NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 2728(ND)/2019

In the matter of:

Om Logistics Limited

130, Transport Centre, Ring Road,

Punjabi Bagh, New Delhi-110035 .....**Operational Creditor**

V/s

Servel India Private Limited

S-15, Okhla Phase-II,

New Delho- 110020

Also at:

SP-26, Phase-1, Riico Industrial Area,

Neemrana Alwar, 301705 (Rajasthan) .....**Corporate Debtor**

SECTION: U/S 9 of IBC, 2016

Order delivered on: 08.06.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Petitioner: Mr. Mahe Zehra

For the Corporate Debtor: Ms. Sunieta Osha

ORDER

Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)

1. The present application is being preferred by Om Logistics Limited (hereinafter referred to as "Operational Creditor") against Servel India Private Limited (hereinafter referred to as Corporate Debtor") under Section 9 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code") read with Rule 6 of the IBC, 2016 to initiate corporate insolvency resolution process in respect of Corporate Debtor.

2. The brief facts leading to filing of the instant application are as under:

   i. The Corporate Debtor is a limited company and is running its business from the address as mentioned in the array of the application. An official from the Corporate Debtor approached the Operational Creditor company and talked to Manager Sales and Marketing at the registered office of the Operational Creditor for transportation of their consignments throughout India by the Operational Creditor. The Operational Creditor quoted their rates as well as the terms and conditions for the transportation of the goods of the Corporate Debtor. The Corporate Debtor clearly understood and accepted the offered rates as well as the other terms and conditions of the Operational Creditor. Our Company entered into a contract with Servel India Pvt. Ltd. for Logistics for the routes mentioned in the Contract dated 01st July, 2017 and the said Contract, at the instance of Servel India Pvt. Ltd., was renewed/ amended

from time to time. After the Corporate Debtor accepted the offer of the Operational Creditor through written contract, the Operational Creditor started the business dealings with the Corporate Debtor. In 2017, the officials from the Corporate Debtor Company also visited the Operational Creditor Company at the registered office in order to be ensured about the infrastructure of the Operational Creditor Company. They met the Senior Management persons as well before striking the deal. Thus, written contract was entered into between the Operational Creditor and the Corporate Debtor.

ii. The Operational Creditor raised various bills upon the Corporate Debtor towards the freight charges for the transportation carried out by the Operational Creditor for the Corporate Debtor along with the proof of deliveries of the consignments of the Corporate Debtor. The bills which remain pending for payment by the Corporate Debtor to the Operational Creditor are mentioned by the Operational Creditor in a separate bill wise ledger of the Corporate Debtor, which is attached as an annexure 1 to the present application. The last pending bill is dated 07.08.2019. Further,Applicant while fulfilling its part of contractual obligations provided its services strictly in terms of the Contract executed with Servel India Pvt. Ltd. (the "Corporate Debtor") which was renewed/ amended from time to time and provided the Operational Creditor the

relevant invoices, computer generated copies of which are once again enclosed herewith as Enclosure-I.

iii. The Corporate Debtor was required to pay the freight charges to the Operational Creditor. As per the arrangements between the parties to the present application, the Operational Creditor used to raise the bills for freight charges along with the proof of the delivery of the goods. The Corporate Debtor used to make the payment of the freight amount on the 'on account basis'. Further, as per the accounts maintained by the Operational Creditor, after adjusting all the payments made by the Corporate Debtor, the Corporate Debtor is required to pay a sum of Rs. 7,94,035/- towards the freight charges to the Operational Creditor.

iv. That the Operational Creditor requested the Corporate Debtor to pay the freight charges for the aforementioned bills as mentioned but the Corporate Debtor avoided the same on one pretext or the other and they did not pay any heed to it.

v. Further, the Operational Creditor sent a demand notice dated 19.08.2019 to the Corporate Debtor by Speed Post A/D on 20.08.2019, through Vice President of the Operational Creditor. This demand notice/invoice demanding payment of an unpaid Operational Debt of Rs. 7,94,035/- due from Servel India Pvt. Ltd. to Om Logistics Limited.

vi. That the accounts between the parties were/are open, current, running and mutual. That in total the Corporate Debtor is liable

to pay a sum of Rs. 7,94,035/- towards the freight charges to the Operational Creditor. The said amount is payable at Delhi at the registered office of the Operational Creditor. Since, the Corporate Debtor have failed to pay the same inspite of repeated requests and demand notice, they are also liable to pay interest @ 18% per annum on the aforesaid amount.

3. The present application is within the period of limitation as prescribed in law.

4. Pursuant to the Court notice issued to the Corporate Debtor, reply was filed and it was submitted by Corporate Debtor that:-

   i. The present reply is being filed pursuant the liberty granted by this Tribunal vide order dated 04.12.2019 and to oppose the admission of the petition filed by the alleged operational creditor for appointment of the IRP in terms of the IBC Code, 2016.

   ii. At the outset, the Corporate Debtor denies the claims made by the alleged Operational Creditor in its application for initiating the Corporate Insolvency Resolution Process under the IBC Code, 2016 save and except specifically admitted herein.

   iii. It is submitted that present application has been filed without having any cause of action in the favour of the in as much as Petitioner is not an Operational Creditor in terms of the provisions of the IBC code 2016.

   iv. It is submitted that the Petitioner has falsely claimed to be a operational creditor in the company. The respondent

vehemently denies having entered into any agreement with the alleged operational creditor

v. That there are serious disputed facts in the present case and the said dispute can only be resolved in trial.

vi. The Application is based on conjectures and surmises and no cogent proof for the deposit of money has been furnished thereof.

vii. The respondent denies the alleged debt of Rs. 7,94,035/- and reiterates that there is no debt due or payable by the Respondent to the Operational Creditor.

viii. The respondent denies the authenticity and/or genuineness of the invoices filed by the Operational Creditor. The alleged invoices are neither stamped nor signed by the authorized persons of the Respondent company. The alleged ledger sought to be relied upon by the Operational Creditor is self serving documents and cannot be relied upon for invoking the IBC proceedings.

ix. The respondent denies having been served with the demand notice dated 19.08.2019 as alleged. As such the legal requirements of the IBC has not been complied by the Operational Creditor and the present petition is devoid of merit.

5. The Operational Creditor has filed rejoinder and asserted the following contentions:

i. It is submitted that the petitioner is a transporter, who has carried out transportation on behalf of the Corporate Debtor at their instructions and the petitioner is entitled to the freight charges for the work done by them on behalf of the Corporate Debtor. Hence, the petitioner is an Operational Creditor in the eyes of law and is legally entitled to maintain the present application.

ii. It is submitted that a written contract was entered into between the parties which is already on the records .

iii. It is submitted that the Operational 'Creditor is entitled to the amount of Rs. 7,94,035/- from the respondent as claimed in the present proceedings.

iv. It is submitted that as a proof of delivering the goods of the respondent by the Operational Creditor, the copies of invoices with respective Proof of deliveries are being filed along with the present rejoinder.

v. It is submitted that the demand notice dated 19-08-2019 was duly served upon the respondent and its directors. The proof of service is already filed by the Operational Creditor in the present proceedings. It is submitted that all the legal requirements of IBC have been complied by the Operational Creditor and the present petition is liable to allowed as prayed for.

6. We have heard the Learned Counsel appearing for the Operational Creditor as well as Corporate Debtor. In the light of the submissions raised on behalf of the parties, when we have gone through the application, reply and rejoinder to the reply filed on behalf of both the parties then we find that it is admitted fact that the Corporate Debtor has not sent the reply as required under Section 8 (2) of the IBC, 2016, according to which, the Corporate Debtor shall within a period of 10 days of the receipt of demand notice or copy of invoices mentioned in sub section (1) bring to the notice of the Operational Creditor, the existence of dispute or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such disputes.

7. Whereas the Operational Creditor in its application has produced the postal document to show that the demand notice was duly delivered on the registered address of the Corporate Debtor on 21.09.2019 as well as to its directors, therefore, before going into the merit of the case of the parties we would like to refer the provision contained under Section 8 and 9 of the IBC, 2016 and the same is quoted below:

> ***"Section: 8. Insolvency resolution by operational creditor***
>
> *(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.*

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor -

a) Existence of a dispute, 1[if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) The [payment] of unpaid operational debt-

(i) By sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) By sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

***Explanation**. – For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding 3[payment] operational debt in respect of which the default has occurred."*

"Section 9: Application for initiation of corporate insolvency resolution process by operational creditor. –

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application

before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish-

(a) A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt [by the corporate debtor, if available;]

2[(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) Any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]

(4) An operational creditor initiating a corporate insolvency resolution process under this section may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order–

(i) Admit the application and communicate such decision to the operational creditor and the corporate debtor if, -

(a) The application made under sub-section (2) is complete;

(b) There is no 3[payment] of the unpaid operational debt;

(c) The invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) No notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) There is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) Reject the application and communicate such decision to the operational creditor and the corporate debtor, if -

(a) The application made under sub-section (2) is incomplete;

(b) There has been 1[payment] of the unpaid operational debt;

(c) The creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) Notice of dispute has been received by the operational creditor or

There is a record of dispute in the information utility; or

(e) Any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section."

8. Mere plain reading of the provisions contained under Section 8 & 9 of the Code shows that on the occurrence of a default, the operational-creditor is required to deliver a demand notice of unpaid operational debt or copy of the invoice demanding payment of the amount involved in the default to the Corporate Debtor in such form and manner as may be prescribed and the Corporate Debtor after the receipt of the demand notice or copy of the invoice mentioned in Section 8(1) of the Code, within ten days of the receipts of the notice bring to the notice of the operational-creditor the existence of disputes or show the documents that the payment of unpaid operational-debt has been made. Section 9 makes it clear that after the expiry of period of ten days, from the date of delivery of the notice or invoice demanding payment, if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Section 8(2) of the Code, only in that case the Operational Creditor may file an application for initiation of the CIRP. If we shall read these two provisions together then we find, before initiating a proceeding

under Section 9, the operational-creditor is required to fulfil the conditions mentioned under Section 8(1), if he has not sent the demand notice as required under Section 8(1) of the Code, then he cannot invoke the provision under Section 9, rather he can invoke the provision of Section 9 only, when Corporate Debtor fails to raise the existing of disputes or produce the document to show that unpaid operational debt has been paid within ten days of the receipt of the demand notice. Therefore, on the basis of aforesaid provision, we are of the view that Section 8 and 9 cast a duty upon the operational-creditor as well as Corporate Debtor to act as per Section 8 and if they fail to fulfil the conditions of Section 8 and 9 then in that case neither the application filed by the operational-creditor is maintainable nor the plea of existing of disputes or the payment of debt subsequently taken by the Corporate Debtor can be taken into consideration.

9. At this juncture, we would also like to refer the decision reported in the case of ***Nathi Devi v. Radha Devi Gupta 2005 (2) SCC 271***, and we find that Hon'ble Supreme Court in Para 14 of the judgment held that:

> *"It is equally well settled that in interpreting a statue, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statue should have effect. A construction which attributes*

redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors."

10. In the light of that decision, when we shall consider the case in hand then we are of the considered view that since it is specifically mentioned in Section 8(2) of the Code that within ten days from the date of the receipt of the demand notice, the corporate-debtor is required to bring to the notice of the operational-creditor, the existence of dispute or the documents regarding the payment of debt, therefore, we have no option, but to hold that since the corporate-debtor fails to give the reply of the demand notice and raised the disputes, hence after his appearance in response to the notice, he cannot raise it by filing the reply to the application filed on behalf of the operational-creditor and this has also been held by another NCLT, Delhi Bench in the case of ***M/s Jai Laxmi Traders v M/s. Mayasheel Retail India Ltd. IB-2184/(ND)/2019.***

11. For the reasons discussed above, we are of the considered view that in view of Section 9(5)(i)(a) since the application is complete, there is no payment of unpaid operational debt, which is more than Rs. 1 Lakh, which is the minimum threshold U/S 4 of the Code for initiating a proceeding U/S 9 of the Code and no notice of dispute as required U/S 8(2) of the Code is raised by Corporate Debtor. Therefore, we think it is proper to admit the application.

12. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the IBC, 2016 shall come into effect forthwith staying:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debt or any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Further:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector

regulator. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

13. The Operational Creditor has proposed the name of any IRP. Accordingly, we appoint, Mr. Reetesh Kumar Agarwal, an Insolvency Professional, Registration No. IBBI/IPA-001/IP-P00878/2017-2018/11475 email- carkagarwal@gmail.com duly empanelled with the IBBI as the IRP. He is directed to take such steps as are mandated under the Code, more specifically under Sections 15, 17, 18, 20 and 21 and shall file his report before the Adjudicating Authority.

14. The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

15. Copies of the order be sent to both the parties as well as to the IRP.

16. The office is directed to send a free copy of this order to both the parties.

sd/-

K. K. VOHRA

Member (T)

sd/-

08/06/2022

ABNI RANJAN KUMAR SINHA

Member (J)