

**THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH
AT NEW DELHI**

Company Petition No. (IB)-2011 (PB)/2019

**Under Section 9 of the Insolvency and Bankruptcy Code,
2016**

In the matter of:

Vandana Motors

Applicant/Operational Creditor

Vs.

On-Dot Couriers and Cargo Limited

Respondent/Corporate Debtor

Judgment Pronounced on: 26.02.2020

CORAM:

Dr. DEEPTI MUKESH, HON'BLE MEMBER (J)

Mr. S. K. MOHAPATRA, HON'BLE MEMBER (T)

For the Applicant:

Mr. Paras Dawar, CA

For the Respondent:

Mr. Dhruv Dwivedi,

Mr. Chetan Wahi Advocates.



ORDER

S. K. Mohapatra, Member

1. Vandana Motors, claiming as the operational creditor has filed this application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') for initiation of Corporate Insolvency Resolution Process in respect of respondent company M/s. On-Dot Couriers and Cargo Limited, referred to as the corporate debtor.
2. The Respondent Company M/s. On-Dot Couriers and Cargo Limited (CIN No. U 64100 DL 1991 PLC 045783) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, has its registered office situated at Plot No. 7, Floor 2nd, Block-2, Kriti Nagar, Industrial Area, New Delhi-110015. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having



territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. As per the application the applicant is a partnership firm incorporated on 21.03.2017 under the name and style of Vandana Motors under the provisions of the Partnership Act, 1932 with an object to carry out business of renting of motor vehicles and goods transport agency. The applicant is stated to be registered with the Registrar of Firms on 13.07.2017. Mr. Pradeep Kumar Gupta, one of the partners of the applicant duly authorized vide Resolution dated 17.06.2019 has preferred the present application on behalf of the applicant Vandana Motors, for initiation of Corporate Insolvency Resolution Process against the respondent corporate debtor in terms of the provisions of the Code.



4. Respondent is a company incorporated on 24.09.2019 under the name and style of On-Dot Couriers and Cargo Limited under the provisions of the erstwhile Companies Act, 1956 engaged in the business of delivery of documents, small parcels, and heavy shipments.
5. It is the case of the applicant that the Respondent had approached the applicant in the month of June 2017 for renting applicant's vehicles as per the needs and demands of the respondent company. In lieu of renting of vehicles by the applicant, the applicant raised monthly invoices to the respondent. As per the terms agreed by the respondent, payment against such invoices were to be made within 60 days of presentation of respective invoices.
6. It is alleged that respondent had always delayed in making payments for discharging its obligation towards vehicle rent due to the applicant and consequently it defaulted in payment of Rs. 9,02,955/- due to applicant on account vehicles



rented for the period from October 2018 till March 2019.

7. It is claimed that the applicant operational creditor had raised 11 invoices for renting its vehicles to the respondent for the period from October 2018 till March 2019 as per which a sum of Rs. 9,34,496/- was due. However, the respondent corporate debtor merely paid a sum of Rs. 31,541/- out of the total debt due resulting in default of operational debt of Rs. 9,02,955/-.
8. It is submitted that the applicant tried to follow up with the respondent for payment of aforementioned debt through various phone calls and personal visits. However, despite applicant's best effort, the respondent reneged upon its contractual obligation and defaulted in payment of aforementioned operational debt of Rs. 9,02,955/- to the applicant.
9. Respondent corporate debtor has filed reply on 20.11.2019 disputing that the debt claimed in the present application is not due and payable to the applicant by the respondent company.



10. Respondent has alleged that there is no document to show that the claimed operational debt has been accepted by the respondent at any point of time. It is further claimed that the invoices filed by the applicant have never been accepted by the respondent. It is alleged that there is no document on record to show the nature of transaction and the rates at which the respondent engaged the applicant. Respondent has denied that the payments were to be made within a period of 60 days from the presentation of respective invoices. It is the case of the respondent that both parties maintain a running account and there was no fixed time period to make payments in respect of invoices raised. It is submitted that the payments were always subject to final reconciliation between the parties.

11. Additionally, respondent has raised dispute with respect to quality of service provided by the applicant. It is alleged that the applicant on various occasions delayed the delivery of goods assigned by the respondent which not only resulted in monetary

loss but also caused loss of reputation of the respondent company.

12. Besides respondent has denied receipt of any notice issued under Section 8 of the Code. It is also alleged that the applicant has concealed the fact of receipt of payments from respondent even after filing of the present application.

13. We have heard the learned counsels for the parties and have perused the case records including the rejoinder to the reply filed by applicant on 05.12.2019.

14. The application for initiation of corporate insolvency process by operational creditor, who claims to have not received the unpaid operational debt, is dealt with under Section 9 of the Code. An application under Section 9 of the Code can be filed only by an 'Operational Creditor' in respect of the operational debt. Therefore, a perusal of Section 9 of the Code would show that in order to maintain an application as an 'Operational Creditor' the applicant



has to satisfy the requirements of Section 5(20) and (21) of the Code.

15. The aforesaid expressions have been defined in section 5(20) & (21) of the Code which envisages that:

"5. In this Part, unless the context otherwise requires, -

(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,

(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".

16. From the definition of "operational creditor" and "operational debt", it can be seen that the following persons can claim to be an "operational Creditor".

i. The person who has claim in respect of provisions of goods (supplied) to the corporate debtor.

ii. *Persons who have provided service to the corporate debtor, including those who are in employment.*

iii. *Central Govt., State Govt. and local authorities, who are entitled to claim debt in respect of dues arising under any law for time being in force.*

17. It is thus seen that the unpaid applicant, who has rendered services to the corporate debtor, comes within the purview of 'Operational creditor'.

18. The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the "Operational Creditor" is delineated under Section 9 of the Code. The present application filed by operational creditor, accordingly, has to be dealt with in terms of Section 9 of the Code which envisages that.

"Application for initiation of corporate insolvency resolution process by operational creditor.

9. (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 subsection (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;



(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 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 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 subclause (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.”

19. Sub-section (1) of Section 9 mandates filing of the petition only after expiry of the period of 10 days from the date of delivery of notice or invoice demanding payment under sub-section (1) of Section 8.

20. In the present case demand notice in Form-3 dated 22.06.2019 as per Section 8 of the Code was sent to the respondent and as per the postal tracking report placed on record the notice was delivered to the respondent on 27.06.2019. The demand notice was also served through email of the respondent which has not bounced back. Applicant has filed the proof of service of the demand notice through both the modes at Annexure 5 of the application. However, the corporate debtor has sent no reply in terms of sub-section (2) of Section 8 of the Code and the corporate debtor also failed to make payment of the



outstanding dues to the applicant. It is thus seen that before filing the present application under Section 9 of the Code, due prior notice under Section 8 of the Code was duly served on the respondent.

21. It is further seen that the present application under Section 9 of the Code has been filed in Form-5, wherein it was specifically mentioned that no reply from the corporate debtor has been received by the applicant under sub-section (2) of Section 8 of the Code raising any dispute against the claim of the operational creditor. The application under Section 9 of the Code is thus complete and the required particulars have been furnished along with details of subsistence of default.

22. In terms of sub-section (4) of Section 9 of the Code the applicant has elected to propose the name of Shri Shyam Arora, for appointment as Interim Resolution Professional having registration number IBBI / IPA-002 / IP-N00546/ 2017-18 / 11703 having address as 96, Aravali Apartment, Alaknanda, New Delhi - 110019 with email-id



arora.shyaam@yahoo.com. Shri Shyam Arora has agreed to accept the appointment as the interim resolution professional and has signed a communication dated 18.11.2019 in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Shri Shyam Arora as per the requirement of the IBBI Regulations.

23. Moreover, in compliance of Section 9 (3) (a) of the Code the Petitioner has placed on record copy of relevant invoices, Copy of Ledger Account of Corporate Debtor in the books of the applicant from the date 1.10.2018 to 09.08.2019 and copy of the ledger of applicant in the books of respondent wherein the respondent acknowledges alongwith copy of emails through which it was sent. In addition, copy of demand notice issued in requisite Form 3

delivered by the Petitioner Operational Creditor to the respondent Corporate Debtor has also been annexed to the application.

24. That apart in compliance of sub-section (3) (b) and (C) of Section 9 of the Code, the petitioner has affirmed that respondent corporate debtor has not replied to demand notice, raising any dispute in respect of the unpaid operational debt.

25. In support of the operational debt and commission of default, applicant has placed on record copy of 11 invoices for renting its vehicles to the respondent for the period from October 2018 till March 2019 as per which a sum of Rs. 9,34,496/- was due. Out of the dues respondent merely paid a sum of Rs.31,541/- resulting in default of operational debt for a sum of Rs. 9,02,955/-.

26. During pendency of hearing it was placed by both the sides that parties are exploring for amicable settlement in the matter. It is submitted that respondent transferred a sum of Rs. 1,00,000/- to the applicant in the month of October 2019 as part



payment towards discharge of operational debt. The respondent also handed over 6 cheques totaling Rs. 1,00,000/- as further payment towards discharge of its operational debt. However, when presented in the month of November, 2019 only 3 of such 6 cheques were honored. It is stated that further sum of Rs. 45,000/- was received from respondent towards discharge of its operational debt. True copy of updated ledger account of corporate debtor in the books of operational creditor showing default as Rs. 7,57,955/- has been placed on record.

27. Needless to say, that the Code gets triggered the moment default is of rupees one lakh or more in view of Section 4 of the Code. What is material is that the default is at least of Rs. 1 lakh. Adjudicating Authority is only to ascertain the existence of a default. The Adjudicating Authority is not required to decide as to what is the actual amount of claim and other details. Even part of the dues, once becomes payable comes within the meaning of debt and if not paid will amount of default.



28. The contention of the respondent that it had maintained a running account of the applicant which was subject to final reconciliation is a patently feeble legal argument unsupported by any evidence. Not a single correspondence has been placed on record requesting for conciliation of accounts. There is nothing on record to show that the liability has been disputed from time to time for which parties had also met a few times to trash out the differences, but the accounts between them have not been reconciled. There is also no document to show that the operational debt is less than one lac.

29. The alleged 'dispute' raised for the first time by the respondent in its written reply dated 19.11.2019 solely cannot be termed as a *pre-existing dispute* in the absence of any supporting material.

30. In this regard the findings of the Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited V. Kirusa Software Private Limited, reported in AIR 2017 SC 4532 is reproduced as below:



“24. The Scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the insolvency and Bankruptcy (Application of Adjudicating Authority) Rules, 2016 read with Form 4 or 4, as the case may be Section 8(1). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute Section 8(2) (a). What is important is that the existence of the dispute



and/or the suit or arbitration proceeding must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.” (Emphasis supplied)

31. The respondent has not brought even a shred of evidence on record to prima facie demonstrate that it had raised the issue of the substandard services or no obligation to make any payment, prior to the written reply dated 19.11.2019. In absence of even a whisper from the corporate debtor suggesting that the services were sub-standard and its failure to show any communication emanated from its side intimating the operational creditor that the services were sub-standard, would not constitute a prior and pre-existing dispute as contemplated under the Code.

32. The respondent has not brought even a single evidence on record to prima facie demonstrate that dispute was truly raised prior to the issuance of Section 8 notice. Something more than mere assertion is required because if they were not so then anyone could merely say it did not owe debt.



33. Hon'ble NCLAT in the case of *M/s. Next Education India Pvt. Ltd. v. M/s. K12 Techno Services Pvt. Ltd.* in Company Appeal (AT) (Insolvency) No. 98 of 2019 decided on 01.08.2019 with regard to 'pre-existing dispute' held that:

“It is a settled law that if any dispute is raised prior to the issuance of the invoices or Demand Notice u/s 8(1) of the I&B Code with regard to quality of service or goods or pendency of the suit or arbitration, in such case one may take the plea that there is an ‘existence of dispute’ but if any dispute is raised after issuance of Demand Notice u/s 8(1) that cannot be termed to be a ‘pre-existing dispute’.”

34. Merely repudiating the claim belatedly and only in reply to the application would not absolve the corporate debtor from initiation of the resolution process against it. The corporate debtor has simply raised the dispute only in the reply without supported by any particulars. Dispute raised only after Section 8



notice without any particular of pre-existing dispute is to be ignored. Any dispute subsequent to issuance of demand notice cannot be taken into consideration to reject an application under Section 9.

35. That apart in compliance of sub-section (3)(b) of Section 9 of the Code, the applicant has affirmed vide affidavit dated 13.08.2019 as under:

“2. That there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt.”

36. In compliance of Section 9(3) (c) of the Code, the applicant has filed a certificate dated 08.08.2019 from Indian Overseas Bank certifying as under:

“there is no payment of an unpaid operational debt, corporate debtor named-On Dot Couriers & Cargo Ltd.”

37. It is also pertinent to note that the default of operational debt clearly exceeds the ceiling of Rs. 1 lakh, as provided in Section 4 of the Code. The corporate debtor has also not raised any dispute in respect of the claims of the applicant operational



creditor. It is thus seen that the application preferred by the operational creditor is complete in all respect and there is a default committed by corporate debtor in making payment of the operational debt.

38. Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited V. Kirusa Software Private Limited, reported in AIR 2017 SC 4532 has held that:

“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?”

39. In the present application all the aforesaid requirements have been satisfied. It is seen that the application preferred by applicant operational creditor is complete in all respect and there has been default in payment of the operational debt by the respondent corporate debtor. Once the application is complete and in the absence of any pre-existing dispute and with the subsistence of default, the application is liable to be admitted.

40. Therefore, on fulfilment of requirements of Section 9 (5) (i) (a) to (d) of the Code, the present application is admitted.

41. In terms of sub-section (6) of Section 9 of the Code the Corporate Insolvency Resolution Process in respect of respondent corporate debtor shall commence from the date of this admission order.

42. Accordingly, we appoint Shri Shyam Arora, having registration number IBBI / IPA-002 / IP-N00546/ 2017-18 / 11703 resident of 96, Aravali Apartment, Alaknanda, New Delhi - 110019 with email-id arora.shyaam@yahoo.com. as an Interim Resolution Professional.

43. The petitioner is directed to pay a sum of Rupees one lakhs to the Interim Resolution Professional to meet the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

44. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to



admission of this application under Section 9 of the Insolvency & Bankruptcy Code, 2016.

45. We also declare moratorium in terms of Section 14 of the Code, which shall have effect from the date of this order till the completion of Corporate Insolvency Resolution Process as per sub-section (4) of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
(b) transferring, encumbering, alienating or disposing of by the corporate debtor 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 Securitization 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.”

46. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.



47. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the

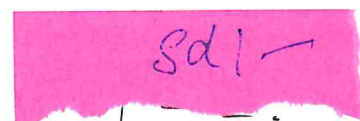


property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

48. Let the copy of the order be communicated to the Operational Creditor and the Corporate Debtor in accordance with Section 9 (5) (i) of the Code. The office is also directed to communicate a copy of the order additionally to the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi and Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.



(S. K. MOHAPATRA)
MEMBER (T)



(DR. DEEPTI MUKESH)
MEMBER (J)

SHAMMY