

(2024) 04 NCLAT CK 0008

National Company Law Appellate Tribunal New Delhi

Case No: Company Appeal (AT) (Insolvency) No. 402 Of 2024

Akbar Travels of India Private
Limited

APPELLANT

Vs

Ritco Travels & Tours Private
Limited

RESPONDENT

Date of Decision: April 3, 2024

Acts Referred:

- Insolvency and Bankruptcy Code, 2016 - Section 5(20), 5(21), 8, 9, 9(5), 9(5)(2)(d), 61(1)

Hon'ble Judges: Ashok Bhushan, Chairperson; Barun Mitra, Member (T); Arun Baroka, Member (T)

Bench: Full Bench

Advocate: Nausher Kohli, Gaurav Arora

Final Decision: Dismissed

Judgement

Arun Baroka, Member (Technical)]

1. This is an appeal filed by M/s Akbar Travels of India Private Limited under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 ("Code") against the Impugned Order dated 30.11.2023 passed by the National Company Law Tribunal, Jaipur Bench at Jaipur (hereinafter referred to "The Adjudicating Authority") in I.A. (IBC) No.312/JPR/2023 & C.P. (IB) No.26/9/JPR/2019, whereby the Adjudicating Authority has dismissed the Application under Section 9 of the Code, against M/s Ritco Travels & Tours Private Limited.
2. The Respondent Company i.e. M/s Ritco Travels & Tours Private Limited is an international travel agent and is recognised by International Air Transport Association (IATA) and is in the business of giving assistance to traveling and touring public. The

Appellant is also travel agency recognised by IATA, which deals with international organisations as well. The Respondent received orders for bulk booking of SOTO tickets from a global corporate client i.e. M/s Elumatec UK Limited in April, 2017. The Respondent passed / referred the booking order received by it to the Appellant. The transactions for the booking of the tickets referred to by the Respondent were accepted by the Appellant and tickets were booked by the Appellant for the passengers of M/s Elumatec UK Limited during the period of 04.04.2017 to 13.04.2017. The entire process of issue and booking of tickets was done by the credit cards of the intending purchaser of the air tickets. The payments against such booking was made through the credit cards referred by the purchaser of such tickets i.e. M/s Elumatec UK Limited. The payment through credit cards is processed by the banks issuing such credit cards when the card is swiped followed by entering three-digit pin number. The actual amount to be charged is transmitted to the Bank, which has issued the credit card. After the payment is received by the Bank of the Airlines, the confirmation of payment is received by the travel agency within few minutes of the transaction from the Bank. Thereafter, the travel agency issues the air tickets.

Submissions of the Appellant/ Akbar Travels of India Private Limited:

3. In April, 2017, the Respondent had approached the Appellant and requested the Appellant to process and issue "Sold Outside Ticketed Outside" ("SOTO") tickets for their clients on credit card basis. On 08.04.2017, Respondent requested the Appellant not to hold / cancel any tickets and also undertook full responsibility in the event of debit note issued against such transactions from 04.04.2017 to 13.04.2017. The Appellant provided services to the Respondent by processing and issuance of air tickets for an aggregate value of Rs.1,25,87,533/- Accordingly, invoices qua the same were also duly issued / raised by the Appellant in the name of the Respondent. The payments qua the said tickets were to be made to the airlines through the credit cards, the details of which were filled up / provided by the Respondent. Since the value of the said tickets were high, the Appellant expressed its concern to the Respondent that if the payment through credit cards failed, then there would be a debit note i.e. Agency Debit Memo (ADM) from the Airlines as per IATA Regulations against the Appellant. The Respondent time and again expressly and unconditionally undertook full responsibility for payment in case if any debit notes are issued by the Airlines. Various emails dated 04.04.2017, 05.04.2017, 08.04.2017, 11.04.2017, 12.04.2017, 13.04.2017 and 14.04.2017 are placed on record by the Appellant to show the assurance given by the Respondent. The Appellant processed and issued the air tickets reserved / booked by the Respondent for its customers amounting to Rs.1,25,87,533/- and accordingly invoices qua the same were issued in the name of the Respondent. The details of the parties and the details of credit cards were filled up / provided by the Respondent only.

4. On 17.04.2017, the Appellant received emails from one airline i.e. Emirates Airlines about the "charge back" intimation. Further, 37 Agency Debit Memos (ADMs) were issued by them for an amount of Rs.46,96,835/-as the reservations made by the Respondent on the credit card were fraudulent transactions. The Appellant immediately informed the same to the Respondent and requested to make the necessary payment regarding the same. On 29.05.2017, the Respondent requested the Appellant to dispute the ADMs, as credit cards used for payment were fraudulent. Respondent had also lodged police complaints. The Appellant replied to the email on the same day and informed the Respondent that the time period for raising dispute with the Airlines qua 4 ADMs was already over and for the rest 33 ADMs, the Appellant will raise the dispute with the Airlines and in case the disputes are rejected, the Respondent will be liable to pay the same. On 31.05.2017, the Respondent made a payment of lump-sum amount of Rs.3,40,000/- to the Appellant towards the above said 4 ADMs, against which the time period of raising the dispute was already over. In the meantime, the Appellant informed the Respondent on 15.06.2017, that the dispute which was raised regarding the ADMs has been rejected by the Airlines and the payment qua the same is to be made to the Airlines. The Respondent on the same day replied, to once again convince the Airlines for dispute. Further, various ADMs were issued by the Airlines and accordingly, the first cycle of ADMs aggregating to Rs.44,92,880/- was to be paid by 26.06.2017 and the next cycle of ADMs of Rs.44,92,880/- was due to be paid and ADM's amounting to Rs.22,17,207/-was due to be paid by 31.08.2017.

5. The Appellant requested the Respondent many times to make the payments qua the ADMs but the Respondent failed to make the same. As the IATA Regulations provides for blacklisting of the agency, in case of non-payment of ADM's, therefore, the Appellant paid the same to avoid its black listing and save its business.

6. Since the Respondent failed to make the payment towards various ADMs, therefore the Appellant issued a demand notice dated 22.08.2018 under Section 8 of the Code, demanding an aggregate payment of Rs.1,21,52,221/-. Instead of making the payment, the Respondent raised various allegations against the Appellant and denied that it is payable. Since the Respondent failed to make the payment, the Appellant filed petition under Section 9 of the Code before the Adjudicating Authority in C.P. (IB) No. 26/9/JPR/2019. The Adjudicating Authority passed the impugned order on 30.11.2023, thereby dismissing the said petition of the Appellant on the ground that there is a pre-existing dispute between the parties.

Submissions of the Respondent/ Ritco Travels & Tours Private Limited

7. Respondent denies the debt raised by the Appellant on the basis of various correspondences and also on the ground of a pre-existing dispute.

8. In the present case, the payment made by such credit cards was honoured and confirmation was instantly received by the Appellant from the Bank with respect to the booking of the tickets. Only after the payment confirmation, the Appellant issued and booked the tickets.

9. The Respondent merely acted as a referral agent against Commission and only provided the details of the credit cards through which the corporate client intended to make payments against the booking of such tickets. Respondent claims to have no role in the issuance of the tickets or the corresponding payment.

10. Later on, the Appellant raised the financial claim on the Respondent after few days i.e. on 18.04.2017, alleging that the transactions done through credit cards have failed. The Appellant also sent goons to the Respondent's office to intimidate and demand the payment against the alleged credit card transactions. The Respondent sent a legal notice to the Appellant on 11.08.2017 to stop such criminal acts. On 22.08.2017, the Appellant replied to the legal notice and demanded a sum of Rs.1,23,04,479/- (Rupees One Crore Twenty-Three Lakhs Four Thousand Four Hundred and Seventy-Nine Only) in respect of the SOTO tickets booked by them. Despite receiving payment confirmation before booking of tickets, the Appellant asked the Respondent to pay for the Agency Debit Memo (ADM) for the reason that the reservations bookings were fraudulent credit card transactions. The Appellant started asking the Respondent to indemnify against such losses. Appellant cannot demand any kind of payment from the Respondent, since the tickets were issued by the Appellant only after the credit cards transactions were duly honoured by the issuing Bank. After a lapse of time, the Respondent in no way can be made liable for the charge back received from the credit card issuing Bank. Various correspondences were exchanged between the Respondent and the Appellant in respect of the bookings of the air tickets booked between 04.04.2017 to 17.04.2017, which clearly show genuine pre-existing dispute wherein the alleged debt has been denied by the Respondent. Despite such correspondence between the Appellant and the Respondent, the Appellant sent a demand notice on 27.08.2018 under Section 8 of the IBC, 2016 demanding a sum of Rs.1,21,52,221/- in respect of the alleged failed credit card transactions. The Respondent duly replied to the demand notice denying any kind of payment / debt. Despite Appellant's reply and denial of the debt, the Appellant proceeded to file an Application under Section 9 of the IBC. The Appellant has tried to rely on the e-mail of 11.04.2017 sent by Ms. Sewrin Fernandes, an employee of the Respondent Company, alleging it to be an assurance given by her to keep the Appellant indemnified against any claim arising out of such booking or reservation.

11. The Respondent submits that the tickets are issued only after the acceptance of the payment through credit card by the airlines. The tickets were to be issued after the confirmation of the receipt of the payments. No liability can be fastened on the

Respondent for failed transactions once the tickets are issued by the Appellants.

12. Moreover, the Appellant was very well aware that the tickets are booked only when the subject credit card payment was honoured by the system. If the tickets are not issued for any reason including the non-payment, in that event no commission would be receivable by the Respondent. In the past also, the Appellant had rejected the issuance of the tickets to the passengers where the payment was declined by the credit card issuing Bank. Further, it is not an appropriate forum for adjudicating the present dispute as an Appellant may prefer a civil suit in respect of this dispute.

13. It is claimed by the Respondent that the Appellant does not fall within the ambit of the definition of Operational Creditor as per Section 5(21) of the IBC Code, 2016, as this Section enables only a person, who has provided goods or rendered services under a transaction to another person and on completion of such transaction the Corporate Debtor has defaulted in relation to the payment arising under such a transaction. In this case, the Appellant has not rendered any services nor provided any goods to the Respondent but the Respondent acted only as a referral agent to the Appellant.

14. In the present case, it is claimed by the Respondent that neither there is any provision of service or supply of goods from the Appellant to the Respondent, nor the Respondent has ever received any money from the Appellant. The Appellant had neither supplied goods nor has rendered any services to acquire the status of an Operational Creditor. The Respondent played no role, but just acted as a referral agent / facilitator to the Appellant. The initiation of proceeding by the Appellant under Section 9 is an attempt to harass the Respondent and extort money from him. The alleged transactions on credit basis were never to be charged to the Respondent. Therefore, a charge back, later on cannot be passed on to the shoulders of the Respondent, since, the bookings were made by the Appellant itself.

Appraisal

15. Heard both sides and perused the documents on record.

16. The primary issue before us is whether in the instant case the Appellant and Respondent are having relationship of Corporate Debtor and Operational Creditor. Further whether there is any pre-existing dispute between the parties which will disallow initiation of CIRP proceedings.

17. We first look into the issue whether in the instant case, the Appellant and Respondent are having any relationship of Corporate Debtor and Operational Creditor.

18. Before going into that, we reproduce the definition of these two. As per Section 5(21) of the IBC, which is reproduced as below:

"(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority"

and the definition of the Operational Creditor under Section 5(20) of the IBC, is reproduced as below:

"(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred."

19. The Respondent placed orders for issuance of SOTO airlines tickets to the Appellant against certain credit cards. The Appellant alleges that the tickets were booked through GDS system in which the details were filled by the Respondent and PNR generated was entered in the GDS by the Appellant.

Then the tickets were issued and payment was made to the Airlines directly. The Respondent on the other hand, states that in this system, credit card details were filled followed by entering three-digit pin number and the actual amount charged was transmitted from the Bank account of the purchaser to the Bank account where the payment was made. Only upon successful completion of the transaction, the travel agency issued air tickets to the purchaser. When the payment was not made for the tickets issued by the airlines, the airlines would issue Agency Debit Memos (ADMs), which were payable by the agency issuing the tickets. Initially, when the ADMs were issued by the airlines to the Appellant, the records demonstrate that the Respondent had requested the Appellant to dispute the said ADMs as fraudulent transactions. The Appellant disputed some of the ADMs and for some other ADMs the time to dispute had expired. Later on, after the dispute was raised, the airlines rejected the ADMs disputed by the Emirates Airlines in accordance with IATA Rules and thereafter, the Appellant called upon the Respondent to pay for the ADMs.

20. From the records, there are many emails to suggest the undertakings to pay for any debit notes if any raised by the Airlines. Few such emails are reproduced:

"E-mail dated 10.04.2017 from Corporate Debtor to Appellant:

Dear Abu,

We are taking full responsibility if you get any debit note from the airline."

E-mail dated 11.04.2017 by Corporate Debtor to Appellant:

"We refer to our ticketing through Corporate Credit Card kindly be advised that the card holder is our Corporate Client and the tickets are issued only after the

acceptance of the payment through Corporate Card by the airline.

We assure that there won't be any issue of any kind of debit notes and we are taking full responsibility of the same.

Kindly instruct your day/night staff to offer quick service as there is a reluctance / delay in service which is felt.

E-mail dated 12.04.2017 from Corporate Debtor to Appellant:

Dear Team,

Issue below tickets on VISA CARD

4046*** - 09/17**

4021*** - 02/21**

4046*** - 01/19**

4121*** - 02/21**

If any debit note comes against those tickets, then we will be responsible."

21. The facts of the case clearly bring out that the Appellant was acting on the referral instructions of the Respondent and was issuing the air tickets on the basis of the credit card the customers details provided by the Respondent.

The Respondent had also given the undertaking that if any debit note comes against those tickets, then they will be responsible. The plea of the Respondent that they are not having any debt and the Appellant is not an Operational Creditor as they were not supplying any goods or services to the Respondent is not tenable. We can therefore conclude that there is a relationship of operational creditor and corporate debtor between the Appellant and Respondent.

22. We have gone through the emails, which were exchanged between the parties. From these emails, it is clear that Respondent i.e M/s Ritco Travels & Tours Private Limited, while passing on the referrals to M/s Akbar Travels of India Private Limited had given the undertaking that "**if any debit note comes against those tickets then we will be responsible**". This has been repeated in many emails. But when the debit notes were issued against the Appellant, this issue was raised by them with M/s Ritco Travels & Tours Private Limited- that debit notes and ADMs have been issued and it falls on the account of M/s Ritco Travels & Tours Private Limited. And it becomes an operational credit towards the Appellant as per the undertaking given by M/s Ritco Travels & Tours Private Limited. The undertaking as per the emails was also unconditional and therefore it is an act of acknowledgment of debt towards M/s Akbar Travels of India

Private Limited. Thus from the above emails, it is clear that Respondent was undertaking the responsibility for issuance of the debit notes and when ADMs were issued by the airlines, a debt arises and the unconditional undertakings will act as an acknowledgment of debt towards the Appellant.

23. When the demand notice was issued under Section 8 of the IBC, 2016 on 22.08.2018, it was disputed in its reply by the Respondent vide letter dated 08.09.2018. There are police complaints also on record. It had become a criminal case. Thus it had become a dispute and is not a spurious, hypothetical or illusory dispute. The judgment of **Mobilox Innovations Private Limited Vs. Kirussa Software Private Limited, (2018) 1 SCC 353**, clearly lay down the conditions precedent for triggering the CIRP under Section 9 of the Code, which are reproduced as follows:

“...

25. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

- (i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh? (See Section 4 of the Act)**
- (ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and**
- (iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?**

If any one of the aforesaid conditions is lacking, the application would have to be rejected.

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the Application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.”

XXX

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...”

[Emphasis supplied]

24. From the correspondence on record, it can be clearly made out that there is a pre-existing dispute. The Adjudicating Authority has gone into the circumstances of their business dealings and have come to the conclusion that the dispute raised by the respondent is plausible and not a patently feeble legal argument. Thus, when the Appellant received the reply to Section 8 demand notice raising a dispute, the Section 9 petition could not have been proceeded under I&B Code against the respondent.

Conclusion:

25. For CIRP under Section 9 of IBC, 2016 to be initiated, the Appellant is required to prove that the debt is due, it has not been paid and the debt is an undisputed debt. In this particular case, there is no record to suggest that there is any contract entered into between the parties but there is a evidence of pre-existing dispute. The ingredients laid down under Section 9 read with the requirements laid down by the judicial pronouncement are not fulfilled. Therefore, in the present case owing to the pre-existing dispute between the parties, the Adjudicating Authority has rightly rejected the Section 9 Application. We do not find any error in the orders of the Adjudicating Authority and accordingly, the Appeal is dismissed. No order as to the cost.