

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH III
NEW DELHI**

CP-IB-483/ND/2017

**IN THE MATTER OF SECTION 9 OF THE INSOLVENCY AND
BANKRUPTCY CODE, 2016.**

**M/s DURLUM INDIA PVT. LTD.
H.Z.T. NHIZAMUDDIN WEST,
NEAR COMMUNITY CENTRE,
NEW DELHI- 110013**

... OPERATIONAL CREDITOR/APPLICANT

Versus

**M/s SHARMA KALYPSO PVT. LTD.
16 C, BASANT LOK,
VASANTVIHAR,
NEW DELHI-110057**

.. CORPORATE DEBTOR/RESPONDENT

Coram:



**R.VARADHARAJAN,
Hon'ble Member (JUDICIAL)**

**Dr.V.K.SUBBURAJ
Hon'ble Member (TECHNICAL)**

**Counsel for the Petitioners : Mr.Sarwar Raza, Mr. Takrim Ahsan
Khan, Advocates**

**Counsel for the Respondents : Mr. Sidharth Chopra, Mr. Aditya
Awasthi, Advocates.**

Order delivered On: 22.05.2018

ORDER

This is an Application filed by an Operational Creditor (OC) namely, M/s Durlum India Private Limited seeking to initiate the Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor (CD) above named under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC,2016) and the claim arising out of the transaction between the parties is stated to be in a sum of Rs.38,67,500/-. The nature of transaction which is said to have given rise is that of supply of goods namely false ceiling boards, under two invoices bearing No. IN1718TDS-041 dated 13.6.2017 for Rs.16,95,575/-and another invoice bearingNo.IN1718TDS-046 dated 26.06.2017for a sum of Rs.26,71,985/-. Further, it is also averred in the

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application that the carrier in relation to supply of goods had also issued receipts for Rs.50,000/- and Rs.1,10,000/- respectively evidencing that the goods in relation to invoices have also been received by the Corporate Debtor on 16.06.2017 and 29.06.2017 respectively. In relation to the said amounts due, it is also averred that post dated cheque of Rs.16,03,750/- dated 14.6.2017 and another cheque for Rs.21,03,750/- dated 17.07.2017 were also given to the OC by the CD and that the said cheques got dishonored due to 'insufficient funds' when it was presented for payment and was returned vide return memo dated 29.7.2017 and 03.08.2017 respectively. Further, the freight charges which was also duly agreed to be paid by the CD for the goods purchased to the extent of Rs.50,000/- and Rs.1,10,000/- as cost of transportation/freight of goods purchased under two invoices has also not been paid by the CD. Taking into consideration all the above, the transaction for supply of goods for consideration in a sum of Rs.38,67,500/- is due and payable by CD and that in relation to the sum payable by CD, cheques have been issued in acknowledgement of the amount due and dishonored as stated above thereby giving rise to default, and in the circumstances, notice under Section 8 of the IBC,2016 was duly issued to the CD dated 20.9.2017 and also in consonance with Rule 5 of Insolvency and Bankruptcy(Application to Adjudicating Authority) Rules, 2016 for brevity called "AAA Rules, 2016" and the said notice was also



served upon the CD on 27.9.2017 and in the absence of any dispute raised or payment made on the part of the Corporate Debtor this application.

2. Pursuant to the service of advance copy of the Petition by the Petitioner to CD, CD had entered its appearance vide order dated 29.11.2017 and subsequently has also filed its reply to which a rejoinder has also been filed by the Petitioner.

3. Perusal of the reply of CD shows that the following contention has been taken by the CD to stave of the claim of the OC, namely:

- (i) The OC has failed to deliver the demand notice in consonance with Rule 5 of "AAA Rules".
- (ii) An objection has also been taken to the effect that the Application filed in Form-I is defective and the Board Resolution dated 28.3.2017 is not a specific resolution authorizing the authorized signatory who has signed the Petition on behalf of the Applicants.
- (iii) On facts, it is contended that goods have not been supplied in full as per the purchase order dated 1.6.2017 and whatever supplies have been effected in relation to the purchase order dated 1.6.2017 have been supplied

beyond time and that objections have also been duly recorded to the knowledge of the OC on the packing list dated 28.6.2017 annexed along with the counter affidavit.

- (iv) It is also contended that in relation to the invoice No.IN1718TDS-046 dated 26.06.2017 has been manipulated as the OC has conveniently removed objections in relation to the number of boxes delivered to the OC where endorsements have been made by CD of the lesser quantity delivered.
- (v) Further, documentary evidences has been also filed to disclose in acknowledgement or receipt of goods by the CD to the contrary as stated in the invoice which only goes to show that the goods have not been delivered to the CD as otherwise contended by the OC. In this connection, it is stated that while the invoice claimed that it had supplied 650 boxes and 8 bundles of material, however, on actual receipt of goods since it was found that CD had only received 588 boxes and 8 bundles and in view of the same, objection was duly recorded therein.
- (vi) The objection in relation to the non-delivery of goods, it is contended can also be corroborated with endorsement made in the packing list.



(vii) It is contended by the CD that in order to cover up the objections which have been raised by the CD in relation to supply of goods/material, OC had deliberately filed illegible copy of logistics receipt dated 27.6.2017 and in order to set the records straight, a clear copy of the logistics receipt is claimed to have been annexed along with the counter affidavit which proves beyond doubt the shortage in the supply of goods effected.

(viii) Contention is also taken that in relation to the payment terms as contained in the purchase order, CD was liable to make 50% of the payment within 20 days upon complete goods being supplied and the remaining sum was to be paid 30 days thereafter provided the goods were supplied within the time specified. Thus, it is contended that the amount claimed in default is not payable due to non-supply of the complete goods within the stipulated time as the same is material for fixing the false ceiling based on measurements and that the CD has suffered a irreparable loss particularly when time was the essence of the contract and the supply of goods were not on time as also admitted by the OC vide emails dated 16.06.2017 and filed as Annexure R-4 to the counter affidavit.



4. Taking into consideration all the above, it is contended that there is no cause of action accruing to the OC to file the present Application. It is further averred in the counter affidavit that since the payment in relation to the OC was hedged based on the contract awarded by NBCC, however, the same came to be terminated by NBCC due to delay in the delivery of goods on the part of OC, being one of the factors, and the unprofessional conduct of the OC giving rise to damages and compensation to be paid by the OC. Further inconsistency between those made in the criminal complaint filed before the Judicial Magistrate First Class, Gurugram and the present Application in relation to the delivery of goods is also pointed out and it is contended that this Application has been falsely filed and that the OC is liable for perjury. In addition, CD also seeks to rely on the ground that there is no operational debt owed to the OC herein and also in support of its contention to the existence of dispute places reliance on the decision of Hon'ble Supreme Court in "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited - 2017 SCC OnLine SC 1154", and has sought for the dismissal of this Application/Petition.

5. A rejoinder under the nomenclature of reply has been filed on behalf of the OC to the counter affidavit of the CD wherein the claim



of fabrication in the invoices is sought to be denied by the OC. It is also contended that no dispute whatsoever with regard to quality, quantity, specification and delivery of goods had been raised by the CD previously, other than those made out presently in the counter affidavit. It is also brought to the notice of this Tribunal that despite service of notice under Section 8 of IBC,2016, no reply to the said notice nor any notice of dispute was ever served or received by the OC from the CD. It is also reiterated in the rejoinder that all the goods were supplied by the OC on time and as per the specification of the purchase order and that in relation to non-receipt of goods, no dispute had been raised and on the other hand cheques have been issued in acknowledgement of the debt which ultimately got dishonored. It is also averred in the rejoinder that CD was satisfied by the execution of the purchase order and dispute in this regard was never raised by the CD prior to this application. In relation to non-compliance with the provisions of Section 9(3)(c) of IBC,2016, it is averred by the OC that the same has been duly enclosed along with the rejoinder in addition to the bank statements which have already been annexed with the typed set filed along with the Application. In fine, it is stated that the statements made by the CD are mere bald statements and it has been made just to obstruct the dispensation of justice.



6. Subsequent to completion of pleadings in the matter it was finally heard by this Tribunal on 8.5.2018. Ld. Counsel for the parties were given an opportunity to make their oral submissions wherein the respective pleadings made by the parties were reiterated and attention particularly was drawn of this Tribunal to the invoices, packing list and logistics manifest filed by the Applicant OC as well as the copy of the same furnished along with the counter affidavit by the Corporate Debtor. Leaving aside all the technical pleas as raised by the CD in relation to the notice of demand under Section 8 of IBC,2016 was not served at the registered office, which in any case cannot be given much credence to as the same has been dispatched to the address as reflected in the Master Data of the Corporate Debtor and the tracking report also discloses delivery of the consignment as well as in relation to the format of the Application which is required to be filed before this Tribunal under the relevant rules, which we find to be in compliance, the issue centers around the delivery of supplies as required to be made by OC and whether it had been duly made to the CD as CD has raised a serious issue that the quantity as stated in the invoices raised by the OC has not been duly supplied to it and that on the face of invoice an endorsement to this effect was also made not only in the invoice but as well as in the packing list issued by OC and logistic report issued by the transporter. It is to be noticed here that based on

the purchase order dated 01.06.2017, supply of goods seems to have been effected in two tranches by the Operational Creditor, one under Invoice No. IN718DTS-041 dated 13.06.2017 and the other under Invoice No. IN1718DTS-046 dated 26.06.2017. While in relation to Invoice No. IN1718 DTS-041 dated 13.06.2017 there seems to be no issue, however in relation to Invoice No. IN1718DTS-046 dated 26.06.2017, a serious issue of short supply is raised by CD, but however vehemently denied by OC. Referring to Annexure A-5 at page No. 30 of the typed set filed along with the Application being the copy of invoice dated 26.6.2017 bearing No. IN1718DTS-046 it is seen it is co-relating to the purchase order as referred to therein being No.148/17 dated 1.6.2017. A further perusal of the said invoice shows that the quantity specified therein is to the extent of 650 boxes and 8 bundles and the invoice amount including sales tax, surcharge and freight charges comes to Rs.26,71,985/- all of which form part of the claim amount of the OC against the CD before this Tribunal and non-payment of which has been stated to be one of the reasons for filing this Application. In connection with the Invoice ending with No. 046, a Logistics Report being Annexure A-11 issued by Manish Logistics (India) being the transporter dated 27.06.2017 has been filed by the Petitioner-OC in which we find certain endorsements had been made by hand at the left hand side bottom of Annexure A-11 and on closer

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scrutiny it seen that the entry '650 boxes' had been struck off and against the same '596' is specified and beneath it an entry in hand of Nos. 588 and 8 has been written. Taking into consideration the same (i.e.) Annexure A-11, Learned Counsel for CD seriously and vehemently disputes the copy of invoice filed as Annexure A-5 as a manipulated one by CD and in order to sustain the same CD insupport of its contention of short supply and thereby in relation to the dispute has pointed out Annexure R-2 at page No.18 of the typed set of papers filed along with the counter affidavit of CD. A perusal of the said Annexure discloses that on the face of the very same invoice as produced by the OC as Annexure A-5 there is an endorsement made in hand to the effect "588 boxes and 8 bundles received" and the date is stated to be 29.6.2017. In this connection, Ld. Counsel for CD also further points out to Page No.19 of CD's typed set filed as Annexure R-2 being the packing list in which too an endorsement in hand is to be found off "588+8=596" after striking off 2 individual items given in the earlier part of the said packing list. In this connection, it is also further pointed out by the Ld. Counsel for CD of Annexure R-3 wherein similar endorsement has been made as against the total quantity of 650 boxes and 8 bundles wherein it contains '588+8' written in hand equal to 596bundles and underneath date is given as 29.6.2017 and in the circumstances, it is contended that

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fabricated documents have been filed by OC to deliberately hide the dispute relating to short supply of contracted goods.

7. In response to the above said contention of the CD, in the rejoinder OC has stated that OC has not filed deliberately illegible copy of the logistics receipt dated 28.6.2017 and further the copy of the logistics receipt which has been annexed along with the rejoinder also does not contain any endorsement to the said effect. However, we do not find the explanation offered by OC to be very convincing and on the other hand seems to be rather evasive. The dispute is in relation to whether the goods under Invoice No. 046 was fully supplied or not. While Annexure A-5 of typed set of the Petition is clear as a slate without any endorsement, the same invoice produced by the CD in its typed set contains hand written endorsements as noted above. Further the same is also consistently supported by the hand written endorsement made in the packing list as produced and noted above of CD's typed set. The Logistics Report annexed as Annexure P-11 of the OC's typed set also bears the same endorsement even though smudged off of which a hue and cry was made by Counsel for CD. A clear copy of the said Logistic Report of the transporter annexed as Annexure R-3 at page No. 20 of CD's typed set correlates with the one



produced by OCas Annexure-11 of its typed set filed along with the Petition. While so, in an application bearing Diary No. 869 dated 16.2.2018 OC has sought to file additional documents to establish the claim and at page 15 of the said application the disputed invoice No. 046 has been annexed and perusal of the said copy of the invoices shows a hand written endorsement to the effect that 'Total 650 Box - OK' and underneath it another endorsement in hand "short". Comparing this copy of invoice with that produced with the Petition as Annexure A-5 there seems to be a paradox and giving rise to inconsistency, even discounting the documents produced by CD by way of annexures as noted above in its typed set. The inconsistency in the invoices furnished by the OC taken together with those furnished by CD along with counter affidavit give rise to a plausible contention in relation to a dispute of short supply sought to be projected by CD. It is also to be considered by this Tribunal that the nature of transaction between the parties are such that unless full and complete materials ordered are supplied, the laying of false ceiling will not be feasible for CD. It is also submitted by CD that NBCC, the ultimate customer to whom works were to be executed had also terminated the works and seized the materials, including the one supplied by the OC and hence the same is not able to be returned. Existence of a plausible contention has been considered by the Hon'ble Supreme Court as ground for

rejection in "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited – 2017 SCC OnLine SC 1154", at paragraph 40, which is reproduced hereunder:

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 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.

8. Taking into consideration the invoices, copies of which have been filed before this Tribunal having conflicting endorsements in it and also the additional documents filed by way of logistics report and the



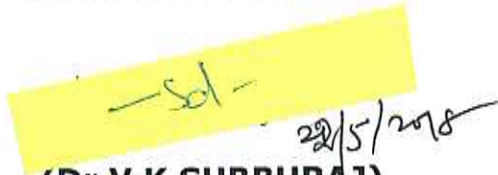
packing lists, this Tribunal is of the view that there exists a dispute as between the parties in relation to the actual quantum of delivery of goods and which cannot be resolved in a summary manner and since the amount claimed in the invoice No.046 also forming part as an amount claimed as the default amount on the part of the CD, we are not in a position to accept the contention of the OC.

9. Further, the point raised by the OC that the notice of dispute therein being not given within the time specified or thereafter necessarily leads to the conclusion that there is no pre-existing dispute as between the parties and hence the defence of CD should be shut out seems to be based on not sound judicial logic and reasoning. If taken in converse, in case of issue of notice of dispute, even when a sham or illusory defence put up by the respondent therein, then is it required of this Tribunal to dismiss the Petition. That will militate against the ratio of the judgement of the Hon'ble Supreme Court cited above. If the contention of the Operational Creditor is taken prima facie then there will be no requirement to issue notice of the Application filed under the provisions of IBC,2016 read with "AAA Rules, 2016", in a case of no notice of dispute given by CD. The intent of the provisions contained under Rule 5 of "AAA Rules" that notice of Application is to be issued to the CD and which has also been construed by the decision of Hon'ble NCLAT as mandatory in


order to comply with the principles of natural justice in Kaliber Associates Pvt Ltd -Vs- Mrs Tripat Kaur in Company Appeal (AT)(Insolvency) No.52 of 2017 demonstrates that it is not an empty formality, as an onus is placed on this Tribunal to follow the principles of justice as mandated to be followed under Section 424(1) of the Companies Act, 2013 and as a necessary corollary to allow the CD to defend its cause and also to consider the pleadings as filed by the CD. In this connection, this Tribunal is of the considered view that absence of Notice of Dispute raises a serious presumption as against the CD of its default however, the same is a rebuttal presumption which can be rebutted by way of demonstration that there is in fact a pre-existing dispute even though it may not be clinching, but however a 'plausible' one as per the decision of the Hon'ble Supreme Court held in Mobillox Case cited above. No doubt in case of notice of dispute issued the same should be placed on record and the fact of receipt or non-receipt of notice of dispute is to be disclosed by an affidavit filed under Section 9(3)(b) of IBC,2016 as held by this Tribunal in the matter of OPGS Power Gujarat Private Limited vs. R.L. Steel and Energy Limited in IB-492(ND)2017. However, it is the pre-existence of dispute between the parties which can save the CD from the clutches of IBC,2016 if otherwise the application is found to be complete as filed by an Operational Creditor. Since the OC seeks to place reliance upon the invoices of the value stated therein in relation to the goods supplied of



which the dispute is being raised of short supply, which seems to be a plausible one and taking into consideration the unique nature of transaction as put forth by the CD, we are constrained to dismiss this Application but without cost.


(Dr.V.K.SUBBURAJ)
MEMBER (TECHNICAL)

U.D.Mehta
22/05/2018


(R.VARADHARAJAN)
MEMBER (JUDICIAL)