IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. 1)
KOLKATA

C.P (IB) No. 1801/KB/2019

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:

Talbot & Company [Partnership Firm]

...Operational Creditor

Versus

Austin Distributers Private Limited [CIN U34103WB1938PTC009476**],** a company incorporate under the Companies Act, 1913, having its registered office at 19, Jawarhar Lal Nehru Road, Kolkata – 700087.

...Corporate Debtor

Date of Hearing: 02.09.2022
Date of pronouncing the order: 18.10.2022

Coram:

Shri Rohit Kapoor	***:***	***Member (Judicial)***
Shri Balraj Joshi	***:***	***Member (Technical)***

Appearances (through Video Conferencing/physical hearing)

For the Operational Creditor	:	Mr. Arik Banerjee, Adv.
	:	Mr. Abhishek Jain, Adv.
For the Corporate Debtor	:	Mr. Rishav Banerjee, Adv.
	:	Mr. Rajashi Banerjee, Adv.

O R D E R

Per Balraj Joshi, Member (Technical)

1. The Court convened *via* hybrid mode.

2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 ***('the Code')*** read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Basanta Kumar Baral, Partner, Talbot & Company ***('Operational Creditor')***, duly authorised *vide* resolution dated 15 July, 2019[1] for initiation of Corporate Insolvency Resolution Process ***('CIRP')*** against Austin Distributers Private Limited ***('Corporate Debtor')***.

3. The present Petition was filed on ***25 October, 2019*** before this Adjudicating Authority. The total amount claimed in default is Rs.8,17,678.54/- (Rupees Eight Lakh Seventeen Thousand Six Hundred Seventy Eight and Fifty Four Paisa only) and interest of Rs.1,46,052/- (Rupees One Lakh Forty Six Thousand Fifty Two only) @ 24% till 15 July, 2019.

4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.4,00,00,000/- (Rupees Four Crore only) with subscribed share capital of Rs.3,40,09,330/- (Rupees Three Crore Forty Lakh Nine Thousand Three Hundred Thirty only).

5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor***.

5.1 The Operational Creditor is engaged in the business of providing security services, ranging from solution designing to deployment of security guards, security officers, housekeeping, gunmen, armed guards, firemen, dog handlers, consultants, investigators and command and control centre employees etc. Where as, the Corporate Debtor is engaged in automobile business and handles the distribution of Automobile Vehicles.

[1] Annexure – C, at page 17 of the Petition.

5.2 The Corporate Debtor, for the purpose of deployment of security guard at one of its showroom, approached the Operational Creditor in the months of September, 2015 for providing security arrangement and protection of the showroom. Subsequently, the terms and conditions were entered into between the parties.

5.3 Thereafter, the Corporate Debtor placed a work order dated 30 September, 2015 with the Operational Creditor and the Operational Creditor rendered the said services.

5.4 As per the agreed terms and conditions, the Operational Creditor would deploy its security guards, house-keeping, security officers, armed guards etc. as per the requirement of the Corporate Debtor at various showrooms and thereafter, for such deployment, the Operational Creditor would raise invoices on monthly basis. The said services were duly accepted by the Corporate Debtor without raising any objection.

5.5 The Corporate Debtor made payments against some of the invoices raised by the Operational Creditor prior to 01 August, 2017 and thereafter, made payments towards certain bills. The Corporate Debtor requested the Operational Creditor to continue to provide the services and assured that the payments pertaining to the outstanding bills would be made shortly. Despite, several requests, the Corporate Debtor failed to make payments of the invoices raised by the Operational Creditor.

5.6 The Operational Creditor issued various emails calling upon the Corporate Debtor to make payments of the outstanding bills. Though, on certain occasions the Corporate Debtor had indicated that there were alleged declination of duties on the part of the Operational Creditor, however on being completely satisfied with the quality of service rendered by the Operational Creditor, the Corporate Debtor assured that necessary payments will be made to the Operational Creditor.

5.7 Further, by an email dated 21 May, 2019 the Corporate Debtor not only acknowledged its liability towards the dues of the Operational Creditor but also assured that necessary payments will be made. In the email dated 21 May, 2019 *[at page 311 – 313 of the Petition]* the only reason given by the Corporate Debtor for non-payment of the dues of the Operational Creditor was on account of the tough market situation faced by the Corporate Debtor. Despite the email dated May 21, 2019, no payment as regards the dues of the Operational Creditor has been made by the corporate debtor.

5.8 In the said circumstances, the Operational Creditor issued a demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 on 26 July, 2019 calling upon the Corporate Debtor to make payments of its dues within 10 days of receipt of the notice failing which the Operational Creditor shall initiate a corporate insolvency resolution process in respect of the Corporate Debtor. The said notice dated 26 July, 2019 was duly received by the Corporate Debtor.

5.9 The Corporate Debtor replied to the said demand notice by a letter dated 06 August, 2019. The Corporate Debtor made baseless and frivolous allegations against the Operational Creditor to evade from paying the admitted dues. The contents of the said reply are all false and baseless and are denied and disputed. The Corporate Debtor, in order to avoid making payments of the admitted dues replied to the said demand notice by falsely accusing the Operational Creditor.

5.10 There are no pre-existing disputes before receipt of the Form - 3 dated 26 July, 2019. Furthermore, had there been any pre-existing disputes, the same has been waived after issuing the letter dated May 21, 2019, wherein the Corporate Debtor not only admitted its liability but also assured the Operational Creditor that payments shall be made shortly.

***6. Submissions by the Ld. Advocate appearing on behalf of the Corporate Debtor*.**

6.1 The demand made in the purported demand notice has been made on the basis of manifestly spurious and fabricated invoices. The said demand notice is not in accordance with the Code.

6.2 Further, the Application filed by the Operational Creditor is malicious and fraudulent; it is squarely aimed at unjust enrichment of the Operational Creditor at the expense of the Corporate Debtor. This Application is further not maintainable on the ground of existence of pre-existing disputes between the Operational Creditor and the Corporate Debtor.

6.3 The Operational Creditor has also clubbed different purported claims arising out of distinctly different, multiple purported contracts/agreements between the Parties.

6.4 The Corporate Debtor has suffered loss due to the deficient and poor service rendered to the Corporate Debtor by the Operational Creditor under different contracts of service at various sites belonging to the Corporate Debtor and this fact had been communicated multiple times to the Operational Creditor by the Corporate Debtor much before the receipt of the purported statutory demand notice by the Corporate Debtor.

6.5 The Corporate Debtor had also protested against such willfully deficient and poor service by the Operational Creditor via correspondence multiple times before the Corporate Debtor received the said statutory demand notice on 31 July, 2019.

6.6 The fact that such willfully deficient services was rendered by the Operational Creditor had been communicated by the Corporate Debtor to the Operational Creditor multiple times verbally and also via e-mail on February 26, 2016, November 10, 2017, October 2, 2018 (12:48 PM), March 12, 2019, March 14, 2019, but no compensatory action was never taken by the Operational Creditor *[Annexure – A of the Reply]*.

6.7 The services provided by the Operational Creditor to the Corporate Debtor violated the terms and conditions of the said contracts of service as well as the general industry standards of care and diligence expected from a provider of such services on commercial basis.

6.8 A bare perusal of the emails constituting *Annexure A* hereto will make it plain and evident that the willful violation of contracted quality and performance standards by the Operational Creditor caused the Corporate Debtor immense business losses, saddled the business and property of the Corporate Debtor with entirely avoidable risk and resulted in theft of, as well as damage to, property belonging to the Corporate Debtor. The Corporate Debtor is entitled to be compensated by the Operational Creditor for such contractual violations

6.9 The Operational Creditor has even admitted and acknowledged that it has rendered defective and deficient services to the Corporate Debtor and engaged incompetent and unethical and untrained manpower while purportedly performing its contractual obligations.

6.10 Various times verbally and also via e-mail on February 27, 2016, and on August 29, 2018. The Operational Creditor has specifically admitted in the aforesaid e-mail dated August 29, 2018, that at least one of its employees/associates/representatives involved majorly in executing its contractual obligations towards the Corporate Debtor was actually working unethically and in derogation of the standards of service quality contemplated by the contracts) and industry standards of care and diligence. In this connection the said e-mails dated February 27, 2016, and August 29, 2018 *[Annexure – B of the Reply]*.

6.11 A bare perusal of the said emails constituting Annexure A hereto will shows that there exists multiple pre-existing disputes between the Corporate Debtor and the Operational Creditor pertaining to the contracted services that had been raised by the Corporate Debtor and duly and diligently communicated to the Operational Creditor. These pre-existing disputes go to the root of the matter under adjudication in the instant Application but the Operational Creditor chose to ignore the same before concocting the untenable, illegal demand against the Corporate Debtor in the said statutory demand notice and frivolously filed the instant Application

6.12 The corporate debtor states and submits that the proceedings under IBC, 2016, are summary in nature and it is now a settled proposition of law that the Adjudicating Authority cannot adjudicate such issues concerning pre-existing disputes between a purported operational creditor and a purported corporate debtor since they can only be adjudicated in a trial after leading

7. Issues

7.1 Is there any Pre-existing dispute?

Analysis & Findings

8. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and the Ld. Counsel appearing on behalf of the Corporate Debtor and perused the record.

9. From the record at page 32 *(i.e., email dated 26 February, 2016)*, page 33 *(i.e., email dated 10 November, 2017)*, page 34 *(i.e., email dated 02 October, 2018)*, page 35 *(i.e., email dated 12 March, 2019)* and page 37 *(i.e., email dated 14 March, 2019)* it is apparent that at various circumstances the Corporate Debtor raised disputes with respect to the service provided by the Operational Creditor.

10. Further, the Ld. Counsel appearing for the Operational Creditor relied on the email dated 21 May, 2019 (*at page 311)* wherein, the Corporate Debtor acknowledged their outstanding dues and promised to clear the same. Whereas, on the contrary the Corporate Debtor contests the said email on the grounds that it is a creature of fraud, forgery and misrepresentation, because the said email does not bear any individual office holder's name anywhere in the mail as the issuing party. Further, *'HR and Admin Dept'* is not authorized to issue any admission of debt or balance confirmation.

11. However, be that as it may, it is imperative to mention that from the year 2016 to 2019 the Corporate Debtor raised several issued with respect to the services provided by the Operational Creditor. Further, the email dated 21 May, 2019 is very unconventional because it is the same Corporate Debtor who has been disputing the services rendered by the Operational Creditor.

12. With respect to the pre-existing dispute, we also rely on ***Innoventive Industries Ltd. v. ICICI Bank and Anr.,***[2] where the Hon'ble Supreme Court while explaining the provisions of Sections 7 or 9 observed and held:

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is preexisting- i.e. before such notice or invoice was received by the corporate debtor. ***The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code****."*

13. Further, in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited***[3] it was opined by the Hon'ble Apex Court that;

*"33. ...****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. ……..***"

14. 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***

[2] (2018) 1 SCC 407
[3] 2017 (1) SCC onLine SC 353

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.

15. In this context it is pertinent to mention that the disputes raised by the Corporate Debtor are not spurious or plainly frivolous or vexatious. Hence, the Petition being C.P***. (IB) No. 1801 /KB/2019*** is ***dismissed***. Needless to say that the Corporate Debtor is at liberty to resort to other remedies that may be available to it under any other law.

16. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 18th day of October, 2022

SA [LRA]