

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
SINGLE BENCH
NEW DELHI

No. IB.242(ND)/2017

SECTION: UNDER SECTION 9 OF INSOLVENCY & BANKRUPTCY
CODE, 2016

IN THE MATTER OF:

Mr.Vishaal Bhatnagar,
S/o Late Sh.Krishna Gopal Bhatnagar,
R/o 99, Punjabi Bagh Apartments,
DDA-SFS, Madipur,
New Delhi-110063

..... Applicant

Cyber Media Research & Services Ltd.
(formerly known as Cyber Media Research Ltd.)
D-74, Panchsheel Enclave,
New Delhi-110017

....Respondent

Coram:

R.VARADHARAJAN
Hon'ble Member (Judicial)

For the Petitioner(s) : Mr. Sunil Goyal, Advocate
Mr. Deepak, Advocate

For the Respondent(s) : None

Order delivered on 16.11.2017

Page | 1

Q

ORDER

This is an Application filed by the applicant herein claiming to be an erstwhile employee of the Corporate Debtor and that in relation to his employment while in service with the Corporate Debtor a sum of Rs.11,53,069/- is due, as per the full and final account dated 28.04.2016 by which a sum of Rs.9,43,842/- was required to be paid in relation to the financial year 2016-17 and that in all a sum of Rs.10,83,227 after deduction of TDS was agreed to be paid during the financial year 2017-18 and that a payment of Rs.11,53,069/- became due and payable on 10.7.2017 as per the final clearance issued on 28.04.2016 and after payments adjusted received thereafter.

2. The details of the Corporate Debtor as given in Part II of the Application filed by the Applicant discloses



that the Corporate Debtor was incorporated on 29.8.1996 and that the nominal share capital of the Corporate Debtor is to the extent of Rs.2.50 crores and the paid up share capital of Rs.1.50 crores. It is also disclosed that the registered office of the Corporate Debtor is situated at D-74, Panchsheel Enclave, New Delhi-110017. In support of the claim, the Operational Creditor has enclosed a copy of the appointment letter dated 26.8.1994 a perusal of which shows that the Operational Creditor had been appointed as Assistant Manager (Marketing). Subsequently, it is seen that vide letter dated 22.3.2001 issued by the Corporate Debtor, the Operational Creditor was named as Business Manager (CAOM) with effect from 1.4.2001 and transferred to Corporate Office, Bangalore and the salary slip issued on 10.11.2014 discloses that the annual remuneration of the Operational Creditor was to the extent of Rs.13,15,000/- including all allowances, perquisites with effect from 1.10.2014. During the year



2014, it has been averred by the Operational Creditor that the name of the Corporate Debtor was changed to the present name from that of "Cyber Media Research Limited".

3. On and from 1.5.2014, it is averred by the Operational Creditor that there has been a backlog in relation to payment of salary and pay plus bonus pending payment for several years and in the circumstances the Petitioner was forced to tender his resignation from the services of the Corporate Debtor on and from 2.5.2015. At the time of resignation, it is averred by the Operational Creditor, that he was employed as Associate Vice-President and that his resignation was accepted by the Corporate Debtor from 29.10.2015 with the acceptance date of resignation being from 10.11.2015 and the date of relieving as 10.2.2016. On 28.4.2016 the Corporate Debtor issued a full and final account as per which a sum of Rs.9,44,842/- was to be paid during the financial year



2016-17 and a sum of Rs.10,83, 227/- to be paid during the financial year 2017-18. Despite reminders since the payment was not forthcoming the Operational Creditor avers that a legal notice was issued to the Corporate Debtor and the same had also been served on 9.9.2016. In view of lack of response, on 22.11.2016 winding up Petition was filed before the Hon'ble High Court after the expiry of statutory period of 21 days and the said winding Petition was transferred to this Tribunal vide order dated 22.12.2016 and that on 9.2.2017 the said winding up Petition transferred from the Hon'ble High Court was withdrawn with a liberty to file appropriate Petition under Insolvency and Bankruptcy Code, 2016.

4. Thereafter, it is averred that a demand notice dated 24.3.2017 annexed as Annexure-1 herein in Form-3 alongwith copy of the invoice in Form-4 was also issued under the hand of the Operational Creditor wherein a sum of Rs.11,53,069/- after deducting TDS

was claimed as the amount in default towards the unpaid salary and various other earnings from the Corporate Debtor. Since no reply was forthcoming despite service of the above stated demand notice, the present Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC,2016) came to be filed before this Tribunal seeking initiation of the Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor.

5. The Application/Petition came to be listed before this Tribunal on 11.8.2017 as well as on subsequent dates. Perusal of the order dated 16.8.2017 discloses that a final opportunity was given to the Operational Creditor to produce a certificate from the bankers in relation to the unpaid operational debt vis-à-vis from the Corporate Debtor and a week's time was granted and the matter was posted on 4.9.2017 on which date the matter was taken up and order was reserved. On going through the records, it is seen that the Corporate



Debtor has not put in his appearance before this Tribunal despite service of notice as evident from the postal receipt and tracking report in relation to the service of the Application enclosed at p.107-108 of the typed set filed along with the Application. It is also noticed that the Operational Creditor has filed the statement of account from its bankers namely HDFC Bank. In relation to the certificate from the bankers, the following certification has been issued by the Bank dated 17.7.2017 and same is extracted below:

HDFC BANK

"It is certified that Vishaal Bhatnagar is maintaining saving account No.00911050072612, since 17-11-2003 and the given cheque received from Cyber Media Research and Services Ltd.

Date	Amount	Cheque No.
10.5.16	75000	964
03.06.16	75000	995
09.08.16	75000	1122
15.09.16	75000	1191
06.10.16	75000	1238

Q

23.11.16	50000	1336
27.12.16	50000	1399
19.01.17	50000	1469
30.03.17	50000	1601
20.04.17	50000	1637
17.05.17	50000	1695
16.06.17	50000	1740

This certificate is being issued at his specific request and without any risk and responsibility on the bank or its staff.”

For HDFC Bank Ltd.
(Signature)
Name: Vijay Tanwar
Designation: Branch Operation Manager
Employee code; V2868

A perusal of the said certificate shows that the same is not in compliance with the provisions of Section 9(3)(c) of IBC,2016 as the unpaid Operational Debt due from the Corporate Debtor has not been reflected and from the certificate as issued by the Bankers in view of the summary and limited jurisdiction, this Tribunal is not in



a position to ascertain prima facie the unpaid dues of the Operational Creditor as claimed to be due from the Corporate Debtor.

6. In relation to the production of statement of account and the certificate of Bankers as issued even though not in compliance with the provisions of Section 9(3) (c) of IBC,2016, the Ld. Counsel for the Petitioner choose to rely on the decision rendered by Hon'ble NCLT, Kolkata Bench on 21st August, 2017 in the matter of Shree Shyam Inorganic Private Ltd. vs. RHD Enterprises Private Ltd. in CP(IB) No.245/KB/2017. Ld. Counsel for the Petitioner draws attention of this Tribunal to p.6 of the said decision of the Hon'ble NCLT, Kolkata and for ready reference the same is extracted as below:

"The requirement of sub clause (b) of Sec.9(3) of I&B Code, 2016 seems to be complied by the Operational Creditor, an affidavit to that effect has been filed by the Operational Creditor.

On a perusal of bank statement, it appears that bank statement certified by the Bank has been filed which is annexed as Annexure E with the supplementary affidavit. There is no bank certificate as required u/s 9(3)(c) to the effect that there is no payment of unpaid operational debt by Corporate Debtor. On perusal of the certified copy of bank statement, it appears that in the bank account of operational creditor there is no any credit entry of unpaid operational debt. Learned counsel for the petitioner has contended that bank only gives the copy of bank statement and bank authorities have refused to certify that corporate debtor has not paid the unpaid debt. It is important to point out that under I&B Code no provision is relating to the direction to banks, on which basis bank can be asked to certify that no payment of unpaid operation debt has been made. The argument advanced by the learned counsel for the petitioner is not without any basis. I can take judicial notice of the fact that bank in case of need only provides a certified copy of the statement of bank account and that certified copy of bank statement is admissible in evidence."

7. However, this Tribunal is not able to accede to the submission made by the Ld. Counsel for the Petitioner



in view of the judgement rendered by the Hon'ble NCLAT being the Appellate Tribunal whose decision acts as a binding precedent in relation to this Tribunal as rendered in Smart Timing Steel Limited vs. National Steel and Agro-Industries Limited in Company Appeal (80)(Insolvency) No.28/2017 wherein after detailed consideration of the provisions of Section 9 of IBC,2016 at paragraph 11 and 16, the Hon'ble Appellate Tribunal has laid clearly the mandatory nature of compliance with Section 9(3) as follows:

"11. On perusal of entire Section (3) along with sub-sections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-clause (3) of Section 9 required to be mandatorily followed and it is not empty statutory formality.

16. Therefore, it is clear that the word '**shall**' used in sub-section (3) of section 9 of 'I&B Code' is mandatory, including clause 3 therein."

8. In view of the facts as already stated in paragraph infra and that the certificate from the Bankers does not



comply with the provisions of Section 9(3) (c) of IBC,2016, this Tribunal is not in a position to consider the Application and is perforce required to reject the Application as mandated under the provisions of Section 9 of IBC,2016. The Application hereby stands dismissed. However, since the claim of the Applicant/Operational Creditor is not rejected on merits but due to procedural non-compliances as mandated under IBC,2016, the Applicant will be at liberty to take recourse to such or other proceedings as may be desired by him to establish his claim before other forums.

Sd/-
16/11/17
(R.VARADHARAJAN)
(MEMBER (JUDICIAL))

U.D.Mehta
.11.2017