

**NATIONAL COMPANY LAW TRIBUNAL
 “CHANDIGARH BENCH, CHANDIGARH”
 (Exercising powers of Adjudicating Authority under
 the Insolvency and Bankruptcy Code, 2016)**

CP (IB) No. 30/Chd/Hry/2019

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

In the matter of:

M/s Pawan Cargo Forwards (P) Ltd.,
 Pawan Imperia No. 518,
 MKN Road, Alandur,
 Chennai-600016

...Petitioner-Operational Creditor

Vs.

M/s Bestways Transport (India) Ltd.
 having its registered office at
 5NH/87NIT, Faridabad,
 Haryana

...Respondent-Corporate Debtor

Judgement delivered on: 26.03.2021

**Coram: Hon’ble Mr. Ajay Kumar Vatsavayi, Member (Judicial)
 Hon’ble Mr. Raghu Nayyar, Member (Technical)**

For the Operational Creditor: Mr. Abhilaksh Grover, Advocate

For the Corporate Debtor : Mr. Sanjeev Ghai, Advocate

Per: Ajay Kumar Vatsavayi, Member (Judicial)

JUDGMENT

This petition is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **Code**) read with Rule 6 of

the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as **Rules**) by M/s Pawan Cargo Forwards Pvt. Ltd. (**Operational Creditor**) for initiating the Corporate Insolvency Resolution Process (**CIRP**) in the case of M/s Bestways Transport (India) Ltd. (**Corporate Debtor**).

2. The corporate debtor was incorporated on 16.11.1983 as a Private Limited Company under the provisions of Companies Act, 2013. The CIN of the corporate debtor is U63090HR1983PTC016952. As per master data at page 32 of the petition, the registered office of the Corporate Debtor is 5 NH/87 NIT, Faridabad, Haryana. Therefore, the jurisdiction lies with this Bench of the Tribunal.

3. It is stated that the corporate debtor has approached the operational creditor in the year 2011 and booked several consignments with the operational creditor through its division office, i.e. M/s Gale Countrywide Movers, situated at Yerwada, Pune and against all valid and confirmed consignments for delivery at different places such as Delhi, Chennai and Calcutta. It is further stated that the operational creditor has rendered its services from time to time on credit basis, as usually practiced in the due course of business.

4. It is further submitted that the corporate debtor has acknowledged its liability towards operational creditor vide email dated 29.10.2012 and 18.11.2015, but however has failed to make any payment in respect of its

liability despite several reminders by the operational creditor. Copy of the e-mail dated 18.11.2015 is marked as Annexure P-8 of this petition.

5. As per Part IV of Form 1, the total amount due from the corporate debtor is ₹5,32,61,032 including 24% interest per annum, i.e. ₹2,99,95,502/- as on 01.03.2018. It is stated that the total debt has arisen on account of unpaid invoices raised during the period of 30.09.2011 to 15.05.2013 by the operational creditor in lieu of its services provided to the corporate debtor and the same are attached at Annexure P-11. It is also stated that the operational creditor has also maintained the ledger account of the corporate debtor and same is also a part of Annexure P-11 of the petition.

6. The demand notices are stated to be issued on 21.09.2015 & 25.10.2015 being Annexure P-6 of the petition. It is stated that the demand notice was accompanied by the computation of the total outstanding towards the corporate debtor commencing from 30.09.2011 till 15.05.2013 in the name of the corporate debtor wherein the corporate debtor was called upon to pay the outstanding amount of ₹4,02,95,390/- along with future interest @ 24% per annum from the date of notice till actual realization on the total amount of ₹4,02,95,390/- together with the notice fee of ₹15,000/- within 7 days of the receipt of this notice.

7. It is stated that the corporate debtor after the receipt of the above notices called the Counsel for the operational creditor and sought some time to make payments and thereafter, sent an email dated 18.11.2015 wherein the corporate debtor has admitted the said liability and to pay the interest on

the outstanding due. Copy of the email dated 18.11.2015 is annexed as Annexure P-8 of the petition.

8. The petition is signed by Mr. Sanjay Agarwal, Managing Director of the operational creditor, duly authorised vide Board Resolution dated 18.09.2015 (Annexure P-1 of the petition).

9. In Part III of Form 5, the operational creditor has not proposed the name of IRP.

10. Notice of the petition was directed to be issued to the corporate debtor on 24.01.2019 as to why this petition be not admitted.

11. The corporate debtor in its reply (Diary No. 7225 dated 17.12.2019) has submitted that the petition is liable to be dismissed as the email dated 18.11.2015 being projected as an admission of liability has not been sent by the then Managing Director of the corporate debtor but the same has been sent from the e-mail account of Mr. Dhananjay Mishra, an employee in the respondent- corporate debtor's company who has not been authorised by the then Managing Director of the Company to address any such e-mail in his name, nor on behalf of the corporate debtor without his approval. It is further stated that the aforesaid email is not an acknowledgement of liability on the part of the corporate debtor, as the same could not be considered as an acknowledgement of liability under the provisions of the Limitation Act, 1963, in any manner whatsoever. It is further submitted that the claim made in the instant petition is a time barred claim and is not tenable in law.

12. It is contended that the claim made in the instant petition pertains to the period from 30.09.2011 to 15.05.2013 and as far as the amount claimed as on 30.09.2011 is concerned, no invoice/bill number has been mentioned in the petition against the said amount and it has only been mentioned against the said amount as old pending. It is also submitted that the invoices dated 31.10.2012, 31.12.2012 and 15.05.2013 mentioned in the details of the claim in the petition are not reflected nor available in the accounts and the system of the respondent company and hence, are not genuine.

13. It is also submitted that the claims are very much prior to three years from the date of filing this CP i.e. 13.11.2018 and hence, could not be maintained or made in the petition as the invoices against the claim made in the instant petition are pertaining to the period ranging from 15.02.2012 to 15.10.2012, which was a time barred claim even prior to filing of the said petition in the High Court. The period of almost one year and nine months has elapsed between passing of the order dated 21.02.2017 by this Tribunal in the earlier petition and the date of filing of the present petition on 13.11.2018. It is also represented that even otherwise no amount is outstanding and payable towards the petitioner-operational creditor even against the invoices pertaining to the period from 15.02.2012 to 15.10.2012 and the amount claimed in the petition is vehemently denied.

14. It is further stated that the petitioner-operational creditor has claimed interest @ 24% per annum which is totally uncalled and untenable as there was no agreement entered into between the parties so as to charge

interest at this exorbitant rate of 24% per annum by the petitioner-operational creditor.

15. Heard Mr. Abhilaksh Grover, the learned counsel for the petitioner-operational creditor and Mr. Sanjeev Ghai, the learned counsel for the respondent-corporate debtor and perused the pleadings on record.

16. Mr. Abhilaksh Grover, the learned counsel for the petitioner-operational creditor while reiterating the averments in petition placed heavy reliance on Annexure P-8 e-mail dated 18.11.2015 for the purpose of admission of debt by the corporate debtor and for the purpose of extension of the period of limitation of the CP. The learned counsel for the petitioner further submits that the corporate debtor having failed to give any reply to the Annexure P-10 demand notice dated 01.03.2018 cannot be permitted to deny the debt or default.

17. The learned counsel for the petitioner placed reliance on the following decision in support of his submissions:-

i. Labdhi Enterprises vs. Baramati Agro Pvt. Limited, MANU/NL/0172/2017

18. On the other hand, Mr. Sanjeev Ghai, the learned counsel for the respondent-corporate debtor submits that the Annexure P-8 e-mail dated 18.11.2015 was not issued by any authorized representative of the corporate debtor and hence, cannot be taken as admission of debt by the corporate debtor. He further submits that even otherwise the said e-mail cannot be equated to an acknowledgment of debt. The learned counsel also submitted that since the petitioner failed to file the CP within the permissible period after

the winding up proceedings which were initially filed before the Hon'ble High Court of Punjab and Haryana and later transferred to this Tribunal and numbered as CP No. 236/2016, which were abated vide Annexure R-1 order dated 21.02.2017 of this Tribunal and hence, the instant CP is liable to be dismissed on that ground alone. The learned counsel further submitted that the claim made in the CP pertains to the year 2012 and the same was time barred.

19. The learned counsel for the respondent placed reliance on the following decisions in support of his submissions:-

- i. *V. Padmakumar vs. Stressed Assets Stabilisation Fund (SASF) & Anr., Company Appeal (AT) (Insolvency) No. 57 of 2020, dated 12.03.2020, NCLAT;*
- ii. *Invent Assets Securitization and Reconstruction Pvt. Ltd. vs. Xylon Electrotechnic Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 677 of 2020, dated 11.08.2020, NCLAT;*
- iii. *Jagdish Prasad Sarada (Suspended Managing Director of the Company) vs. Allahabad Bank, Company Appeal (AT) (Insolvency) No. 183 of 2020, dated 28.08.2020, NCLAT; and*
- iv. *Yogeshkumar Jashwantlal Thakkar vs. Indian Overseas Bank, CA No. 236/2020, dated 14.09.2020, [2020] ibclaw.in 78 NCLAT;*

20. Hon'ble Supreme Court in ***Mobilox Innovations Private Limited Versus Kirusa Software Private Limited (2018), 1 SCC 353*** held as under:-

"51. 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.”

The facts of the present case are being examined with reference to the judgment of the Hon’ble Supreme Court.

21. In view of the above referred decision in **Mobilox Innovations (Supra)**, it is to be seen whether the petitioner proved the debt and default in terms of the provisions of the Code and Regulations made thereunder. The respondent-corporate debtor has not disputed the relationship of the operational creditor and the corporate debtor between the petitioner and the respondent. It is also not in dispute that the respondent-corporate debtor has not given any reply to the Annexure P-10 demand notice dated 01.03.2018 issued by the petitioner-operational creditor demanding an amount of Rs.5,32,61,032/- which fell due as on 18.11.2015. It is also not in dispute that Annexure P-8 e-mail dated 18.11.2015 was issued on behalf of the corporate debtor confirming the debt of Rs.2,14,59,536/-. The corporate debtor, except contending that the author of the said Annexure P-8 e-mail dated 18.11.2015 did not have any authority to issue any such e-mail admitting the debt, has not denied the fact that the author of the said e-mail was very much in the employment of the corporate debtor. Therefore, it can be safely concluded that the respondent-corporate debtor admitted the liability on 18.11.2015. Once an admission is made by the corporate debtor with regard to the liability

towards the operational creditor, the same is required to be considered as an acknowledgment of debt and accordingly, it can be safely concluded that the instant CP filed on 13.11.2018 is well within the limitation period of three years from 18.11.2015 i.e. date of Annexure P-8 e-mail dated 18.11.2015. None of the decisions on which the learned counsel for the respondent placed reliance stated that the admission of debt made in an e-mail cannot be considered as an admission of debt and does not extend the period of limitation. Further, the ***Hon'ble NCLAT in M M Ramachandran vs. South Indian Bank Ltd. & others – Company Appeal (AT) (Insolvency) No. 1509/2019***, considered an e-mail as an acknowledgment of debt.

22. It is the settled principle of law that dismissal of earlier CP filed by operational creditor is not a bar for filing another CP in respect of the same debt, if the petitioner is able to prove the subsistence of a legally enforceable debt and if the subsequent CP is filed within the period of limitation.

23. In view of the above discussion, this petition deserves to be admitted.

24. The provisions of Section 9(5)(i) of the Code are as follows:-

“(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."*

25. In view of the above provisions, it could be seen that the application is complete in all aspects and also no objections are being raised to the completeness of the application filed under Section 9(2) of the Code. As discussed above, the operational debt remains unpaid and the operational creditor has attached its bank statements in support of such assertion marked as Annexure P-12 (Colly) of this application. The demand notice accompanied with copy of invoices, dated 01.03.2018 was duly served to the corporate debtor on 13.03.2018 as per the tracking report showing it as 'item delivered'. It is deposed on behalf of the operational creditor that the corporate debtor has not brought to the notice of the operational creditor existence of any dispute or pendency of suit or arbitration proceedings filed before the service of demand notice as defined under Section 5(6) read with Section 9(3)(b) of the Code. It is also deposed that the corporate debtor has failed to repay the unpaid operational debt as specified in the notice sent by the operational creditor.

26. In view of the satisfaction of the conditions provided for in Section 9(5)(i) of the Code, we admit the petition for initiation of CIRP in the case of

the corporate debtor M/s Pawan Cargo Forwards (P) Ltd. and direct moratorium and appointment of Interim Resolution Professional as below.

27. We declare the moratorium in terms of sub-section (1) of Section 14 of the Code, as under:-

- 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 Operational 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.

28. It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, shall not be terminated or suspended or interrupted during moratorium period. The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the

Central Government in consultation with any operational sector regulator and to a surety in a contract of guarantee to a corporate debtor.

29. The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

30. Under sub-section (4) of Section 9 of the Code, the operational creditor may propose the name of Resolution Professional to be appointed as Interim Resolution Professional but it is not obliged to do so. In the instant case also, the operational creditor has not proposed the name of any Resolution Professional to be appointed as Interim Resolution Professional. Section 16(3)(a) of the Code says that where the application for Corporate Insolvency Resolution Process is made by an operational creditor and –

- “a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;*
- b) x x x x x”*

31. Sub-section (4) of Section 16 says that the Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

32. In this regard a letter bearing File No.25/02/2021-NCLT dated 01.01.2021 has been received from the National Company Law Tribunal, New Delhi, forwarding therewith a copy of letter No. IP-12011/1/2020-IBBI/978/1290 dated 31.12.2020 along with the guidelines and the panel of resolution professionals approved for NCLT, Chandigarh Bench for appointment as IRP or Liquidator. The panel is valid for six months from January-June 2021. We select Mr. Khushvinder Singhal appearing at Serial No. 38 of the panel to be appointed as Interim Resolution Professional.

33. The Law Research Associate of this Tribunal has checked the credentials of Mr. Khushvinder Singhal and there is nothing adverse against him. In view of the above, we appoint Mr. Khushvinder Singhal, Registration No. IBBI/IPA-002/IP-N00888/2019-2020/12833, Mobile No. 99140-30030, E-mail: kvsinghal@gmail.com as the Interim Resolution Professional with the following directions: -

- i.) The term of appointment of Mr. Khushvinder Singhal shall be in accordance with the provisions of Section 16(5) of the Code;
- ii.) In terms of Section 17 of the Code, from the date of this appointment, the powers of the Board of Directors shall stand suspended and the management of the affairs shall vest with the Interim Resolution Professional and the officers and the managers of the Corporate Debtor shall

report to the Interim Resolution Professional, who shall be enjoined to exercise all the powers as are vested with Interim Resolution Professional and strictly perform all the duties as are enjoined on the Interim Resolution Professional under Section 18 and other relevant provisions of the Code, including taking control and custody of the assets over which the Corporate Debtor has ownership rights recorded in the balance sheet of the Corporate Debtor etc. as provided in Section 18 (1) (f) of the Code. The Interim Resolution Professional is directed to prepare a complete list of inventory of assets of the Corporate Debtor;

- iii.) The Interim Resolution Professional shall strictly act in accordance with the Code, all the rules framed thereunder by the Board or the Central Government and in accordance with the Code of Conduct governing his profession and as an Insolvency Professional with high standards of ethics and moral;
- iv.) The Interim Resolution Professional shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of

Section 13 (1) (b) of the Code read with Section 15 calling for the submission of claims against Corporate Debtor;

- v.) It is hereby directed that the Corporate Debtor, its Directors, personnel and the persons associated with the management shall extend all cooperation to the Interim Resolution Professional in managing the affairs of the Corporate Debtor as a going concern and extend all cooperation in accessing books and records as well as assets of the Corporate Debtor;
- vi.) The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the operational position of the Corporate Debtor, constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days of filing the report of constitution of the Committee; and
- vii.) The Interim Resolution Professional is directed to send regular progress report to this Tribunal every fortnight.

A copy of this order be communicated to both the parties. The learned counsel for the petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send copy

of this order to the Interim Resolution Professional at his email address forthwith.

Sd/-
(Raghu Nayyar)
Member (Technical)

Sd/-
(Ajay Kumar Vatsavayi)
Member (Judicial)

March 26th, 2021
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