

In the National Company Law Tribunal,
Kolkata Bench,
Kolkata

Coram: Shri V. P. Singh
Hon'ble Member (J)
&
Shri Jinan K.R.
Hon'ble Member (J)

CP (IB) No.412/KB/2017

In the matter of:

An application for initiation of Corporate Insolvency Resolution Process by an alleged Operational Creditor under sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016;

-And-

In the matter of:

M/s. Techno Fac Contracts Private Limited, IC-1/5, 53, Mangla Apartments, I.P. Extension, New Delhi - 110 092;
.....Operational Creditor/ Applicant

-Versus-

Yatri Vihar Hospitality Private Limited having its office at House No.61, Road No.8, Rajendra Nagar, Patna, Bihar- 800 016;
.....Corporate Debtor/ Respondent

Counsels appeared:

For the Respondent : 1. Mr Pandey Neeraj Ravi, Advocate
2. Mr Nilanjan Sen, Advocate
3. Mr. Smarajit Basu, Advocate

For the Operational Creditor: 1. Mr Ratnanko Banerjee, Sr.Advocate
2. Mr Victor Dutta, Advocate
3. Mr. Rahul Lamba, Advocate
4. Mr. Subhajit Das, Advocate

Order pronounced on 12th January 2018

O R D E R

Per Shri V.P. Singh, Member (J):

The petitioner has filed this application under Sec.9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as I & B Code) 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to Adjudicating Authority Rules) for initiation of corporate insolvency process against corporate debtor Yatri Vihar Hospitality (P)Ltd.

2. Brief facts of the case are the following:-

The applicant operational creditor is Techno Fab Contracts (P) Ltd. whose identification No. is U74899DL1995PTC074509 and having its registered office at Flat No. A-1006, 10th Floor, Rishabh paradise, Ahinsa Khand II, Indirapuram, Ghaziabad- 201014. The Corporate debtor is Yatri Vihar Hospitality Private Ltd., whose identification No. Is U55101BR2011PTC016829 having its registered office at House No 61, Road No.8, Rajendra Nagar, Patna, Bihar-800016.

3. The petitioner has stated that under a contract dated 10/6/2012 between the corporate debtor and the operational creditor, the corporate debtor has agreed to give the operational credit for construction of Boutique Hotel Building at Bodh Gaya, Bihar. Copy of the said agreement is annexed to the application as Annexure B.

4. The operational creditor has stated that the Corporate Debtor made default in the payment of Rs.2,19,92,896(Rupees Two crores nineteen lacs ninety-two thousand eight hundred ninety-six only) plus interest on service tax. In addition to the said contractual amount, the corporate debtor was also required to pay to the operational creditor all applicable taxes, insurance and other statutory charges.

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5. Under the said contract agreement the operational creditor had mobilised their men and materials and commenced the work of construction at Budh Gaya, Bihar.

6. The operational creditor has further stated that as per terms of the said contract, the petitioner had been raising invoices from time to time and initially the respondent corporate debtor was making payment of the said invoices. The respondent corporate debtor has delayed in payment to the operational creditor for the services rendered by the operational creditor. After that operational creditor issued reminders by emails dated 12th April 2017 calling upon the corporate debtor to make payment of the outstanding dues of the operational creditor. However, in spite of the same, the corporate debtor did not make payment to the invoices raised by the operational creditor and thereby causing great hardship to the operational creditor. Copies of the reminder letter are annexed with the petition and marked as Annexure II.

7. The operational creditor has further stated that it raised invoices amounting to Rs.9,62,29,567/- for construction of the hotel, from time to time for Earthwork and Site Development, Water Proofing, Floor Finishing etc. Against the said invoices the corporate debtor paid a sum of Rs.7,42,36,671/- leaving a balance outstanding of Rs.219,92,896/-. After that, the respondent did not make payment to the operational creditor.

8. The operational creditor has further stated that although the operational creditor made complete services of constructing a Hotel, the respondent in breach of the contract failed and neglected to make payment to the operational creditor for the stage-wise bills raised by the operational creditor.

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9. The operational creditor has further stated that the corporate debtor did not pay the outstanding dues in spite of receiving demand notice dated 23/5/2017. A copy of the demand notice is annexed to the application as Annexure I. The petitioner has stated that total outstanding dues, as stated in the notice was 2,19,92,896 occurred from 18th April 2015. A copy of the statement of account from Bank/Financial Institutions showing the due amount is annexed with the application and marked as Annexure III.

10. Even after receipt of the demand notice, the corporate debtor failed to make payment of the outstanding dues. Therefore, the petition has been filed for initiation of corporate insolvency process against the corporate debtor.

11. The petitioner has annexed along with the petition copy of the agreement dated 10/6/2012 in support of its claim; emails sent by operational creditor to the corporate debtor till 12th April, 2017 ; statement of account Annexure F; demand notice issued under I & B Code, 2016 on 23.05.2017 Annexure I; copy of construction contract Annexure II and statement of account where deposits are made, or credits generally received by the operational creditor Annexure III.

12. The petitioner has also stated that Shri Fanindra Kumar Budhouliya, Managing Director has been authorised to act on behalf of the operational creditor. In support of its contention, the petitioner has also filed an affidavit. Petitioner has also presented the authorization letter which shows that the petitioner company by its resolution dated 22/6/2017 had authorized Mr. Fanindra Kumar Budhouliya, Managing Director to sign, verify, appoint advocate, institute the petition or/execution case, give written statement and complaints, sign affidavits, replies, evidence on behalf of the company with the appropriate Court of law having jurisdiction on behalf of the applicant company.

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13. The operational creditor has further stated in the affidavit that corporate debtor has failed to bring to the notice of the applicant an existence of a dispute or the pendency of a suit or arbitration proceeding filed before the service of the demand notice.

14. The applicant / operational creditor has delivered demand notice of unpaid operational debt/copy of Invoices on 25th May, 2017 to Corporate Debtor in prescribed manner as specified in Rule 5(2) of Insolvency and Bankruptcy(Application to Adjudicating Authorities) Rules, 2016, under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 vide Annexure-'I'. Further, the petitioner has enclosed the proof of service of Demand Notice vide Annexure-'I', which indicates that the demand notice was duly served upon Corporate Debtor on 25.05.2017 vide Track Consignment Report which is on page 07 of the petition.

15. The operational creditor has also filed an affidavit to the effect that no notice of dispute has been raised by the corporate debtor. In the said affidavit the applicant operational creditor has stated that corporate debtor has not sent a reply or raised a notice of dispute after receiving the demand notice dated 23/5/2017 under Sec.8(1) of the I & B Code, 2016. The applicant has further stated in the affidavit that corporate debtor has failed to bring to the notice of the operational creditor an existence of a dispute or the pendency of the suit or arbitration proceedings filed before the service of the demand notice. The operational creditor has further alleged that even ten days after the date of delivery of the demand notice, he has not received any payment or a notice of a dispute regarding the pending amount from the corporate debtor.

16. The Corporate Debtor has filed objection wherein it is contended that there is an existence of the pre-existing dispute and such disputes have been raised by series of emails on the failure of completion of work. It is further

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contended that disputes were raised regarding pending incomplete works and for not having met the standard protocol of the quality and nature of work carried out during construction. It is also contended that no Demand Notice had been issued to the Corporate Debtor as required U/S 8 of I B Code. It is further stated that bills raised by the operational creditor are forged.

17. Corporate Debtor has also stated that the so-called debt fails to fall within the category as postulated in Sec 5(21) of the I&B Code. Neither it is in respect of the provision of the services or goods, nor in respect of the repayment of dues arising under any law in force.

18. It is further stated by the Corporate Debtor that the corporate debtor wished to avail the services of the contractor for construction of hotel complex in Bodh Gaya, Bihar. In this regard, respondent floated a tender in which the applicant company also participated, and the contract was awarded to the applicant company vide. Letter dated 31.12.2012 and subsequently, the construction contract was entered into between the parties on 10th June 2012. However, due to the deficient services on the part of the applicant, the work is stretched up to July 2015 when the hotel was functional. The applicant contractor left the work after starting it in July 2012 and abandoned and relinquished the work altogether in September 2014 until which time all payments that have been due were being regularly paid to the applicant as per contractual terms. After the applicant left the work in 2014, the respondent had to engage labour directly on its own and get the hotel construction completed. It is further contended by the Corporate Debtor that application is violative of 9(3)(b) and 9(3)(c) of the Code. The petition has been filed without any proper authorisation by the Board of the applicant company.

19. The corporate debtor has further stated that there is no claim within the meaning of the Code, which comes under the definition of "operational debt" under 5(20) and 5(21) of the Code. Corporate Debtor has also contended that as

per the contract terms after completion of work project manager was to give completion certificate and such completion certificate has not been issued to the applicant contractor because the applicant has left the contract work incomplete and he was never in opposition to ask for a completion certificate.

20. We have heard the arguments of the learned counsels' of the parties and perused the records. On the perusal of the records following questions arises for determination:

- (i) *Whether the corporate debtor has committed default in making payment of Rs 2,19,92,896 to the applicant operational creditor.?*
- (ii) *Whether there was an existence of a pre-existing 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 about such dispute, before the initiation of insolvency and bankruptcy proceeding?*
- (iii) *Whether the petition is incomplete for the non-compliance of the provision of 9(3)(b) and 9(3)(c) of the Code?*
- (iv) *Whether the alleged claim of the operational creditor comes within the definition of operational debt as defined under Section 5(20) and 5(21) of the Code?*

Point No (i) & (ii)

21. The petitioner/operational creditor has stated that Rs.2,19,92,896 outstanding amount fell due on the corporate debtor starting on and from 18.05.2015. The petitioner stated that Rs. 21992896/- + Interest and service tax (Rupees Two Crore Nineteen Lac Ninety Thousand Eight Hundred and Ninety-Six Only) is due on the corporate debtor. The statement of bank accounts from the period of 01-09-2012 to 31-07-2014 has been duly annexed marked and annexed as "Annexure-III" to prove that debt amount has not been paid by the corporate debtor. The bank certificate issued on 19.12.2017 from the Bank of

Baroda maintaining the accounts of the operational creditor as against the account nos. 34930400000031, 34930200000059 and 34930200000097 confirmed that there was no payment of an unpaid operational debt by the corporate debtor. Learned counsel for the corporate debtor has laid emphasis mainly on the fact that the applicant contractor left the work incomplete. Therefore Corporate Debtor had to engage labour directly on its own and complete the construction of the hotel.

22. It is pertinent to mention that the Corporate debtor has filed the document related to contract agreement, which is at page 90 of the reply of the corporate debtor. It is stated in the contract that the final bill shall be submitted by the contractor within one month of the date fixed for virtual completion of the work or of the date for virtual completion certificate whichever is later come up furnished by the Project Manager.

23. The final bill will be certified by the Project Manager within 30 working days from the date of the bill submitted. The contractor shall be paid by the owner within 45 working days of receipt of the project manager certificate.

(Cl. 1.12) Of the Contract Agreement, which is at Page. 40 of the Corporate Debtor's reply. It is stated in the agreement that the "completion will be deemed to have achieved, at the end of the Defects Liability Period. A Final Completion Certificate has been issued by the PM/owner/architect when all the requirements of the contract have been made and complied with by the contractor and when all the defective items of work and defects have been replaced and/or rectified and made good by the contractor as directed by and to the satisfaction of the owner."

24. On the perusal of the above clause of the contract agreement, it is clear that the completion certificate is to be issued by the PM/Owner/Architect. It is

pertinent to mention that operational creditor has filed the completion of certificate by 2016 along with rejoinder. It is stated in completion certificate that "this is to certify that the construction work of Hotel Mahabodhi at Bodh Gaya (Bihar) having covered area of about 1,00,000 Sqft was awarded to M/S Techno fab Contracts Pvt. Ltd in the year 2012 for a contract value of Rs. 6.15 crore-----.'

25. The above certificate has been issued by the Uppal Ghosh Associates who happens to be an architect, and contract document shows that the entire work was being supervised by the same architect. As per the contract, document architect was authorised to issue completion certificate which he has issued in favour of the operational creditor.

26. Thus, it is clear that the contention of the Corporate Debtor that the Operational Creditor has left the contract work incomplete, and he had to engage labour directly on its own to complete the construction of the hotel. But this contention is unbelievable by completion certificate issued by the Architect of the corporate debtor. As per contract terms, Project Manager/Owner/Architect was authorised to issue a completion certificate, and Architect has issued completion certificate of the work. Thus it is clear that defence taken by the corporate debtor is unsupported by evidence.

27. It is pertinent to mention that Demand Notice under section 8 of the I.B. Code has been issued by the Operational Creditor through Speed Post, which is at page nos. 7 to 54, which is Annexure-I. Track Consignment Number, which is at page no. 54 shows that Speed post item, which was booked on 25th May 2017, was delivered on 29th May 2017 at 16.59.

28. Ld. Counsel for the Corporate Debtor has raised the argument that in the Track Consignment destination postal code is given as 800001 whereas the Pin Code of Corporate Debtor as provided in the Notice is 8000016 as stated in the

Demand Notice itself. There is no force in the argument raised by the Corporate Debtor because post office name is rightly written in Track Consignment Report and Demand Notice. It is also to be pointed out that Track Consignment Report further shows that the item was delivered at Rajendra Nagar S.O. Patna. The same address is stated in the Demand Notice. If there is an error in typing of the destination pin code, then on this basis it cannot be said that item was not delivered. By demand notice and track consignment report, it is clear that demand notice issued against the Corporate Debtor on 25.05.2017 was delivered on the Corporate Debtor on 29th May 2017.

29. It is also important to point out that Corporate Debtor has not issued any notice of dispute within a statutory period of 10 days after receiving the notice under section 8(1) of the Insolvency & Bankruptcy Code.

30. Corporate Debtor has raised dispute by way of reply filed on 16th October, 2017 and Corporate Debtor's main contention in the reply is regarding the non-receipt of the demand notice, whereas on the basis of track consignment report, it is proved that demand notice was served on the corporate debtor, but he failed to issue any notice of dispute under section 8(2) of the Insolvency & Bankruptcy Code. Corporate Debtor has also failed to make the payment of the debt amount and only for creating defence he has raised the dispute that Operational Creditor has left the contract incomplete, and he was forced to engage the labour on its own and get the work completed, whereas architect appointed by the Contractor has himself issued completion certificate in favour of the Operational Creditor, which proves that contract work was completed satisfactorily in terms of contract. Project Manager/Owner/Architect was competent to issue a certificate which has been filed by the Operational Creditor. It appears from the record that objection raised by the corporate debtor is merely to create a defence. What will be the interpretation of the

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word "existence of dispute" in section 8 is given by Hon'ble Supreme Court in the case of 2017 SCC OnLine SC 1154

31. Mobilox Innovations Private Limited vs Kirusa Software Private Limited. Hon'ble Supreme Court has held that:

"54 "It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

32. In this case, Corporate Debtor has not raised any dispute after receiving the demand notice under section 8(1) of the Insolvency & Bankruptcy Code, 2016. When the notice from the Adjudicating Authority was issued, then reply has been filed by the Corporate Debtor, wherein for the first time dispute has been raised, but as per statutory requirement, within ten days of the receiving of the demand notice, no notice of dispute has been raised by the corporate debtor. In reply filed by the Corporate Debtor, certain objections have been raised, which are mainly relating to non-receipt of the demand notice. It is further contended that Operational Creditor has left the contract incomplete and he was forced to engage the labour on its own and get the work completed,

whereas it is evident by the Completion Certificate issued by the Architect that contract work was completed satisfactorily regarding the contract. Therefore, it appears that the objections raised by the Corporate Debtor are unsupported by evidence. In case of Mobilox Innovations (supra), the Hon'ble Supreme Court has held that Adjudicating Authority is to see whether there is plausible contention which requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is further held that Adjudicating Authority has to reject spurious defence which is a mere blaster. In this case, defence which has been taken by the Corporate Debtor regarding the existence of a dispute is unsupported by evidence. Because certificate has been issued by the Architect, who was supervising the contract himself and he has certified that contract work was completed satisfactorily by the Operational Creditor. Thus, it is clear that the defence of the existence of a dispute is unfounded and it does not come within the definition of existence of dispute.

33. Hon'ble Supreme Court in the case of Mobilox Innovations (supra) has further held that:

“34. 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 debt above is due and payable and has not yet been paid? and
- (iii) Whether there is the 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 about such dispute? ”

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The Hon'ble Court has further held that if any one of the above conditions is lacking, the application would have to be rejected.

34. In this case, by the documents filed by the Operational Creditor, it is clear that the Corporate Debtor has failed to make the payment of operational dues of Rs.2,19,92,896/-, in spite of receiving the demand notice under 8(1) of the Insolvency & Bankruptcy Code, 2016.

35. The Operational Creditor has also filed the bank certificate in compliance of provision of section 9(3)(c) of the I.B.Code, which shows that the Operational Creditor has not received the payment from the Corporate Debtor in the accounts maintained by the Operational Creditor in Bank of Baroda. Thus, it is clear that the Operational Creditor has done the compliance of section 9(3)(c) of the Insolvency & Bankruptcy Code. By certificate issued by the Bank of Baroda, it is evident that Corporate Debtor has failed to clear off outstanding dues Rs.2,19,92,896/- of the Operational Creditor.

36. Operational Creditor has also filed affidavit wherein it is stated that after issuing the demand notice, he has not received any notice of dispute from the Corporate Debtor. It thus appears that the Operational Creditor has complied with the provision section 9(3)(b) and 9(3)(c) of the Insolvency & Bankruptcy Code.

37. Corporate Debtor has also objected that alleged amount of dues does not come within the definition of operational debt under section 5(20) or 5(21) of the Code.

Section 5(21) of the Insolvency Code provides that-

“Operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of 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.”

38. In this case, Operational Creditor has filed the Insolvency case on account of services rendered by the Contractor regarding construction of a hotel and the amount is due relating to the said contract, which comes under the definition of operational debt under the provision of section 5(21) of the Code.

39. Operational Creditor owes such debt which is due on the Corporate Debtor on account of services rendered by the Operational Creditor regarding the construction of a hotel. Thus, it is clear that all the ingredients of section 9 are satisfied, and Operational Creditor has proved that the Corporate Debtor has failed to clear off the dues of more than one lakh rupees, even after receiving the demand notice under section 8(1) of the Code. It is also clear that the Corporate Debtor has not raised any notice of dispute within ten days of receiving the demand notice, and for the first time, Corporate Debtor has raised dispute while submitting the reply and that too on flimsy grounds, unsupported by any document. Thus, it is clear that petition filed by the petitioner under section 9 of the Insolvency & Bankruptcy Code, 2016 deserved to be admitted.

ORDER

Application filed by the Operational Creditor under section 9 of the I&B Code for initiation of Corporate Insolvency Resolution Process is admitted.

Moratorium under section 14 of Insolvency & Bankruptcy Code shall apply in respect of following:

1(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 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 (54 of 2002);

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

(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 the 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 affect 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.”

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.”

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Necessary public announcement as per section 15 of the IBC, 2016 may be made. Let the copy of the order be sent to the Applicant / Financial Creditor as well as Corporate Debtor and I.R.P.

The Operational Creditor has not proposed any name for appointment as IRP and the company is in Patna. The Panel of Insolvency Professions (IPs) sent by the Insolvency and Bankruptcy Board of India for appointment as IRP or Liquidator contains only the name of the Professionals who belong to Odisha and West Bengal. In my opinion, Insolvency Professional must be appointed from the state of Bihar in this respect. Therefore, letter may be sent to the Insolvency & Bankruptcy Board of India for recommending the name of Interim Resolution Professional who can perform the duties of Insolvency Professionals in the state of Bihar. Copy of the order be immediately sent to the IBBI for urgent necessary action.

Let a copy of the order be communicated to the Corporate Debtor and Operational Creditor.

Discontinue 02-2-18

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(Jinān K.R.)

Member (Judicial)

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(V. P Singh)

Member (Judicial)

Signed on this, the 12th day of January, 2018.