

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH**

TCP No. 149/IBC/NCLT/MB/MAH/2017

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

Mr. Ampreet Singh

..... Operational Creditor  
(Petitioner/Applicant)

v.

M/s. Trilogic Digital Media Limited

..... Corporate Debtor  
(Respondent)

Order Pronounced on: 30.08.2018

**Coram :**

Hon'ble M.K. Shrawat, Member (J)

Hon'ble Bhaskara Pantula Mohan, Member (J)

**For the Petitioner :**

Adv. Henal Ganatra i/b Clove Legal.

**For the Respondent :**

None Present.

*Per: M.K. Shrawat, Member (J)*

**ORDER**

1. This petition is originally filed with the Hon'ble Bombay High Court under S. 433 and S. 434 of the Companies Act, 1956 on 02.03.2016 but thereafter with the enforcement of the Insolvency and Bankruptcy Code, 2016 (hereinafter as **Code**) w.e.f. 01.12.2016 and vide a notification viz. 'Transfer of Pending Cases with High Court' dated 07.12.2016 this Petition got transferred to this Bench of NCLT for further proceedings under provisions of the Code.
2. Hence, consequentially Mr. Ampreet Singh (hereinafter as **Operational Creditor**) has furnished Form No. 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as **Rules**) in the

capacity of "Operational Creditor" on 14.06.2017 by invoking the provisions of Section 9 of the Code.

3. In the requisite Form, under the Head "Particulars of Corporate Debtor" the description of the debtor is stated as M/s. Trilogic Digital Media Limited (hereinafter as **Debtor**) having registered address at, 5<sup>th</sup> Floor, Blue Wave Building, Off new Link Road, Opposite Laxmi Industrial Estate, Andheri West, Mumbai-400053.
4. Further under the Head "Particulars of Operational Debt" the total amount in default is stated to be ₹9,48,000/-. The Debt fell due in May 2015.

### **5. Brief Background :**

- 5.1. The Operational Creditor is a senior management professional engaged in the field of management and marketing of digital advertising companies. the Petitioner and Mr. Rajesh Gopalan prepared a tentative business plan to start a Company operating in the field of digital advertising under the name and style of *Robins 150*.
- 5.2. However, since the incorporation of a separate company for the purpose of carrying on the digital advertising business would require some time, the Petitioner, on the request of the Respondent, rendered the services of Chief Change Officer (CCO) to the Respondent Company with effect from 01.02.2015.
- 5.3. The Corporate Debtor called and informed the petitioner that the Respondent Company would no longer be in a position to undertake the business since another digital advertising network promoted by the Respondent Company namely 'Pointfic' had been acquired by 'HT Media Group' and as per the terms of the acquisition, the Respondent Company was barred from having any interest or involvement in any business competing with the business of Pointfic.
- 5.4. The Corporate Debtor accepted its liability in April,2015 after a lot of discussion and a sum of ₹9 Lacs is due for salaries and ₹48,000/- is due as reimbursement.

**6. Submissions by the Operational Creditor :**

- 6.1. The Learned Advocate for the Operational Creditor has submitted that the Operational Creditor has served as Chief Change Officer (CCO) to the Corporate Debtor during the year 2015. The Corporate Debtor has not paid the salary of the Operational Creditor to the extent of ₹9,48,000/-.
- 6.2. It is further stated that the Bank Statement of the Operational Creditor annexed in the petition reveals that a payment of ₹4,14,060/- has been received from the Corporate Debtor towards the salary for the month of February, 2015 i.e. for the period preceding the month for which the present petition has been filed.
- 6.3. Also that, thereafter the Debtor has not made any payment towards the balance amount and consequentially the Operational Creditor has issued a Statutory Notice U/s. 433 and 434 of the Companies Act, 1956 dated 18.08.2015 annexed in the Petition as Exhibit-D. The said notice was duly received by the Debtor.
- 6.4. The Corporate Debtor, through its Advocate, replied to the Petitioner's Legal Notice dated 18.08.2015 on 28.08.2015 wherein the Petitioner's demand had been refused. The Debtor has chosen not to repay the money and hence, the Operational Creditor has filed a Petition for winding-up of the Debtor with the Hon'ble High Court on ground of inability to pay the Debts.
- 6.5. It is further submitted that, the Debtor has never appeared before NCLT in order to reply to this Application/Petition.
- 6.6. The Learned Advocate also finally submitted that, the Application/Petition U/s. 9 of the Code is fit for admission; as the Debtor has made only the part payment towards the salaries of the Operational Creditor hence, default in making the total payment which is evidenced from the record. Consequentially this Application/Petition may be admitted.

**7. Findings :**

- 7.1. We have considered the submissions made by the Petitioner. We have also perused the Petition filed before Hon'ble High Court and subsequently filed Form – 5 as per the Code.

- 7.2. Before we proceed to consider the merits of the case, it is necessary to examine the compliance of pre-condition before submission of any petition under the insolvency code. With regard to the question of issuance of Notice raised by the Debtor, we have perused the Notice sent by the Operational Creditor U/s. 434 of the Companies Act, 1956 and also the R.P.A.D. slip to that effect and we are of the opinion that, the Notice U/s. 434 of the Companies Act, 1956 is duly received by the Debtor.
- 7.3. As regards the question of issuance of Demand Notice U/s. 8 of the Code it is admitted fact that, the Operational Creditor has not issued the Demand Notice U/s. 8 of the Code after transfer of Winding-up Petition from the Hon'ble High Court as against the Debtor.
- 7.4. Accordingly, we have perused the decision of Hon'ble NCLAT in *Era Engineering Ltd. v. Prideco Commercial Projects Pvt. Ltd. (Company Appeal) (AT) (Ins) No. 31/2017* wherein it is held as follows :

*"8. Admittedly, no notice was issued by Operational Creditor under section 8 of the I & B Code, 2016.*

*Demand notice by Operational Creditor stipulated under Rule 5 in Form 3 has not been served. Therefore, in absence of any expiry period of tenure of 10 days there was no question of preferring an application under section 9 of I & B Code, 2016."*

- 7.5. Similarly, the Hon'ble NCLAT set aside the order of NCLT, Chennai Bench in the matter of *MSP Paper Mill Pvt. Ltd. v. Arjun Chemicals Pvt. Ltd. [Company Appeal (AT) (INSOLVENCY) No. 155 Of 2017]* following the lines of *Sabari Inn Pvt Ltd v. Ramesh Associates Pvt Ltd, Company Appeal (AT) (Insolvency) No. 117 of 2017 on similar facts* stating that:

*"In the present case as notice under sub-section (1) of Section 8 of I&B Code has not been issued by the Respondent (operational creditor), we hold that the application preferred by the Respondent was incomplete. In this circumstances, we have no other option but to set aside the impugned order dated 28<sup>th</sup> July, 2017 passed by the National Company Law Tribunal, Chennai Bench, Chennai and declare that the application*

*preferred by the Respondent under section 433 of the Companies Act, 1956 stands abated”.*

- 7.6. Hence, in the light of above judgement we are of the opinion that this matter also deserves **Rejection** in absence of issuance of Demand Notice U/s. 8 of the Code.
- 7.7. Accordingly, this Petition/Application under S. 9 of the Code is **Rejected** as the defect in this Petition/Application is not a curable defect and time cannot be granted as per the Proviso of S. 9 (5) of the Code which provides 7 days' Notice for Removal of defect. Nevertheless, the said defect makes the very Petition/Application as incomplete that too a ground for rejection under the Code. Needless to mention that, the Operational Creditor can issue a Fresh Demand Notice as per the Provisions of the Code and thereafter can approach this Tribunal again to seek appropriate reliefs.
- 7.8. Hence, this Petition/Application is accordingly **Dismissed**. However, in the facts and circumstances of the case there is no order as to cost.
8. Ordered Accordingly. To be consigned to Records.

SD/-

**BHASKARA PANTULA MOHAN**  
**MEMBER (JUDICIAL)**

SD/-

**M. K. SHRAWAT**  
**MEMBER (JUDICIAL)**

**Dated : 30.08.2018**