IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH

(IB) No.1895/ND/2019

In the matter of:
The Insolvency and Bankruptcy Code,2016

AND
In the matter of:
Sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 read with Section 14, 33 and other Applicable Provisions of the Insolvency and bankruptcy Code, 2016 and Rule 6 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016

AND
In the matter of :

Ashok Agarwal
Proprietor of
M/s Shree Marketing
G-308, Preet Vihar, Vikas Marg,
New Delhi-110092

Petitioner/Operational Creditor

VERSUS

Amitex Polymers Private Limited
17 Tribhuan Complex Ishwar Nagar,
Friends Colony, New Delhi-110065

Respondent/ Corporate Debtor

ORDER DELIVERED ON: 08.06.2020

CORAM :
Sh. Abni Ranjan Kumar Sinha, Hon'bleMember (Judicial)
Sh. Kapal Kumar Vohra, Hon'ble Member (Technical)

For the Applicant/ Operational Creditor: Adv. Pankaj, Adv. Ishita
For the Respondent/ Corporate Debtor: Adv. Amit, Adv. Abhishek

ORDER

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER, JUDICIAL

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code,2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule,2016 by the Applicant/ operational creditor, i.e. "***Ashok Agarwal, Proprietor of M/s Shree marketing***"for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company "***Amitex Polymers Private Limited***".

2. The Operatioanl creditor is engaged inter-alia in business of procuring and selling of goods/material, operational supplies, industrial etc. for increase their profitability by demand aggregation and providing goods material at competitive prices by directly buying from large manufactures and enabling its customers to increase business efficiencies against cash payment or on credit basis.

3. Brief Facts of the case are as follows:

i. In February 2011, the Corporate Debtor through its Director approached the Operational creditor and requested to supply various chemicals/materials. It was agreed between the Operational Creditor and Corporate debtor that the Corporate debtor will make payments in time upon raising of necessary invoice and as such timely payments was essence of the contract and was agreed that payment would be made within 30 days from the receipt of invoices.

ii. Purchase order dated 17.02.2011 was placed on the operational creditor by the corporate Debtor. Corporate Debtor through its purchase order

offered to make payment within a period of 45-60 days. However, the payment was agreed to be made within 30 days from the date of invoice.

iii. The corporate debtor placed another purchase order dated 25.02.2011.

iv. The goods were supplied by the operational Creditor vide following invoices:

Invoice No.	Date	Amount (Rs.)
447	19.02.2011	35,700/-
448	19.02.2011	22,185/-
449	19.02.2011	31,365/-
450	19.02.2011	20,971/-
451	19.02.2011	1,95,046/-
456	24.02.2011	17,850/-
457	24.02.2011	2,90,926/-
489	26.03.2011	69,390/-
490	26.03.2011	44,639/-
	TOTAL	7,28,072/-

v. In due discharge of its legal liability/lawful debt towards the payment of the dues/invoices by the corporate debtor, the corporate debtor made the Operational creditor the following payment:

Cheque No.	Bank	Amount (Rs.)
854341	ING Vysaya Bank Ltd.	35,700/-
854342	ING Vysaya Bank Ltd.	22,185/-

564006	ING Vysaya Bank Ltd.	31,365/-
564007	ING Vysaya Bank Ltd.	20,971/-
	Total	1,10,221/-

vi. The Operational Creditor vide its letter dated 24.06.2011 while reminding the corporate debtor of the delay in payment also asked the corporate debtor to make payment for the accrued interest and detailed debit note was sent along with the said letter.

vii. The operational Creditor filed a suit in 2014 for recovery of Rs. 9,07,450/- along with interest bearing CS no. 6912 of 2016 in the case of Ashok Agarwal vs. Amitex Polymers Pvt. Ltd. and Anr. Before the Ld. ADJ-03, Saket Court, at New Delhi.

viii. The abovementioned suit has been settled in terms of six instalments which are admitted by the Corporate Debtor and settlement agreement was executed on 16.08.2018 between both the parties.

ix. The above debt is payable as admitted by the Corporate Debtor and as recorded in its undertaking recorded and consent decree passed by the Ld. ADJ Saket dated 25.10.2018 as per settlement agreement executed on 16.08.2018 between both the parties.

x. The amount claimed to be due is Rs. 7,50,000/- towards principal amount towards goods received by the corporate debtor and Rs. 1,35,000/- towards penalty of Rs. 5,000/- per installment per month as per undertaking given by the Corporate Debtor and recorded vide order dated 25.10.2018 by Ld. ADJ-03, SE/Saket/Delhi in CS no.

6912 of 2016 in the case of Ashok Agarwal vs. Amitex Polymers Pvt. Ltd. and Anr. Thus, the total dues is Rs. 8,85,000/-.

xi. The Operational creditor vide its letter dated 11.03.2019 issued demand notice to the Corporate debtor.

xii. The Operational creditor sent a statutory notice dated 01.04.2019 via email on the registered email address of the respondent company as available on the official web portal of ROC.

4. The Corporate debtor contended the following in its reply dated 26.12.2019:

i. The Petitioner does not fall under the definition of "Operational Creditor" u/s 3(23) of the Insolvency and Bankruptcy Code, 2016 as held in R.G. Steels Vs. Berry Auto Ancillaries Pvt. Ltd. by National Company Law Tribunal vide its order dated 23.09.2019 specifically held that by virtue of definition of term "person" as contained in Sec. 3(23) of IBC, it though includes individual but does not include a Sole Proprietary Concern.

ii. The Petitioner has concealed that it has already settled its dispute outside court with the Respondent and the petitioner has received the post-dated cheques from the Respondent Company which are payable in the following schedule:

Date	Cheque no.	Amount (Rs.)
23.10.2019	17134	1,11,000/-
15.11.2019	17135	1,00,000/-
25.11.2019	17136	50,000/-
15.12.2019	17137	1,00,000/-

25.12.2019	17138	50,000/-
15.01.2019	17139	1,00,000/-
25.01.2020	17140	50,000/-
15.02.2020	17141	1,00,000/-
25.02.2020	17142	50,000/-
30.12.2019	17144	50,000/-
30.01.2020	17145	50,000/-

iii. The amount claimed is not a "Debt" as envisaged under its definition u/Sec. 3(11) of the IB Code, 2016.

iv. The respondent is a going concern and has a regular turnover and also filed Income tax return each year.

5. We have heard the Ld. Counsel for the Applicant as well as the Corporate Debtor (herein after referred as CORPORATE DEBTOR) and perused the averments made in the application , reply along with the documents enclosed with the application and reply.

6. Ld. Counsel for the Applicant submitted that the Applicant has filed the present application on the basis of the settlement decree passed by the court of Ld. Additional District Judge, Saket District Courts in Civil Suit No. 6912/2016. He further submitted that earlier the applicant had filed a Civil Suit before the Ld. Additional District Judge, Saket District Courts in which a settlement was arrived between the parties and a consent decree was passed on 25/10/2018 by the Ld. Additional District Judge, Saket District Courts. He further submitted that thereafter a Demand Notice was issued to the CORPORATE DEBTOR and the same was duly delivered which is evident from the tracking report enclosed at page no. 57 of the

application. He further submitted that no reply has been filed by the CORPORATE DEBTOR as required under Section 8 (2) of IBC within ten days from the date of the delivery of the demand notice, So the CIRP may be initiated against the CORPORATE DEBTOR.

7. On the other hand, Ld. Counsel for the CORPORATE DEBTOR submitted that the Applicant is not the Operational Creditor in terms of Section 3 (23) of the IBC. He further submitted that the present application filed by the Applicant is not maintainable. He further submitted that the Applicant has concealed the facts that the matter has been settled outside the court and a post -dated cheque has already been given to him. Therefore, the said amount is not debt under Section 3 (11) of the IBC. He further submitted that the Corporate Debtor had not received any demand notice dated 11/03/2019. He further submitted that since the amount claimed by the petitioner doesn't come within the definition of debt, therefore, the present application is not maintainable.

8. In the light of the aforesaid submissions, we have gone through the averments made in the application, reply and the documents enclosed with the application and reply. Since the respondent has raised this issue that the demand notice has not been received by the Corporate debtor, therefore, at this juncture, we would like to consider the tracking report enclosed at page no. 57 of the application. On perusal of tracking report, we find that however a notice was sent on 13/11/2019, which was booked from the Jungpura SO but the same was not delivered to the registered office/Pin Code of the Corporate Debtor and the notice was returned to Jungpura SO from where the article was booked. We further find that the tracking report clearly shows that the address given by the Applicant was insufficient and it could not be delivered on the registered address of

the Corporate Debtor, rather, it was returned to the Applicant. Therefore, the claim of the Applicant that he had delivered the demand notice as required under Section 8 (1) of the IBC is not supported with the document. Thereafter, we have gone through the page no. 58 of the application i.e. annexure P7, which is the e-mail sent on 01/04/2019 and in this e-mail it is specifically mentioned that the notice which the Applicant sent was returned with a remark ***"Left"*** and thereafter, the Applicant sent the demand notice through e-mail ***"amitexppr@hotmail.com".*** At this juncture, we would like to refer page 40 of the application i.e. master data enclosed by the Applicant as annexure P2 ,which also shows the name of the directors of the Corporate Debtor company but in the master data, the e-mail ID of the director is not given rather one e-mail ID of which the applicant claimed to sent the demand notice is given but from the perusal of the same, it can not be said that this e-mail ID is one of the persons as required under Rule 5 (2) of the Adjudicating Authority Rule. At this juncture, we would like to refer Rule 5 (2) Adjudicating Authority Rule and the same is quoted below:-

> ***(2) The demand notice or the copy of the invoice demanding payment referred to in subsection (2) of section 8 of the Code, may be delivered to the corporate debtor, 1 Published in the Gazette of India, Extra., Part II, Sec.3, No. 828 (E), dated 30th Nov., 2016 (w.e.f. 01.12.2016). (a) at the registered office by hand, registered post or speed post with acknowledgement due; or (b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.***

9. Mere plain reading of the rules shows that the e-mail ID on which the Applicant had delivered the demand notice was neither of a whole time director,or designated partner or key managerial personal of corporate debtor, therefore, we have no option but to hold that the demand

notice as required under Section 8 (1) of the IBC has not been delivered, therefore, the claim of the Applicant that no reply as required under Section 8 (2) of the IBC is given by the Corporate Debtor is not liable to be accepted.

10. At this juncture, we would like to mention this fact that the Applicant admit that he filed the present application for the amount which has been settled in Civil Suit No. 6912/2016 and on the basis of a consent decree, the said amount became due and for that amount, the present application has been filed. Therefore, we would like to consider this whether decree comes under the definition of Corporate Debt or not? At this juncture, we would like to quote the following definition of Section 3 (10) and the same is quoted below:-

Creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decreeholder;.

11. From the perusal of the aforesaid definition, we find that of course definition of creditor includes a Financial Creditor, an Operational Creditor, Secured Creditor, Unsecured Creditor and a Decree Holder but this definition does not shows that the decree holder means a financial creditor or an operational creditor. The words financial creditor and operational creditor are defined under Section 5 (7) and 5 (20) of the IBC and the same are quoted below:

"Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;

"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;.

12. At this juncture, we would also like to refer the definitions of financial debt and operational debt and the same are quoted below:-

Section 5(8) of IBC, 2016

"Financial Debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. -For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

Section 5(21) of IBC, 2016

"Operational Debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the 6[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;

13. If we shall read all the definitions together then we find that the Financial Creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to whereas an 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. Since the present application has been filed under Section 9 of the IBC, therefore, we can say that the applicant claimed that on the basis of consent decree an Operational Debt became due but when we shall read the definition of Operational Debt then we find that the decree is not included as an Operational Debt, ofcourse definition of Creditor include decree holder but definition of Operational Creditor does not include decree holder.

14. At this juncture, we would like to refer the latest decision of Hon'ble NCLAT passed in the matter of Digamber Bhondwe Vs. JM Financial

Asset Reconstruction Company Limited in which Hon'ble NCLAT held "We further reject the submission that because in Section 3(10) of I&B Code in definition of "Creditor" the "decree holder" is included it shows that decree gives cause to initiate application under Section 7 of I&B Code. Section 3 is in Part I of I&B Code. Part II of I&B Code deals with "Insolvency Resolution And Liquidation For Corporate Person", & has its own set of definitions in Section 5. Section 3 (10) definition of "Creditor" includes "financial creditor", "operational creditor" "decree-holder" etc. But Section 7 or Section 9 dealing with "Financial Creditor" and "operational creditor" do not include "decree-holder" to initiate CIRP in Part II." and when we shall consider the case in hand in the light of aforesaid decision then we are of the considered view that a decree-holder does not come within the definition of Operational Creditor, therefore, the present application is not maintainable.

15. Under such circumstances, generally in a case when the demand notice was not duly delivered then we direct the Operational Creditor to file a fresh application after delivery of demand notice, but here in this case, since we hold that applicant is not Operational Creditor and decree is not a Operational debt, therefore, we are not inclind to give such such directions rather we held that the present application is not maintainable as Applicant is not an Operational Creditor, therefore, we have no other option but to dismiss the present application.

16. Accordingly, the present application is DISMISSED.

17. Registry to inform both the parties.

Sd/-

Kapal Kumar Vohra

(Member Technical)

Sd/-

Abni Ranjan Kumar Sinha

(Member Judicial)