

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-670/(ND)/2022

*Section: Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule
6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority),
Rules, 2016.*

In the matter of -

M/s Aeris Communications India Pvt. Ltd.

Office at: -

Through its Authorized Representative,

Office at 8th Floor, Tower 1,

Okaya Centre Plot No. B-5,

Yoganand Marg, Sector-62, Noida,

Uttar Pradesh (India).

...Petitioner/Operational Creditor

Versus

M/s. Kshiv Ventures Pvt. Ltd

Office at: -

S-41, Third Floor, Office No. 302

School Block, Shakarpur, Delhi 110092

...Respondent/Corporate Debtor

CORAM:

SHRI. MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI.RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

PRESENT

Counsel for the Petitioner

Mr. Shashank Deo Suhi, Mr. Aru
Prakash

Counsel for the Corporate Debtor

Mr. Arvind Kumar, Adv.

ORDER

PER – RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date: 08.07.2024

1. The present application has been filed by the Petitioner i.e., M/s Aeris Communications India Pvt. Ltd (hereinafter referred to as the Operational Creditor) to initiate Corporate Insolvency Resolution Process (“CIRP”) in accordance with Section 9 of the Insolvency and Bankruptcy Code 2016 (“the Code”) against the Respondent i.e., M/s. Kshiv Ventures Private Limited (hereinafter referred to as the Corporate Debtor) for the alleged default on the part of the Respondent in clearing the debt of INR 21,33,33,223/-
2. The particulars of transactions leading to the filing of the present application as averred by the Applicant/Operational Creditor are as under –
 - i. That Aeris Communications India Private Limited (hereinafter called as Operational Creditor) is engaged in the business of machine-to-machine communication services and Internet of Things ("IOT") and other such applications for the Internet of Things across the world.

- ii. That in year 2018, two directors of Corporate Debtor approached the Operational Creditor company and had represented that they required various electronic goods and services including LED lighting products with IOT solutions.
- iii. That the Operational Creditor after having considered all the business possibilities had agreed to enter into formal business relationship with the Corporate Debtor by virtue of an agreement dated 03.08.2018 along with formal business understanding.
- iv. The said business is purely based upon the terms and conditions agreed under the agreement between Operational Creditor and Corporate Debtor vide agreement dated 03.08.2018.
- v. That the Corporate Debtor had also represented that the goods can be procured from one Globus Ecotronics Pvt Ltd and accordingly Operational Creditor consented to have business relation with said suggested company i.e. Globus Ecotronics Pvt Ltd. vide agreement dated 03.08.2018.
- vi. Thereafter, the Operational Creditor had started delivering the deliverable business as agreed under above said agreement dated 03.08.2018 between the parties.
- vii. That Operational Creditor had partly received the payments against the various invoices raised upon the Corporate Debtor for supply/delivery of goods/services from time to time. However, the Corporate Debtor had not paid Rs. 21,33,33,223/- (Rupees

Twenty-One Crore Thirty-Three Lakh Thirty-Three Thousand Two Hundred Twenty-Three only) to the Operational Creditor towards various invoices along with the interest @24% per annum from invoice date.

- viii. That Operational Creditor had made several reminders against the above said outstanding amount from time to time but Corporate Debtor maintained complete silence over the said outstanding payments.
- ix. That the Operational Creditor has also initiated pre-litigation mediation before Hon'ble High Court of Delhi but the Corporate Debtor does not seem to be concerned towards making the above said outstanding payment towards supply of goods and services made by the Operational Creditor.

3. The Corporate Debtor has filed its reply and made following averments –

- a. That the Petitioner and the Respondent had entered into an agreement 03.08.2018 (“Agreement”) for data management services and application for internet of things to be provided by the Petitioner to the Respondent.
- b. That as per Clause 1.2 of the said Agreement, for each service ordered by the Respondent, the two parties would have to agree upon and execute an ordering document which would specify the terms of each respective order.

- c. That right from the date of the Agreement, no goods or services have been supplied by the Petitioner to the Respondent. Since no transaction has occurred from the Petitioner to the Respondent, no obligation for payment or debt has come into existence towards the Petitioner. Accordingly, the cause of action as claimed by the Petitioner has never even arisen.
- d. The fact that no goods have been supplied by the Petitioner to the Respondent has previously been admitted and concluded in two separate proceedings before different authorities. The same have been detailed below:
- I. That on 19.03.2020, a search was conducted by the Directorate General of Goods and Services Tax Intelligence on the Petitioner, the Respondent, and M/s Globus Ecotronics Private Limited. After the said raid/ search, it was established that there was no movement of goods or services from the Petitioner. Further, an inquiry was initiated against the Respondent. During the said inquiry, the fact that no goods or services have ever been supplied by the Petitioner to the Respondent had been duly recorded by the officials of the Petitioner.
- II. That on a separate occasion, the Petitioner had filed a complaint before the EOW Faridabad, accusing the Respondent of having defrauded them and claiming that they

did not know that supplies were not made. In the said investigation pursuant to the same, the police found the complaint to be false again and filed their closure report stating that the petitioner had all the knowledge of these events.

III. On a third occasion, the Respondent had filed a complaint at a police station in Noida. That pursuant to the same, an investigation was conducted and the report dated 11.12.2021 for the same was submitted by the police. The conclusion of the said report was that no goods or services have been supplied by the Petitioner to the Respondent. The conclusion of the report further states that significant amounts of monies have been transferred by the Respondent to the Petitioner in relation to orders placed for supply of goods and services, however, no positive action has been taken by the Petitioner to make good on its obligations towards the Respondent by supplying goods and services for which he has received the said advance amounts.

- e. In light of the above, the Petitioner is liable towards the Respondent to supply goods and services of a value at least equivalent to the amount advanced.
- f. That the components of the definitions of "debt" itself is not satisfied and there is no liability or obligation on part of the

Respondent to which is due towards the Petitioner since there has been no supply of goods and services from the Petitioner to the Respondent. Since 'non-payment of debt' is an integral requirement for a default to occur, in the present scenario, it cannot be said that there is any default as there exists no debt.

- g. Without prejudice to the above, it is submitted that there is a pre-existing dispute with respect to this matter.
- h. That arbitration proceedings on the issue have been initiated by the Petitioner himself and is currently pending, to be listed next on 17.01.2023 before the High Court of Delhi.
- i. That since the Petitioner himself has initiated the said proceedings, he has full knowledge of the existence of the dispute and does not need to be notified of or made aware of the existence of the same
- j. That further dispute regarding the existence of the amount of debt have been initiated by the Petitioner himself vide the filing of the civil suit for recovery as detailed above. Given this factual scenario, the Petitioner himself cannot deny the existence of such a dispute or lack of knowledge on his part regarding the same

4. The Petitioner has filed its rejoinder and made the following averments -

- i. That the contention raised by the Corporate Debtor that no goods and services had been supplied by the Operational Creditor is itself contradictory, in as much as the Corporate Debtor had made a part

payment against the goods and services delivered by the Operational Creditor from time to time.

- ii. So far as the contentions raised by the Corporate Debtor that there is a pre-existing dispute in form of CS (COMM.) 153 of 2022 and Arbitration Petition No. 692 of 2022 before Delhi High Court prior to filing this application under section 9 of IBC 2016. In this respect, it is important to highlight that the Corporate Debtor had not paid the operational debt under question, despite several reminders through all modes of communications, upon which the Operational Creditor had filed a recovery suit vide CS (COMM) 153 of 2022 which was lying under objection till its withdrawal and subsequently the same was withdrawn.
- iii. That the said recovery suit vide CS (COMM) 153 of 2022 had never listed before the Hon'ble Delhi High Court before filing an application for withdrawal.
- iv. That an Arbitration Petition No. 692 of 2022 has been filed invoking Clause of arbitration under the agreement after issuance of prescribed legal notice followed by service of the Arbitration Petition on same address of Corporate Debtor/Respondent through all modes, despite the Corporate Debtor never register its presence either in mode of reply to the legal notice or by appearing before the Hon'ble Delhi High Court,
- v. The Corporate Debtor cannot rely on this plea as it has neither acknowledged nor appeared before the Hon'ble Delhi High Court in the said arbitration proceedings initiated against it by the Operational

Creditor. Moreover, there has never been any existence of dispute raised by the Corporate Debtor with respect of the above said claim. It is for the first time that the Corporate Debtor is raising a dispute by taking the issue of the pendency of the cases before Hon'ble Delhi High Court as well as GST issue. Pertinent to mention that the GST issue is between GST department and Operational Creditor and Corporate Debtor has no locus standi to comment upon the same.

- vi. That the Operational Creditor is already contesting the proceeding under GST which is completely independent proceeding between the GST Department and Operational Creditor and the same is being contested for the alleged violation of the provision of GST Act.

ANALYSIS AND FINDINGS

5. We have perused the documents filed by the Operational Creditor as well as Corporate Debtor and have heard the arguments made by the counsels appearing for both the parties.
6. The Corporate Debtor has raised the following objections with respect to the application filed by the Operational Creditor.
 - I. That there exists a pre-existing dispute between the parties.
 - II. That no goods were ever supplied nor any services were availed by the Corporate Debtor
7. With respect to the pre-existing dispute between the parties, it is observed that there are multiple applications filed by the Operational Creditor before different forums. A Civil Suit for recovery was filed by the Operational

Creditor bearing No CS (COMM) 153 of 2022 which was said to be withdrawn by the Operational Creditor.

8. Further it is observed that Arbitration Proceedings are going between both the parties which is pending before the Hon'ble Delhi High Court although it was stated by the Operational Creditor in its rejoinder that the Corporate Debtor is not appearing before the Arbitrator but nevertheless the fact that whether the Corporate Debtor is appearing before the Arbitrator is not relevant because in a section 9 petition, the moment it is established that any pre-existing dispute is pending, the Adjudicating Authority has to dismiss the application. Support can be taken from the judgement of Hon'ble Supreme Court in the matter of *Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Private Limited 2018 1 SCC 353* wherein in para 40 of the aforesaid judgement it is held as under:

*“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.***

9. The Operational Creditor has contended that the issue of pre-existing dispute was raised by the Corporate Debtor first time in the reply. In this regard, it is pertinent to refer to judgement of Hon'ble NCLAT in the matter of *M/s Brand Realty Services Ltd v M/s Sir John Bakeries India Private Limited (Company Appeal (AT) (Insolvency) No. 958 of 2020)* and *Neeraj Jain v Cloudwalker Streaming Technologies Private Limited (Company Appeal (AT) Ins No. 1354 of 2019)* wherein it was held that mere fact that Reply to notice under S. 8(1) has not been given within 10 days or no reply to demand notice having been filed by the Corporate Debtor does not preclude the Corporate Debtor to bring relevant materials before the Adjudicating Authority to establish that there is a pre-existing dispute which may lead to the rejection of S. 9 application.
10. In the present case, the Operational Creditor itself has pointed out that Arbitration Proceedings are going on between both the parties before the Hon'ble High Court and the Corporate Debtor is not appearing before the Ld. Arbitrator this clearly shows that there was a pre-existing dispute existing between the parties.

11. As far as the dispute regarding the goods supplied are concerned, this Adjudicating Authority in a summary jurisdiction cannot go into the merits of the dispute between the parties.

12. Consequently, in light of the contentions made by the OC, and the reply given by the CD against the said contentions read in conjunction with the rejoinder filed by the OC, we are of the view that it is evident from the documents placed on record by the Corporate Debtor that there exists a pre-existing dispute between the parties before issuance of the demand notice pertaining to the goods supplied. Consequently, it is the mandate of law that if there is a pre-existing dispute between the parties the Adjudicating Authority is liable to reject the application under section 9(5)(ii)(d) of the Code.

13. In the light of the above, this Tribunal **dismisses** the present application filed by Operational Creditor. However, the claim under any other law, if permissible, can be pursued by the Petitioner as prescribed under that law. Let a copy of this order be served to the parties concerned.

SD/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

SD/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)