

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. (IB) No. 415(PB)/2019

IN THE MATTER OF:

Unimax International

.....Operational Creditor/Petitioner

v.

M/s. Soho Infrastructure Private Limited

.....Corporate Debtor/Respondent

SECTION: Under Section 9 of The Insolvency and Bankruptcy Code, 2016

Judgement delivered on 30.09.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR

HON'BLE PRESIDENT

DR. V.K SUBBURAJ,

HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Petitioner:

Mr. Mrinal Harsh Vardhan, Mr. Kartik Sarin
& Mr. Geetesh Meena, Advocates

For the Respondent:

Mr. Prabhat Kumar, Mr. Shivam Tyagi and
Mr. Rajesh Kumar, Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

The petitioner-Unimax International has preferred the present petition 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 'Rules, 2016) with a prayer for triggering the Corporate Insolvency Resolution Process in respect of Respondent-M/s. Soho Infrastructure Private Limited which has its registered office in New

Delhi. The petitioner has not proposed the name of any Interim Resolution Professional and has left it to the discretion of naming one by this Tribunal as such an option is available to us.

2. Mr. Ajay Bhatjiwale, General Manager of the Operational Creditor has been authorized by Board Resolution passed in the Minutes of the Meeting of the Board of Directors held on 27.11.2018 (pg No. 18) to submit and sign the petition.

3. Brief facts necessary for disposal of the controversy raised in the instant petition are that the petitioner is claimed to have supplied goods and the total outstanding on that account towards Corporate Debtor is claimed to be INR 83,29,507/- including interest on principal debt as on 22.11.2018. The details of the invoices and delivery challans have also been annexed with the petition [Annexure-2 (colly)]. The petitioner sent demand notices dated 10.12.2018 to the Corporate Debtor and its directors under Section 8 of the Code along with the invoices in Form-3 as prescribed under Rule 5 (1) (a) of the Adjudicating Authority Rules, 2016 on the address where the goods were supplied which is its registered office at D-410, Pocket 16, Sector VII, Rohini, New Delhi-110085. However, demand notices were returned with the



endorsement “unclaimed”. It is claimed that the aforesaid amount was due and payable.

4. The petitioner then submitted a copy of the statement of bank account (Annexure-5) where deposits are made (from the Corporate Debtor as well) or credit received normally by the Operational Creditor. It has also attached affidavit (at pgs. 317-318) as per the requirements of Section 9 (3) (b) of the Code.

5. Learned counsel for the Corporate Debtor has opposed the admission of the petition and has advanced the following arguments:-

1. Present petition is not maintainable as Petitioner-Unimax International is not a legal entity and does not fall in the definition of ‘person’ and ‘Operational Creditor’ as defined under Sections 3(23) & 5 (20) of the Code.
2. The status of the petitioner is not clear that whether it is a registered partnership firm or not as no certificate has been enclosed with the petition to show its identification number. Further no partnership deed is attached to prove the existence of the alleged partnership firm.



3. An unregistered firm is not legally entitled to file suit/proceedings on behalf of firm in terms of provisions of Section 69 of the Partnership Act, 1932.
4. In Part-II, Clause 6 petitioner has to disclose the details of authorized person which is left blank because it is aware that being unregistered firm, the present petition would be maintainable.
5. The alleged notice dated 10.12.2018 is sent through Advocate which is not signed by the petitioner or authorized partner/representative. Admittedly the same has not been served and the track report states that the consignment is sent back to the advocate office of petitioner which proves that the demand notice has not been delivered to the registered office of the Corporate Debtor. All three track reports clearly stated that the alleged demand notice is not delivered and also find mention that incorrect or wrong address. Further it is defective one as no details of invoices, statement of account and details of outstanding were sent.
6. There is no affidavit submitted by the petitioner regarding no notice given by the Corporate Debtor

relating to a dispute of the unpaid Operational Debt. The affidavit enclosed purported to be under Section 9(3)(b) of the Code is general affidavit without compliance of the requirements of the Code.

7. The Respondent vide letter dated 02.07.2016 and reminders dated 25.08.2016 & 27.01.2017 raised disputes regarding supplies made by the petitioner and the assurance was given by the petitioner to rectify the same or remove the grievances. The petitioner has accepted payments of Rs. 4,51,84,594/- against supplies and full and final payment of Rs. 12,00,000/- on 17.05.2017 and since then there is no correspondence. Thus, there are disputes with respect to claim raised by the petitioner and on that count the petitioner has deliberately did not submit affidavit required u/s 9(3)(b) of the Code just to mislead and suppress the dispute raised by the Respondent.
8. The petitioner has filed and relied upon forged and fabricated documents for the purpose of filing of present claim as the same can be seen that at page No. 52, undated, fabricated and forged letter which has been

attached to show that supply of goods has been completed to the satisfaction. The said letter is undated and not signed by the Director of the Corporate Debtor.

6. A rejoinder to the reply has been filed by the Operational Creditor reiterating the submissions made in the petition and controverting the assertions in the reply. A true copy of Partnership Deed dated 06.05.2005 and Form-B under Rule 8 of Delhi Partnership (Registration of Firms) Rules, 1972 bearing No. 561/SDM/NW/2012 dated 15.06.2012 (Annexure OC/1) has been placed on record with the rejoinder highlighting that petitioner is a duly registered partnership firm registered on 06.05.2005, entered into the register of the firms through Form-B under Rule 8 of Delhi Partnership (Registration of Firms) Rules, 1972.

7. Subsequently the petitioner has filed an application being C.A. No. 1374(PB)/2019 along with Board Resolution dated 09.07.2019 (Annexure-A) for substitution of authorized Representative namely Mr. Rakesh Kumar in place of earlier one. An amended affidavit under Section 9(3)(b) of the Code is also attached with the said application in terms of the order dated 03.07.2019 passed by us highlighting that after receiving the notice by the Corporate Debtor no dispute has been raised by them relating to unpaid operational



debt. Further an additional affidavit is attached along with copy of general ledger accounts and consolidated ledger account (Annexure A & B). It is stated that the letter dated 02.07.2016 and subsequent letters on which reliance has been placed by the Respondent regarding the quality of material supplied by it, are forged and fabricated which have been filed just to mislead this Hon'ble Tribunal. The courier receipts annexed by the Respondent are more than 3 years old and it is doubtful and suspicious against which no delivery report can be generated.

8. Learned counsel for the petitioner has submitted that the letter dated 27.07.2016 annexed with the reply alleged to be issued by the Petitioner addressing the Corporate Debtor conforming the receipt of letter issued and regarding sending the team of technical experts is a home-made, self-created letter and prepared for taking illegal defence before this Hon'ble Tribunal. The signatures and company seal on the letter/reply dated 27.07.2016 has been fabricated by the Corporate Debtor and in this regard, petitioner also filed an additional affidavit deposing to the unaccepted and illegal act of the Corporate Debtor. The Company seal image of the petitioner is copied from some other document and paste on the alleged letter. The Corporate Debtor intentionally filed the courier



receipts of more than three years old and without any tracking reports.

9. Having heard the learned counsel for the parties we are of the considered view that the instant application is meritorious and warrants admission.

10. It is evident from a perusal of copy of Partnership Deed dated 06.05.2005 and Form-B under Rule 8 of Delhi Partnership (Registration of Firms) Rules, 1972 bearing No. 561/SDM/NW/2012 dated 15.06.2012 (Annexure OC/1) that petitioner is a Partnership firm duly registered with the Registrar of Firms, Delhi.

11. The argument raised is that the mandatory provisions of Section 9 (5) (ii) (c) of the Code have not been complied with in as much as the invoices and the notice for payment under Section 8 of the Code has not been received. The aforesaid objection would not warrant any detailed enquiry because a perusal of the pleadings shows that the service has been effected on the registered office situated at D-410, Pocket 16, Sector VII, Rohini, New Delhi-110085. Such an argument would pale into significance because there is no change in the address in the MCA record which continues to be D-410, Pocket 16, Sector VII, Rohini, New Delhi-

110085. Moreover, the resolution passed by the Corporate Debtor on 27.03.2019 (page 35) shows the same registered office address. According to Section 27 of the General Clauses Act and Section 20 of the Companies Act, 2013 read with Rule 35 of the Companies (Incorporation) Rules, 2014 the service has to be effected on the registered office address and that has been done. Therefore, the argument lacks substance and the same is hereby rejected.

12. Another objection raised by the Corporate Debtor that Part II- Clause 6 of the application has been intentionally left blank by the Petitioner also does not survive in light of the Board Resolution dated 27.11.2018 filed along with the petition authorizing Mr. Ajay Bhatjiwale, General Manager to be the Authorized Representative of the form.

13. The Respondent has placed heavy reliance by arguing that the petitioner has accepted payments of Rs. 4,51,84,594/- against supplies and full and final payment of Rs. 12,00,000/- on 17.05.2017. If we accept said version of the Corporate Debtor it is difficult find any explanation to the fact that subsequently it has issued various cheques bearing No. 763156, 763157, 763158 all dated 22.11.218 amounting to Rs. 6,00,000/- in favour of the petitioner which were dishonoured upon presentation and the



proceedings under Section 138 of Negotiable Instrument Act, 1881 are pending against it. According to us any reasonable prudent person would not handover the cheques after full and final settlement of the account which as per the Corporate Debtor itself finalized on 17.05.2017. Therefore, the defence pleaded is belied.

14. As per the invoices issued by the Operational Creditor from time to time with regard to supply of Aluminium/M.S. Shuttering Material to the Corporate Debtor it is proved beyond doubt that 'goods' in terms of Section 5 (21) of the Code were procured by the Corporate Debtor from the Operational Creditor on various occasions. It is patent from a perusal of the invoices and the delivery challans that the Corporate Debtor had acknowledged the receipts of goods from the petitioner firm.

15. For determination of the aforesaid issue it would be necessary to read the definition of the expression 'Operational Debt' given in Section 5 (21) of the Code and the same is set out below:-

Section 5 (21)

(21) "operational debt" means a claim in respect of the provision of **goods** or services including employment or a debt in respect of the repayment 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.

The definition of operational debt postulates that it is a claim, *inter alia*, in respect of the provision of 'goods' or 'services' including employment etc. A perusal of the invoices issued by the 'Operational Creditor' in the name of Corporate Debtor clearly shows that 'Operational Creditor' has supplied Aluminium/M.S. Shuttering Material to the Corporate Debtor on various occasions. Therefore, the debt which is due and payable by the Operational Debtor to the Operational Creditor is prima-facie covered by Section 5 (21) of the Code.

16. There is no escape from the conclusion that 'Corporate Debtor' has committed default and the amount of Rs. 61,24,637/- as shown to be the closing balance for the financial year 01.04.2017 to 31.08.2018 has remained unpaid. Thus, default has been committed by the Corporate Debtor within the meaning of Section 3 (12) read with Section 4 and Section 9 (1) of the Code, 2016.

17. The Operational Creditor has not named anyone as Interim Resolution Professional and has requested us to appoint one for the Corporate Insolvency Resolution Process. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of

Insolvency Professionals for appointment as Insolvency Resolution Professionals for the period 01.07.2019 to 31.12.2019 in compliance with Section 16 (3) (a) of the Code in order to avoid delay. The list of recommended Insolvency Professionals provides instant solution to NCLT-Adjudicating Authority to pick up the name and appoint anyone. It also helps in meeting the time lines given in the Code and save unnecessary wastage of time in asking the Insolvency and Bankruptcy Board of India to recommend the name and then to appoint such Interim Resolution Professional by NCLT-Adjudicating Authority. Accordingly, we appoint Mr. Punkaj Jain, email id-punkaj.ip@capoc.in, Mobile No. 9810286606 and Registration No. IBBI/IPA-001/IP-P00409/2017-18/10969 as an Interim Resolution Professional. The aforesaid Interim Resolution Professional has no disciplinary proceeding pending against him nor anything else has been pointed out with regard to his antecedents by IBBI. He shall file his written communication in accordance with Rule 9 of Adjudicating Authority Rules, 2016 and all relevant paper immediately before the Registrar of this Tribunal but not later than two days.



18. As a sequel to the above discussion, this petition is admitted and Mr. Punkaj Jain is appointed as an Interim Resolution Professional.

19. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 9 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

20. We also declare moratorium in terms of Section 14 of the Code. A necessary consequence of the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

- “(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 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.”

21. It is made clear that the provisions of moratorium shall not apply to (a) such transactions which might be notified by the Central Government in consultation with any financial regulator; (b) a surety in a contract of guarantor to a Corporate Debtor. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other services or supplies as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

22. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *inter alia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow

best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, erstwhile directors, 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 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/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/Resolution Professional shall be under a 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.



23. Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

24. We direct the Operational Creditor to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out 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. The needful shall be done within three days from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors. The amount must be accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.

25. Before parting we must notice the complaint made against Operational Creditor in the form of discrepancies in the statement of account. We cannot in summary proceedings determine the amount due. This function is required to be performed by the Information Utility which is not yet fully functional. Therefore, Resolution Professional may ask the ex-promoter/director of the



Corporate Debtor for any such correction if need be and act accordingly by placing it before the Operational Creditor as it is only fair to do so.

26. The office is directed to communicate a copy of the order to the Operational Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest 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.

Sd/-

(M.M.KUMAR)
PRESIDENT

30.09.2019

Sd/-

(DR. V.K SUBBURAJ)
MEMBER (TECHNICAL)

30.09.2019
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