along with interest @ 24% p.a. The Amount became due as and when invoice was issued and it remained unpaid for 15 days after service of invoices.

5. Consequent to the notice issued by this Adjudicating Authority, the Respondent filed its reply vide Dairy No. 1912/2022 dated 29.06.2022 stating as follows:

   a. The Corporate Debtor submits that the contracts and claims of the Applicant under question have been in dispute since long due to which this Application is not maintainable. There are several breaches and delays by the Operational Creditor due to which the Corporate Debtor has suffered substantial loss.

   b. The Corporate Debtor while relying on the definition of 'dispute' under Section 5(6) of the Code submitted that as the quality of goods or service has been included in definitional clause, it is necessary to mention that time of the delivery of the goods was essential condition of the contract entered between the parties. Under the heading 'Delivery Commitments' of the agreement, it is stated that *'All shipments will have scheduled date of delivery on a business day…'*. As per the terms of the Work Order/Contract the scheduled date of the delivery of goods is essential to the contract. However, the Applicant miserably failed to complete the work within the stipulated contractual schedule.

   c. The Corporate Debtor sent various e-mails dated 10.05.2018, 11.05.2018, 12.05.2018, wherein the Operational Creditor was requested to deliver the goods before 13.05.2018 as per the contract.

Being the contractor of sensitive medicines, time was of the essence of the contract. The Operational Creditor acknowledging the grievance of the Corporate Debtor vide e-mail dated 12.05.2018 assured to look into the issue. In the said e-mail it was also pointed out by the Corporate Debtor that remedial measures will be taken as per the contract. It was further submitted that due to the delayed supply of goods and materials, the Corporate Debtor had to face penalty in the form of being blacklisting and deduced payment.

d. Thereafter, in the e-mail dated 14.05.2018 the Corporate Debtor intimated to the Applicant that in regard to the non-delivery of goods, the Corporate Debtor would deduct the due payment. As the last date of delivery of goods was 13.05.2018 and the same was very well understood by the Applicant; the Corporate Debtor vide mail dated 15.05.2018 intimated to the Applicant that the bill amount in regard to the delayed delivery shall be deducted.

e. Subsequently, through its area manager, the Applicant requested for adjustment of dues at the time of conclusion of contract as it was a running account so that they can generate Certificate of Facts (COF) for computation of loss. However, no such certificate of facts was ever provided to the Corporate Debtor through the Applicant acknowledging the defects in its services.

f. The Corporate Debtor contended that as per ***Table B*** titled as ***Transit Day Matrix (Regular TCI Express Location)***; the Applicant undertook the liability to deliver goods in South Zone within 3 days of pick-up excluding Pick-up and delivery date. Admittedly goods were picked up by the Operational Creditor on 03.05.2018 however, till 15.03.2018, the Applicant did not deliver the goods which caused loss to the Corporate Debtor. Due to the delayed delivery of goods by the Applicant; the Corporate Debtor faced adverse situations with Tamil Nadu Medical Service Corporation Ltd. As the communication in regard to defective service was intimated before issuance of Demand Notice, the averments made in the Application are liable to be rejected.

g. The Corporate Debtor has further submitted that the Bank Certification with the affidavit attached on page 54 of the Application merely covers duration from 28.02.2019 to 15.01.2020, carefully excluding period after 30.01.2019. As per the Bank Statements of the Corporate Debtor, payment to the tune of Rs. 1,43,206/- (Rupees One Lakh Forty-Three Thousand Two Hundred and Six Only) was made by the Corporate Debtor subsequent to the issuance of the alleged invoice dated 31.01.2019 showing a total outstanding of Rs. 8,547/- (Eight Thousand Five Hundred and Forty-Seven Only) . It is also necessary to mention that the Applicant received a payment from the Corporate Debtor of Rs. 46,101.36/- (Rupees Forty-Six Thousand One Hundred One and

Thirty-Six Paise). The Applicant has failed to include the amount already paid by the Corporate Debtor; hence the amount of claim is incorrect. The Applicant has tried to inflate its claim without taking into consideration the sums already paid by the Corporate Debtor.

h. The Corporate Debtor also stated that as per the Customer Service Agreement *' DWB issued by TCIEXPRESS for each of the shipper's consignment shall be separate and independent agreement between TCI EXPRESS and Shipper.'* Thus, the alleged invoices are to be considered separate destinations with separate date of cause of action accrual. Relying on the judgment of the Hon'ble Supreme Court in *Innoventive Industries Ltd vs. ICICI Bank and Ors (2018) 1 SCC 407*, the Corporate Debtor submitted that the Applicant is debarred from joining/ clubbing of various cause of actions accruing on various dates. In application of the principle, no individual cause of action will be above Rs. 1 Lakh and would not be maintainable under Section 4 of the Code.

6. Pursuant to the Reply of the Corporate Debtor, the Applicant filed its Rejoinder vide Diary No. 2557/2022 dated 29.08.2022 whereby the following was submitted:

a. The Applicant submitted that the Corporate Debtor continued to take the services of the Applicant despite being unsatisfied with the services. There is no pre-existing dispute with regard to invoice under default.

Even after the demand notice was served upon the Corporate Debtor, no dispute was raised which clearly substantiates that all the allegations are afterthought of the Corporate Debtor.

b. Further it is submitted that there is no iota of evidence placed on record justifying raising of dispute with respect to the invoice under default. Further the amount of Rs. 1,43,206/- paid against the invoice number 1080039164 dated 31.01.2019 was duly adjusted. The amount of Rs. 46,101.36/- was duly adjusted by the Operational Creditor against invoice bearing no. 1360041244 dated 31.12.2018 of Rs. 40,050/- and invoice bearing no. 1080036766 dated 31.12.2018 of Rs. 10,085/- while waiving off the remaining amount against the said two invoices.

7. The Applicant also filed written submissions vide Diary No. 2697/2022 dated 08.09.2022 whereby it has been alleged that the amount paid by the Corporate Debtor was duly adjusted and even waiver was provided against part of one (1) invoice, despite of which four (4) invoices remains under default. It was also mentioned that raising of dispute in regard to quality of goods being inferior/substandard or defective service for the first time in response to the notice served by this Authority would not constitute a prior or pre-existing dispute as contemplated under law.

8. This Adjudicating Authority has perused all the relevant papers and found them in order. The Registered Office of the Respondent is situated in Jaipur;

therefore, this Adjudicating Authority has jurisdiction to entertain and try this application.

9. It is observed from the documents presented before us that the Customer Service Agreement issued by the Applicant was duly signed by the Corporate Debtor. Both the Applicant and the Corporate Debtor have annexed the said Agreement as Annexure-3 of the Application and Annexure-R4 of the Reply. The Agreement annexed by the Applicant has *'valid till 10.05.2019'* written whereas the same is missing from the copy annexed by the Corporate Debtor. The Agreement has a Transit Day Matrix for Surface Express Service stating the number of days in which the delivery takes place to different zones. The Agreement provides that All shipments will have a schedule date of delivery on a business day subject to conditions and incase the schedule date of delivery falls on Sunday or holiday, the following business day will be treated as scheduled date of Delivery at destination.

10. The Applicant has submitted that an amount of Rs. 1,85,706/- is pending to be paid by the Corporate Debtor on account of the services provided by the Applicant. It is seen that the Applicant had issued the demand notice under Section 8 of the Code vide Notice dated 26.11.2019. the Respondent has contended that there was a pre-existing dispute with respect to the services as the shipment was not delivered on time with respect to the which, the Corporate Debtor had preferred various e-mails to the Applicant. It is seen

that the Corporate Debtor preferred e-mails on 10.05.2018, 11.05.2018, 12.05.2018, 14.05.2018 and 15.05.2018. The Corporate Debtor has vide the aforesaid e-mails requested the Applicant to ensure delivery of all dockets by 13.05.2018 as that is the last day for accepting goods. The Customer Agreement stipulates that incase the schedule date of delivery falls on Sunday or holiday, the following business day will be treated as scheduled date of Delivery at destination. Accordingly, as 13.05.2018 was a Sunday, the following day i.e. 14.05.2018 ought to be treated as Scheduled date if Delivery. Vide mail dated 14.05.2018, the Corporate Debtor requested the Applicant to ensure the delivery of docket on the same day to which the applicant replied stating "*We will update you the status*". The Applicant has earlier too replied in the same manner.

11. With respect to the balance payments, the Corporate Debtor raised the contention stating that the Applicant while making its claim has not taken into consideration the sums already paid by the Corporate Debtor. It is seen that the Corporate Debtor has attached Statement of Accounts whereby the Corporate Debtor has made a payment of Rs. 1,43,206/- (Rupees One Lac Forty-Three Thousand Two Hundred and Six Only) to the Applicant on 22.02.2019. The Applicant has annexed the certificate of the Bank under Section 9(3)(c) of the Code whereby it has been mentioned that there are no other credit transactions from 28.02.2019 to 15.01.2020. The Applicant vide its rejoinder also submitted the Ledger whereby it has been accounted that

the said amount of Rs. 1,43,206/- received on 22.02.2019 was adjusted towards the Bill No. 1080039164 dated 31.01.2019 whereas the bill issued on 31.01.2019 that amounting to Rs. 84,838/- has not been cleared by the Corporate Debtor. Although it is seen that the Applicant has failed to provide bank statements showing actual payments made by the Corporate Debtor whereas the Corporate Debtor has annexed its Statement of Accounts showing payment of Rs. 1,43,206/- on 22.02.2019. There is no proof of non-payment of the other bill which was issued on 31.01.2019 amounting to Rs. 84,838/-. There is no explanation as to why the certificate under Section 9(3)(c) has been issued from 28.02.2020 instead of the Bill Submission date or the date of invoice as mentioned in the Application.

12. We have a number of judgments showing light on the aspect of pre-existing dispute under Section 9 of the Code. Conjoint reading of Section 8 and Section 9 of the Code shows that an Operational Creditor can trigger the CIRP, when there is an undisputed debt and a default in payment thereof. In the present case the Corporate Debtor had raised dispute with respect to deficiency in service vide the e-mails dated 10.05.2018 to 15.08.2018 to the extent of stating that if the goods are not delivered till 14.05.2018 the Corporate Debtor will not be paying for the services, which was prior to issuance of demand notice under Section 8 of the Code. The Applicant had knowledge of the said dispute as well which is visible from its e-mail replies.

13. In Mobilox Innovations Private Limited Vs Kirusa Software Private Limited, para 34, the Hon'ble Supreme Court laid down what the Adjudicating Authority has to examine in an Application under Section 9. Para 34 is as follows:-

> *"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 15 Company Appeal (AT) (Insolvency) No. 256 of 2021 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. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act."*

However, the defence has to be plausible and while not examining it on merits, it must not appear as a moonshine defence.

14. The correspondence between the parties herein clearly shows that a dispute had already risen between the parties after the alleged services were rendered by the Applicant, which were not upto mark as mentioned by the Corporate Debtor. The exchange of e-mails between the parties is enough to show that there was pre-existing dispute with respect to the services rendered by the Applicant. Further, in view of the order of the Hon'ble

Supreme Court in *M/s S.S.Engineers vs. Hindustan Petroleum Corporation Ltd. & Ors.* we are not inclined to commence CIRP of the Corporate Debtor.

15. Accordingly, CP No. (IB)-217/9/JPR/2020 is dismissed.

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(DEEP CHANDRA JOSHI)
JUDICIAL MEMBER

PRASANTA KUMAR MOHANTY
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(PRASANTA KUMAR MOHANTY)
TECHNICAL MEMBER