

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

C.P IB NO: 504/KB/2017

Coram: Shri Jinan K.R, Hon'ble Member (Judicial)

In the matter of:

An application for initiation of corporate insolvency resolution process by the Operational Creditor under Section(s) 8 & 9 of the Insolvency and Bankruptcy Code, 2016.

And

In the matter of:

SCRAPES (INDIA), 135A, Chittaranjan Avenue, 3rd Floor, Room No.28, Kolkata 700 007.

..... Operational Creditor

And

BALAJI PAPER & NEWSPRINT PRIVATE LIMITED, a Company incorporated under the provisions of the Companies Act, 1956, and being Company within the meaning of the Companies Act, 2013 having its registered office at 23, Brabourne Road, Kolkata 700 001.

... Corporate Debtor

Order delivered on 12th February, 2018.

Mr. Abhishek Sikdar, Advocate } For the Operational Creditor.
Mr. Anuj Singh, Advocate }
Mr. Ritoban *Sankar, Advocate* } For the Corporate Debtor.
Mr. Avishek Das, Advocate }
Mr. Ashok Kumar Singh, Advocate }

ORDER

Per Shri Jinan K.R, Member (Judicial)

1. This is a petition filed under Section 9 of the Insolvency & Bankruptcy Code 2016 (IBC in short) read with Rule 6 (1) of the Insolvency and Bankruptcy (application to Adjudicating Authority Rules 2016) by the operational creditor/petitioner M/S Scrapes (India) for initiating corporate insolvency resolution process as against the corporate debtor/respondent Balaji Paper & Newsprint Private Limited.

2. Briefly the facts emerged from the petition are that the applicant is a dealer in sale of waste paper. The petitioner supplied and delivered waste paper to the respondent as per requirement placed by the respondent from time to time and invoices were generated for payment for the goods supplied to the respondent. The petitioner contends that an amount of Rs.23,87,473/- (Rupees Twenty Three Lakh Eighty-Seven Thousand Four Hundred seventy three only) along with interest is due from the respondent and in spite of demand, the respondent did not repay the amount and thereby issued a demand notice under Form 3 of IBC on 11.08.2017 under Rule 5 of the code to the respondent demanding the alleged outstanding payment. The petitioner further contends that the demand notice was delivered to the respondent and respondent in turn sent a reply on 21.08.2017 contending untenable contentions. The respondent raised disputes to avoid payment of the legitimate dues of the petitioner. The petitioner approached this adjudicating authority with clean hands with supporting documents proving that the debt to the tune of Rs.23,87,473 /- is due from the respondent and since the respondent failed to repay the amount, the petition is liable to be admitted under Section 9 of IBC 2016.

3. The Corporate Debtor / respondent objected this application mainly on two grounds. Firstly, it contends that the respondent is not

a corporate debtor because no amount is due to the petitioner. Secondly, it contends that the goods supplied was damaged and was unable to utilize for the purpose of the respondent's business and a dispute regarding the quality of goods was already raised and it is in existence. In view of the defective supplies the respondent raised a series of complaints with the petitioner and the petitioner is liable to compensate damages to the respondent. The respondent further contends that the petitioner filed the petition on the basis of 08 invoices annexed with the petition of which no amount is due. The amount due as per the invoices have been duly paid and no sum due or payable by the respondent to the petitioner as alleged. To substantiate that contention, the respondent has produced copies of the letter of credit issued by its bank. The respondent further alleged that a dispute regarding the amount demanded by the petitioner already raised by the respondent as per the reply given to the petitioner on 28.11.2016. Upon the above said contentions the respondent prays for rejection of the petition with exemplary cost.

Heard both sides. Perused the records.

4. Upon hearing the arguments on both sides and on perusal of the records the points that arise for consideration are the following:-

1. Whether there exists an operational debt as alleged?

2. Whether there exists any dispute as alleged by the respondent prior to service of demand notice?

The Point No. 1

5. The petitioner filed this petition claiming that an amount of Rs.23,87,473/- (Rupees Twenty Three Lakh Eighty seven Thousand Four Hundred seventy three only) is due from the respondent. According to the petitioner the respondent failed to

repay the outstanding amounts even after the receipt of the demand notice and hence filed this petition. The Ld. Counsel for the petitioner submits that the respondent has always made payment on ad-hoc basis and has never paid on bill to bill basis and that the invoices produced along with the petition are few, specimen invoices and challans of the last supply of goods to the respondent. The above said invoices and challans were produced and marked as Exhibit-A. To prove payment made on ad-hoc basis petitioner produced Exhibit-B a copy of Ledger Sheet. Ld. Counsel for the petitioner further submits that there was no payment after 19.03.2015 and a reminder letter Exhibit-C was issued to the respondent and lastly on 11.08.2017 the demand notice Exhibit-D was issued to the respondent and since there is no repayment of the debt, petitioner succeeds in proving the default. He further contends that the dispute raised by the respondent in its reply is not at all genuine.

6. The respondent's main contention is that the amount demanded as per the invoices referred as Exhibit-A has been paid and to strengthen his contention Ld. Counsel for the respondent highlighted the registration number of Letter of Credit of the respondent's endorsed in the challans annexed to Exhibit-A. To prove that the reference number of letter of credit written in the challans was issued to the respondent by its Indian Overseas Bank produced copy of Letter of Credit and marked as Annexure-A (page No. 17). The reply to the demand notice issued by the respondent is produced by the petitioner and marked as Exhibit- E. Ld. Counsel for the respondent submitted that as per the Letter of Credit referred in the challans there is no outstanding dues as claimed by the petitioner. Ld. Counsel for the petitioner at this juncture submits that petitioner admitted the receipt of the above said amount and to prove its bonfides produced copy of the ledger sheet pertaining to the year 2013-2014 and it is Exhibit-G produced along with the petition. According to him the above said payment was credited to its account and even after adjusting the said amount the balance outstanding as on the date of demand is the amount claimed in this case.

7. Exhibit-H is the Bank Statement for the year 2014-2015 evidencing transactions between the petitioner and the respondent. It is pertinent to note that prior to issuance of the demand notice in the case in had petitioner issued one another demand notice under section 434 of the Companies Act, 1956 on 08.11.2016 demanding the very same amount demanded in this petition. To the said demand notice the respondent sent a reply on 28.11.2016. The above said demand notice issued by the petitioner is produced by the respondent and marked as Annexure-B at page No.21 in the reply affidavit. The respondent sent a reply to the petitioner and it is marked as Annexure-C at page No.23 in the reply. In the said reply the very same contentions taken by the respondent in its reply affidavit seems to have raised by the respondent. One among the contention is that the amount claimed as per the invoices have been duly paid off by way of letter of credit.

8. A careful scrutiny of the above referred invoices, the Letter of Credit issued by the Bank of the respondent and the Ledger Account Exhibit G, it is understood that the respondent received goods supplied by the petitioner from 01.04.2013 to 28.01.2014. The total number of invoices generated as per ledger sheet G are 65 and out of that 65 number of invoices 8 invoices referred to in the petition were produced and marked as Exhibit A along with some challans. The very case of the petitioner is that out of total goods supplied to the respondent the amount demanded is still due and balance amount was paid by the respondent.

9. According to the Ld. Counsel for the respondent no amount is due on the basis of the invoices produced in this case and remaining invoice for were not produced for misleading the adjudicating authority. He further would submit that on 19.03.2015 the entire account of the petitioner was settled and there is no amount due thereafter and there was no business transaction after 28.01.2014. Since the claim of the petitioner not at all supported with the invoices produced in this case Ld Counsel was requested to produce a computation statement of outstanding debt and produced such a statement by way of

supplementary affidavit dated 29.11.2017. The above said computation statement is not at all helpful to the petitioner to prove that the demand made on the basis of the invoices has not been paid by the respondent. The petitioner did not produce the entire invoices to substantiate its claim for the amount demanded as the debts due from the respondent. Petitioner also did not sent invoices other than the 08 invoices referred in the petition. On the other hand , letter of credit and documents produced by the respondent shows that the amount demanded as per the invoices referred to in the petition has been paid. To prove that payment by the respondent was on ad-hoc basis and respondent never paid the amount due as per the invoices produced in this case there is no supporting proof. It is uncertain as to what amount is due on the basis of the invoices raised by the petitioner. Even according to the petitioner, the invoices produced along with the petition are specimen invoices and challans. We are unable to fix liability on the respondent on the basis of few invoices out of 65 invoices referred to in this petition.]

10. A perusal of Exhibit G shows that the total number of invoices raised by the petitioner for the entire supply of goods are 65. Out of which 08 invoices were picked up by the petitioner for demanding the amount claimed in this petition. The challans annexed to the above said invoices are self-explanatory. The endorsement of letter of credit in it proves payment of the amount due as per the above said invoices referred to in the petition. Whether the total outstanding as per 65 invoices referred in Exhibit-G has been discharged or not is not at all an issue to be answered in the case in hand.

The above said discussions concludes that the contention on the side of the respondent that the amount demanded on the basis of the invoices referred to in the petition is not at all due is found true. The petitioner being failed to establish that the amount as claimed as per the invoices is due I have no hesitation in holding that there is no unpaid operational debt due to the petitioner from the respondent. This point is answered accordingly.

Point No.2.

11. The respondent also raised a contention that goods supplied were substandard and unusable and respondent lodged series of complaints with the petitioner and demanded compensation and it is pending for consideration. To substantiate the above said contention the respondent produced Annexure B dated 8.11.2016 a copy of the demand notice issued by the petitioner under Section 434 of the Companies Act, 1956 and Annexure C a reply sent by the respondent dated 28.11.2016. Issuance of demand notice dated 08.11.2016 is admitted by the petitioner. The Ld. Counsel for the petitioner submits that other than the said contention taken in the reply notice alleging quality of goods no supporting document produced to prove that the goods delivered to the respondent were not utilised by the respondent. To support that there exists a pre-existing demand of damages on account of unused goods supplied to the respondent herein this case no supporting proof. However, Annexure C proves that notice of dispute in regards the debt claimed by the petitioner was already issued to the petitioner prior to the demand notice issued in this case. What is meant by existence of dispute to be established on the side of the respondent in a case of this nature is dealt with in Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (C A .No. 9405 of 2017 SC) by the Hon'ble Supreme Court. It is significant to read Para 40 of the said judgement. It read as follows: -

"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 patties. 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".

12. In the case in hand Ld. Counsel for the respondent succeeds in convincing us that a dispute regarding plea of discharge of all outstanding dues as claimed by the petitioner in the case in hand is under consideration of the petitioner which is liable to be investigated further. The evidence available in this case leads to a legitimate conclusion that the defence taken by the respondent that no debt is due to the petitioner as claimed in the petition is "not spurious, hypothetical or illusion/" as held in the above refereed citation. Therefore, bearing in mind the principle laid down in the case Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited the existence of genuine dispute prior to the demand notice issued in the instant case stand established in this case. The respondent succeeded in proving that there is pre-existing dispute as defined under Section 5(6) (a) of the IBC

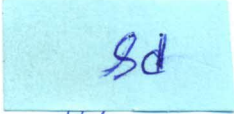
13. The Ld. Counsel for the respondent at this juncture submits that respondent demanded proof of the demand made by the petitioner as per Annexure C dated 28.11.2016 and raised a dispute regarding the amount claimed and despite providing proof of the demand made by the petitioner filed this case without supporting invoices with malafide interest to grab money and hence this petition is liable to be rejected with exemplary cost.

14. The above said discussion leads to a conclusion that petitioner failed to produce supporting proof to prove that the debt claimed is outstanding and nonexistence of a dispute regarding the outstanding amount due to the petitioner. More over petitioner failed to prove that any amount as claimed was unpaid by the respondent. In view of the above, this petition is liable to be rejected under Section 9 (5) (ii) (c) and (d) of the Insolvency and Bankruptcy Code 2016. However, considering

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the peculiar nature and circumstances of the case in hand, parties are directed to bear their respective costs.

15. Urgent Photostat copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.


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(Jinan, K.R)
Member (J)

Signed on 12th day of February 2018.

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