

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA
C.P. (IB) No. 27/KB/2021

In the matter of:

Under section 9 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

G4S Secure Solutions (India) Private Limited (CIN U74920DL1988PTC031060), a Company incorporated under the Companies Act, 1956, having its registered office at C-16, Community Centre Janakpuri, Behind Janak Cinema, New Delhi, West Delhi -110058.

... Operational Creditor

-Versus-

Heavy Engineering Corporation Private Limited (CIN U27100JH1958GOI000630), a company incorporated under the Companies Act, 1956, having its registered office at H.E.C.Administrative Bldg. Plant Plaza Road, Ranchi, Jharkhand – 834 004.

... Corporate Debtor

Coram:

Shri Rajasekhar V.K., Member (Judicial)

Shri Balraj Joshi, Member (Technical)

Appearances (via video conferencing):

For Operational Creditor

1. Mr. Ratnanko Banerji, Senior Advocate
2. Ms. Shweta Bharti, Advocate
3. Mr. Shantanu Malik, Advocate
4. Ms. Amrita Pandey, Advocate
5. Ms. Anamika Pandey, Advocate
6. Ms. Ankita Pannikar, Advocate

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH

G4S Secure Solutions (India) Private Limited v. Heavy Engineering Corporation Private Limited
C.P. (IB) No. 27/KB/2021

For the Corporate Debtor

- 1) Ms. Madhavi Diwan, Ld ASG.
- 2) Ms. Urmila Chakraborty, Adv
- 3) Mr. Amit Meharia, Adv
- 4) Ms. Tannishtha Singh, Adv
- 5) Ms. Paramita Banerjee, Adv
- 6) Ms. Amrita Das, Adv

Date of Hearing: 16.12.2021

Date of pronouncing the order: 31.01.2022

ORDER

Per : Rajasekhar V.K., Member (Judicial):

1. This Court convened through video conferencing.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*'the Code'*) by G4S Secure Solutions (India) Private Limited (*'Operational Creditor'*), a Company incorporated under the Companies Act, 1956, having its registered office at C-16, Community Centre Janakpuri, Behind Janak Cinema, New Delhi, West Delhi -110058. This Petition has been filed by Mr. Rajeev Sharma, Chairman cum Managing Director and Mr. Deepak Sharma, General Legal Counsel, authorised by a Board Resolution dated 09 December, 2018, seeking to initiate Corporate Insolvency Resolution Process (*'CIRP'*) against Heavy Engineering Corporation Private Limited, a company incorporated under the Companies Act, 1956, having its registered office at H.E.C.Administrative Bldg. Plant Plaza Road, Ranchi, Jharkhand - 834 004 (*'Corporate Debtor'*).
3. The present petition was filed on 20 October, 2020, before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 2,50,20,319/- (Rupees Two Crore Fifty Lakh Twenty Thousand Three Hundred Nineteen only) along with interest calculated @24% from the date of accrual of debt till actual payment. The date of default is 31 January, 2019.
4. ***Submission of the learned Counsel for the Operational Creditor***
 - (i) The case of the Operational Creditor is that the Corporate Debtor had issued a Notice dated 18 August, 2015, inviting tenders for the purpose of providing

round the clock security arrangement of all plants, HQ and township of Heavy Engineering Corporation Limited, Ranchi, seeking a specific number of uniformed trained manpower for security services.

- (ii) The Operational Creditor, has a strong nationwide presence and a team of professionally trained security personnel. Fitting into the requirements put forth by the Corporate Debtor, the Operational Creditor submitted its tender application to the Corporate Debtor along with the earnest money ('*EMD*') amounting to Rs.11,50,000/-(Rupees Eleven Lakh Fifty Thousand only). Subsequently, the tender application submitted by the Operational Creditor was accepted by the Corporate Debtor and on 28 September, 2016 and a proforma for execution of Agreement¹ ('*Agreement*') was entered between the parties.
- (iii) As per the payment terms², payment (less deduction as applicable) shall be made in full on monthly basis within two weeks from the date of the requisite documents. Provided the Operational Creditor has to timely submit the bills along with required documents as mentioned in Clause 13 of the Agreement.
- (iv) The Operational Creditor raised numerous bills for the period ranging from December 2018 to May 2019 against the Corporate Debtor. Irrespective of the efficient services provided by the Operational Creditor from the beginning of the Agreement, the Corporate Debtor have deliberately failed in making timely and complete payments towards the bills/invoices³ raised by the Operational Creditor along with the EMD.
- (v) The Operational Creditor had continuously followed with the Corporate Debtor for the outstanding dues. Demand letter dated 09 October, 2019 and several mails dated 03 October, 2019, 19 November, 2019, 30 November, 2019, 11 December, 2019 and 15 December 2019 were sent by the

¹ Annexure – A-5, Pages 84 – 117 of the Petition.

² Clause 13 of the Agreement.

³ Work Orders bearing No. HQ/ BDC & DISP/ SECURITY/ 2016-064 and No. HQ/ BDC & DISP/ SECURITY/ 2016-065; Annexure – A-6, Pages 118 – 129 of the Petition.

Operational Creditor to the Corporate Debtor asking for clearance of such operational dues.

- (vi) The Corporate Debtor in its letter dated 20 December, 2019⁴ stated that the monthly claim bills against performances have been processed and the same would be settled shortly.
- (vii) It is also submitted that the Corporate Debtor turned a deaf ear to the intimation given by the Operational Creditor about price revision for security personnel, in terms of the Central Minimum Wage notification issued by the Central Government. The Operational Creditor from its own pocket had to increase the minimum wages as per law amounting to Rs.5,78,000/- (Rupees Five Lakh Seventy Eight Thousand only).
- (viii) In view of the outstanding operational debt, the Operational Creditor issued a statutory demand notice under section 8 of the Code to the Corporate Debtor on 30 December, 2019⁵. No objections were ever raised by the Corporate Debtor with respect to the services provided or to the invoices raised from time to time by the Operational Creditor.
- (ix) After receiving the notice under section 8 of the Code, the Head of the Legal Department, Mr. Amit Srivastava on behalf of the Corporate Debtor approached the Operational Creditor and confirmed the receipt of the notice. Further, he also informed the Operational Creditor that because of some ongoing legal dispute, the account of the Corporate Debtor has been frozen by the Provident Fund Department because of which the debt of the Operational Creditor cannot be paid. He also said that the concerned officials are internally discussing to resolve the issue related to the outstanding dues, it will take about fifteen day's time to process the payments.

5. *Submissions of the learned Counsel appearing on behalf of the Corporate Debtor*

⁴ Annexure – A-9, Page 145 of the Petition.

⁵ Annexure – A-14, Pages 163 – 165 of the Petition.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH

G4S Secure Solutions (India) Private Limited v. Heavy Engineering Corporation Private Limited
C.P. (IB) No. 27/KB/2021

- (i) The Corporate Debtor issued two notices dated 18 August, 2015 for “*Round the Clock Security Arrangement of Plant & HQ and HEC Township Ranchi – 834004*” for a period of three years with extension for another one year if performance of the Contractor is found satisfactory and dated 05 April, 2016 for “*Round the Clock Security Arrangement of Plant & HQ and HEC Township Jharkhand – 834004*” for a period of one years with extension for another two years if performance of the Contractor is found satisfactory.
- (ii) Pursuant to such notices on 16 July, 2016 two separate work Orders bearing No. HQ/ BDC&DISP/ SECURITY/ 2016-064 and No. HQ/ BDC&DISP/ SECURITY/ 2016-065 were issued to the Operational Creditor.
- (iii) Two work orders pertaining to different units have been surreptitiously clubbed together by the Operational Creditor. Such clubbing together of different work order is not permissible as different claims are arising out of different agreements or work orders and having different amounts and date of default. Each of them give rise to separate cause of action. The work orders were placed for different units and are of different contract value.
- (iv) As per the work Orders, the Operational Creditor was maintaining the standard strength of security in the beginning but later on they provided lesser number of security arrangements. Such breach of terms were brought to the notice of the Operational Creditor *vide* letters dated 14 December, 2018, 11 February, 2019, 15 February, 2019, 26 February, 2019 and 16 April, 2019. Since, the Operational Creditor has committed breach of Terms and as per the clauses in the work order the Corporate Debtor which may impose a penalty up to 5% of the monthly invoice value for the default, apart from deduction of daily wage for each day of absence of the number of security personnel.
- (v) The Ld. Counsel also submits that since the amount claimed by the Operational Creditor is coming to a sum of Rs. 2,50,20,319/- (Rupees Two Crore Fifty Lakhs Twenty Thousand Three Hundred Nineteen only) and if the Corporate Debtor calculates the penalty for short-supply of security personnel

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH

G4S Secure Solutions (India) Private Limited v. Heavy Engineering Corporation Private Limited
C.P. (IB) No. 27/KB/2021

then it would come to Rs.1,67,00,000/- (Rupees One Crore Sixty Seven Lakh only). So if the same is deducted from the outstanding dues amount then the balance amount will be less than One Crore and it does not meet the threshold to initiate a CIRP.

- (vi) Further, the monthly bills against the claims till November 2018 were paid without making any penal recovery as per the clauses in the Agreement and the same was communicated to the Operational Creditor *via* mails and letters. The Corporate Debtor also in its letter dated 16 April, 2019 has categorically mentioned that all these recoveries will be visited on conclusion of the contract⁶.
- (vii) The demand notice under Section 8 by the Operational Creditor was also replied by the Corporate Debtor *vide* its letter dated 05 February, 2021⁷ disputing the purported notice.
- (viii) As per the Agreements between the parties any dispute arising between the parties is required to be settled through the process of Arbitration. Accordingly, a Notice dated 05 February, 2021 was issued by the Corporate Debtor invoking the Arbitration clause as per the Terms entered between the parties. An application being Arb. Appl. No. 20/2021 under Section 11(6) of the Arbitration and Conciliation Act, 1996 for the appointment of the Arbitrator is pending before the High Court of Jharkhand at Ranchi and the same is pending for Adjudication.
- (ix) On 07.06.2019 meeting was held between the parties⁸. Based on discussion Mr. Saxena, CMD, Heavy Engineering Corporation Private Limited gave instructions to Mr. Srivastava and Mr. Ramjee, Dy. General Manager to pay on account of Rs.1,00,00,000/- (Rupees One Crore only) against Operational Creditors outstanding of Rs.3,50,00,000/- (Rupees Three Crore Fifty Lakh only). It was also discussed between the parties that the entire outstanding will

⁶ Page 110 – 115 of the Reply.

⁷ Annexure – 5, Pages 117 - 121 of the Reply.

⁸ Page 161, Volume I of the Petition

be released by the Corporate Debtor by 05 May, 2019 based on final reconciliation.

- (x) The above facts clearly demonstrate that there are pre-existing disputes and the Operational Creditor is acting in abuse of process of law. It is also submitted that the Corporate Debtor is a Government Organization thus, the Application is infructuous.

6. ***Rejoinder by the Operational Creditor to the reply of the Corporate Debtor***

- (i) A claim arising out of different agreement/work orders is maintainable under the provisions of the Code. Further, the pre-existing dispute plea taken by the Corporate Debtor is allegedly false.
- (ii) The Corporate Debtor has acted mala-fide and spuriously invoked Arbitration (i.e., vide letter dated 05 February, 2021) after thirteen months of the issuance of the Demand Notice.
- (iii) The Operational Creditor relies on ***Hindustan Constructions Company Limited and Anr v. Union of India & Ors***⁹, where the Apex Court opined that the definition under Section 2 (20) of the Companies Act, 2013 includes Government Companies as well.
- (iv) The Operational Creditor also relies on ***A2 Interiors Products Private Limited v. Ahluwalia Contract India Limited***¹⁰, where it was said that single applications can be filed by Operational Creditor with regards to the various claims arising out of separate work orders. In ***A2 Interiors Products Private Limited (Supra)*** the reference has also been given to ***J.K. Jute Mills Mazdoor v. Juggi Lal Kamplapat Jute Mills Co.*** in which the Hon'ble Apex Court has opined that separate causes of action can be maintained in a composite section 9 petition.

⁹ 2019 SCC OnLine SC 1520

¹⁰ Company Petition No. (IB) 2135/ND/2019.

- (v) Reliance has also been placed on *Mobilox Innovations Private Limited v. Kirusa Software Private Limited*¹¹ with regard to the pre-existing dispute. The Operational Creditor submits that in this Application there is no pre-existing dispute quoted by the Corporate Debtor before the demand notice under section 8 of the Code.
- (vi) *Adecco India Private Limited v. Bses Rajdhani Power Limited*¹², *Pedersen Consultants India Private Limited v. Nitesh Estates Limited*¹³, *Achenbach Buschhutzen CmbH & Co. v. ArCotech Limited*¹⁴ and *Badjate Stock & Sjhares Private Limited v. Snowblue Trexim Private Limited*¹⁵ were also relied on by the Operational Creditor.

Findings and Analysis

7. We have heard Mr. Ratnanko Banerji, Ld. Sr. Advocate appearing on behalf of the Operational Creditor and Ms. Madhavi Diwan, Ld ASG appearing on behalf of the Corporate Debtor and perused the records.
8. The Hon'ble Supreme Court in a catena of Judgments has laid down the principle that in an Application under Section 9, the Corporate Debtor can point out any 'Pre-Existing Dispute' raised prior to the issuance of Demand Notice under Section 8, IBC, 2016¹⁶. Further, as laid down in *Mobilox Innovations Private Limited (Supra)* it says that the dispute must exist before the receipt of the demand notice or invoice, as the case may be (*Para 33*).
9. With regard to the contention raised by the Corporate Debtor, whether the Operational Creditor can file a single application for various claims arising out of separate work orders. The Hon'ble Supreme Court and the Hon'ble NCLAT on various occasions have affirmatively decided that separate claims can be a part of single application. The judgments have been relied on by the Operational Creditor.

¹¹ 2017 (1) SCC Online SC 353

¹² Company Petition No. (IB) 70/ND/2019

¹³ Company Appeal (AT) (Insolvency) No. 720 of 2018

¹⁴ 2017 SCC OnLine NCLAT 393

¹⁵ 2017 SCC OnLine NCLT 12977

¹⁶ Company Appeal (At) (Insolvency) No. 695 Of 2020.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH

G4S Secure Solutions (India) Private Limited v. Heavy Engineering Corporation Private Limited
C.P. (IB) No. 27/KB/2021

10. Further, upon perusing the records it is evident that several mails dated 14 December, 2018, 11 February, 2019, 15 February, 2019, 26 February, 2019 and 16 April, 2019 were sent by the Corporate Debtor to the Operational Creditor stating the short-supply of the supervisor category personnel and other related services on different occasions and the same was never denied by the Operational Creditor. It is also pertinent to mention that the Demand notice under Section 8 of the Code was sent in December 2019.
11. As regard to the issue of 'Pre-existing Dispute' there are various correspondences by Corporate Debtor which unambiguously state that despite short supply of security paraphernalia by Operational Creditor, Corporate Debtor did not made any deductions from the bills/invoices as it did not want to cause hardships to the employees deployed with Corporate Debtor, and all the same it has been unequivocally stated that these recoveries shall be made at the time of closing of contract¹⁷, which essentially brings to the fore a 'Pre-existing Dispute' in this matter. There is sufficient record evidencing a 'Pre-Existing Dispute' between the parties prior to the issuance of the Demand Notice under Section 8, IBC, 2016, which is in line with the aforementioned Judgement of the Hon'ble Apex Court. Hence, the Petition is **rejected**.
12. The Operational Creditor is, however, free to pursue its remedies under any other law if the same are otherwise available to it, and dismissal of the present petition under the IBC shall not prejudice any such right.
13. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

The order is pronounced on January 31, 2022

SA, LRA

¹⁷ Page 110 – 115 of the Reply.