

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. II)
KOLKATA**

C.P (IB) No.2058/KB/2019

*An application under 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:

Anup Jhunjhunwala

... Operational Creditor

Versus

Adea Powerquips Private Limited

...Corporate Debtor

Date of hearing: 05/12/2022

Order Pronounced on: 05/01/2023

Coram:

Ms. Bidisha Banerjee, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Counsels appeared through Video Conference/Physical hearing

<i>For the Operational Creditor</i>	:	Ms. Urmila Chakraborty, Adv. Mr. Anurag Bagaria, Adv.
<i>For the Corporate Debtor</i>	:	Mr. Ratnanko Banerji, Sr. Adv. Mr. Reetobrato Mitra, Adv. Mr. V.V.V. Sastry, Adv.

O R D E R

Per: Balraj Joshi, Member (Technical)

1. The Court is convened via hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) by Anup Jhunjhunwala, seeking to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against ADEA Powerquips Private Limited (“**Corporate Debtor**”). The Corporate Debtor was incorporated on 18 November 2010, having CIN: U40104WB2010PTC154698, under the Companies Act, 1956, having its registered office at 53B, Mirza Ghalib Street, 2nd Floor, Kolkata – 700 016.
3. The present petition was filed on 02 December, 2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make a payment of a sum of Rs.25,00,000/- (Rupees Twenty Five Lakh only) on account of Salary (Director’s Remuneration) @2,50,000/- (Rupees Two Lakh Fifty Thousand only) per month for 10 months, starting from December, 2018 to September, 2019. The date of default is stated to be as on 11 October 2019.

Submission of learned Counsel appearing for the Operational Creditor

4. The Operational Creditor was one of the promoter as well as shareholder of the Corporate Debtor. The Corporate Debtor is engaged in the business of manufacturing hardware used in power transmissions. The Operational Creditor having vast expertise in the field of power transmission business, was appointed as the Managing Director of the Corporate Debtor on and from 01 April, 2015.
5. Till 31 March, 2017, the Operational Creditor was getting a salary of Rs. 25,00,000/- annually from the Corporate Debtor. On and from 01 April, 2017 the salary of the Operational Creditor was enhanced to Rs.30,00,000/- annually i.e. Rs.2,50,000/-per month and the Operational Creditor has received his salary from the Corporate Debtor company till 30 November, 2018.
6. The Operational Creditor has lent an advanced sum of Rs.27,00,000/- (Rupees Twenty Seven Lakh only) to the Corporate Debtor on various dates. However, on demand being made, the Corporate Debtor refused to repay the amount of

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loan lent and advanced by the Operational Creditor.

7. The Corporate Debtor on 04 May, 2019 paid an amount of Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand only) to the Operational Creditor towards salary for 3 (three) months for the period from September, 2018 to November, 2018. By an email dated 25 May, 2019 the Corporate Debtor also circulated a resolution dated 24 May, 2019, where the Corporate Debtor acknowledged the debt due towards outstanding salary of the Operational Creditor.
8. The Operational Creditor *vide* its emails dated 28 May, 2019, 29 June 2019, 07 August 2019, 16 August 2019 and 12 September 2019 requested the Corporate Debtor to make payment of the due salary. But the Corporate Debtor did not reply to any of the emails of the Operational Creditor.
9. Despite repeated requests and reminders by the Operational Creditor, the Corporate Debtor failed and neglected to release the salary of the Operational Creditor. Thereafter, during the Board Meeting held on 22 August, 2019 the Operational Creditor under complete duress was compelled to express his desire to resign from the designation of the Managing Director of the Corporate Debtor.
10. Under an email dated 23 August, 2019 the Corporate Debtor served a Notice dated 22 August, 2019 to the Operational Creditor, intimating the date of Annual General Meeting of the Corporate Debtor to be held on 16 September, 2019. In the Annual General Meeting of the Corporate Debtor held on 16 September, 2019, the resignation of the Operational Creditor was accepted and he was released from the duties and responsibilities from the Managing Director of the Corporate Debtor. In course of AGM the Operational Creditor once again requested the Board to release his outstanding salary and loan at the earliest.
11. The Operational Creditor has served as the Managing Director of Corporate Debtor till 16 September, 2019, however the Operational Creditor is entitled to receive the salary from the Corporate Debtor till September, 2019.
12. The Operational Creditor further issued a letter dated 11 October, 2019 to the Corporate Debtor and once again requested to forthwith release his

outstanding salary for a period of 10 months starting from December, 2018 to September, amounting to sum 2019 of Rs.25,00,000/- together with refund of loan advanced and interest thereon. The said letter dated 11 October, 2019 was delivered to the Corporate Debtor on 12 October, 2019. The Corporate Debtor under a letter dated 24 October, 2019 has replied to the said letter dated 11 October, 2019.

13. The dues of the Operational Creditor towards the salary have not been disputed by Corporate Debtor. The Corporate Debtor has no defense to the claims of the Operational Creditor. Further, No part of the dues of the Operational Creditor is barred by limitation. The Corporate Debtor has acknowledged and admitted its liability to Operational Creditor in writing and there is no justification for the Corporate Debtor to withhold payment to Operational Creditor.
14. The Operational Creditor has also issued a demand notice in Form 3 dated 13 November, 2019 to the Corporate Debtor [in terms of Section 8 of the code and Rule 5 of the Insolvency & Bankruptcy (Adjudicating Authority) Rules, 2016]. The demand Notice was delivered to the registered office of the Corporate Debtor on November 15, 2019. The Corporate Debtor through its Learned Advocate's letter dated 23 November, 2019 had replied to the said statutory notice dated 13 November, 2019, however, the contents whereof are false and frivolous and afterthought.

Submission of learned Counsel appearing for the Corporate Debtor

15. The Operational Creditor (i.e., Mr. Anup Jhunjunwala) and his two sons, Ayush Jhunjunwala and Nikunj Jhunjunwala were at the helm of the affairs of the Corporate Director as the Director and substantial shareholders.
16. The Corporate Debtor, sometime in 2016 was the beneficiary of foreign investments, in lieu whereof equity shares were allotted to such foreign investors. In spite of such foreign investment and a fairly lucrative business market, the Corporate Debtor was unable to flourish in the manner it ought to have. The financial health of the Corporate Debtor was severely affected. There was no apparent reason for such faltering financial condition.

17. Under these circumstances, sometime in December, 2018, one Modern Malleable Limited made further substantial investment in the Corporate Debtor and were allotted equity shares aggregating to approximately 29% of the total shareholding of the Corporate Debtor. Representatives of the said Modern Malleable Limited were also inducted on the board of the Corporate Debtor.
18. After pursuing with due diligence and causing further inquiry and investigation, the board of directors were shocked and surprised to find that the trio of Anup Jhunjunwala and his two sons have indulged in extreme financial irregularities by not just siphoning out money from the Corporate Debtor's fund, but also taking steps behind the back of the board of directors, without their knowledge or approval.
19. In one such instance, the trio opened an account on behalf of the Corporate Debtor with the Axis Bank, Salt Lake Branch, which was not known to other directors of the company. Money payable to the Corporate Debtor from several of its purchasers and customers were deposited in the said Axis Bank account and were surreptitiously removed by Anup Jhunjunwala and his two sons (*Copies of relevant banks statements at pages 17 – 27 of the Reply*).
20. Upon coming to learn of such fraudulent steps taken by Anup Jhunjunwala, the operational creditor herein and his two sons, board meetings were urgently held and decisions were taken to ensure that Anup Jhunjunwala and Ayush Jhunjunwala would no longer continue as directors of the company. The minutes of such relevant board meetings dated 11 February 2019, 7 May 2019, 6 June 2019, 22 August 2019 and 16 September 2019 (*Annexure – B of the Reply*).
21. In fact, in a resolution adopted by circulation, by the chairman of the Corporate Debtor on 24 May 2019, it was categorically held as decided by the board of the corporate debtor that all payments of wages and salaries to the other workers and employees of the Corporate Debtor would be released at the earliest, though payments to the Operational Creditor and his sons would be withheld in view of the illegalities and prejudicial acts undertaken by them.

22. The said facts of removal and withholding payments of Operational Creditor was duly intimated to him, which was sought to be ignored by successive electronic mails of the Operational Creditor. The Operational Creditor had completely misused his position and breached the fiduciary relation between the director and the Corporate Debtor.
23. Further, when faced with such enquiry and investigation, the Operational Creditor himself offered to resign and indeed tendered his resignation without seeking any further payments, which are in any event neither due nor payable. The resignation tendered by the Operational Creditor was accepted and approved on 16 September 2019 as would appear from the copy of the minutes.
24. The Operational Creditor had unjustly enhanced his monthly remuneration from Rs.2 lacs to Rs.2.50 lacs with effect from 1 April 2017. Such action was without the approval of board of directors and also without the approval of Members at the Annual General Meeting. It is also a matter of record that one of the sons of the operational creditor being Mr. Nikunj Jhunjhunwala was appointed by the Operational Creditor without any basis.
25. Once confronted, the Operational Creditor offered to execute an Indemnity Bond for the loss suffered by the Corporate Debtor due to the acts of omission and commission of the Operational Creditor. In fact, the Operational Creditor had also purchased the requisite stamp paper and furnished Bond, (*Annexure – C of the Reply*). However, before executing the Bond as per the assurance given, the Operational Creditor has initiated this utterly false and harassing litigation.
26. However, upon the Operational Creditor tendering his resignation, the Corporate Debtor decided not to take any further coercive steps against him and also in view of the fact that the person in control of Modern Malleable Limited are close family members of the Operational Creditor. In view of such family and emotional ties and the resignation of the Operational Creditor, further enquiry and proceedings were not initiated.
27. Taking advantage of the aforesaid, the Operational Creditor with an ulterior

motive and intent and to give shape and design to his evil mischievous plan has proceeded to file the present petition as an Operational Creditor purporting to be an application under section 9 of the Insolvency and Bankruptcy Code 2016. Further, the present application under section 9 is ripen with pre-existing dispute and the question of any default of payment as defined under the Insolvency and Bankruptcy Code of 2016 does not arise.

Analysis and Findings

28. The instant application has been filed by one Anup Jhunjhunwala, who has been Managing Director of the Corporate Debtor for initiating Insolvency Resolution Process against the Corporate Debtor in view of the non-payment of the salaries of the individual by the Corporate Debtor.
29. Ld. Counsel appearing for the Operational Creditor has stated that his client had diligently performed his duties as Managing Director of the Corporate Debtor till 16 September, 2019, when he had resigned from the post of the Managing Director due to personal reasons.
30. However, his salary dues amounting to Rs.25,00,000/- have yet not been released by the Corporate Debtor despite requests culminating with Section 8 notice dated 13 November, 2019 (*At page nos. 124 to 135 of the Petition*).
31. It is further stated by the Ld. Counsel appearing for the Operational Creditor that the liability to pay this debt has been acknowledged by the Corporate Debtor in the balance sheets of the year 2018-2019 under the head payments related party wherein this amount of Rs.25,00,000/- Lakhs has been shown to be due to Mr. Anup Jhunjhunwala.
32. On the contention of the Operational Creditor that the Operational Creditor under complete duress was compelled to express his desire to resign from the designation of the Managing Director of the Corporate Debtor is incorrect. As it has been shown in number of documents that he has carried out fraudulent transactions and also siphoned away company money and the matter has been discussed in number of board meetings and one such meeting this has been clearly mentioned that due to these reasons the applicant should be removed as Managing Director of the Company (*at pages 35 and 37 of the petition*).

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33. Ld. Senior Counsel for the Corporate Debtor submits that the averments made by the Operational Creditor that Mr. Anup Jhunjunwala had diligently worked for the said period and needs to be paid are not based on facts and the facts remains that he had siphoned off the company money for loan and personal gain in his personal account, for which he has referred Bank account statement also given (*at page 46 of the petition*).
34. During the hearing, number of charges and counter charges were given by the Ld. Counsel on both sides. Be that as it may, it appears from the documents on record and also arguments made during hearing that there is a pre-existing dispute between the parties.
35. We rely on the judgment of Hon'ble Supreme Court in the matter of Mobilox judgment, it states that even a presumption of pre existing dispute is good enough, and this saves the Corporate Debtor from the touches of CIRP. *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited*¹ it was opined by the Hon'ble Apex Court that;
- “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 nonpayment 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.”*

¹2017 (1) SCC onLine SC 353

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The Hon'ble Supreme Court in *Mobilox (Supra)* has also observed that all that the Adjudicating Authority has to see at 'the stage of Admission' 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 or a moonshine defence unsupported by tangible materials/evidence.*"

36. In view of the above, we note that there has been a pre-existing dispute in the matter and therefore C.P (IB) No. 2058/KB/2029 is *rejected*. Needless to say that the Operational Creditor is at liberty to resort to other remedies that may be available to it under any other law.
37. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order is signed on 05th day of January, 2023

SA(LRA)