

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IBA/146/2020

*(filed 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 M/s. **Southern Investments Private Limited***

M/s. Baiju Cheriyan,
473, F-15, Divyam Flats,
1st Main Road,
Mugappair,
Chennai 600 037

... Operational Creditor

-Vs-

M/s. Southern Investments Private Limited,
Montieth Court,
65, Montieth Road,
Egmore,
Chennai 600 008.

... Corporate Debtor

Order pronounced on 15th March 2021

CORAM :

**R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)**

*For Operational Creditor : C. Suraj, Advocate
For Corporate Debtor : None present*

ORDER

Per: ANIL KUMAR B, MEMBER (TECHNICAL)

1. This is an Application filed under Section 9 of Insolvency and Bankruptcy Code, 2016 (*hereinafter referred to as "IBC,2016"*) by one **Mr. Baiju Cheriyan** (*hereinafter referred as Operational*

Creditor) seeking thereof to initiate Corporate Insolvency Resolution Process (CIRP) against **M/s. Southern Investments Private Limited** (*hereinafter called as Corporate Debtor*).

2. From Part I of the Application, it is seen that this Application has been filed by the Applicant in the capacity as an individual / Operational Creditor. From Part II of the Application, it is seen that the Corporate Debtor is a Private Limited Company incorporated on 01.04.1998 having Corporate Identification Number CIN : U45201TN1998PTC040238 and as per the Application the Registered Office address of the Corporate Debtor is stated to be situated at Montieth Court, 65, Montieth Road, Egmore, Chennai 600 008.

3. Part III of the Application discloses the fact that Applicant has not proposed the name of an Interim Resolution Professional (IRP) and left it to the discretion of this Tribunal to appoint the IRP. From Part IV of the Application it is seen that the Operational Creditor has claimed a sum of Rs.26,68,752/- as due and payable by the Corporate Debtor.

4. Part V of the Application discloses the list of documents filed by the Operational Creditor in order to prove the operational debt.

The following are the list of documents which are filed along with the Application;

- Offer Letter dated 06.07.1992 issued to the Operational Creditor by the Corporate Debtor.
- Transfer order issued by the Corporate Debtor vide letter dated 17.10.2000 to the Operational Creditor.
- Resignation Letter issued by the Operational Creditor vide email dated 31.07.2017.
- Acceptance of Resignation by the Corporate Debtor vide email dated 31.07.2017.
- Salary slips of the Operational Creditor issued by the Corporate Debtor for the month of June 2017.
- Letter dated 13.09.2017 issued by the Corporate Debtor requesting the Operational Creditor to contact the accounts department for full and final settlement of accounts due to the Operational Creditor.
- Experience Letter dated 30.09.2017 of the Operational Creditor as issued by the Corporate Debtor.
- Full and Final Settlement Form dated 17.10.2017 issued by the Corporate Debtor.
- Gratuity Order dated 20.07.2018 passed by the Deputy Commissioner of Labour.

5. The Learned Counsel for the Operational Creditor submits that based upon offer letter issued by the Corporate Debtor on 06.07.1992, the Operational Creditor joined as an employee of the Corporate Debtor as a 'Site Supervisor' on 17.08.1992 at the Cochin Office of the Corporate Debtor. Thereafter, it is submitted

that the Operational Creditor was performing his duties and was promoted during various stages of his career and as such the basic pay and other emoluments of the Operational Creditor was revised on a regular basis. On 01.11.2000, the Operational Creditor was transferred from Cochin Branch to Chennai Branch of the Corporate Debtor.

6. It is submitted by Learned Counsel for Operational Creditor that on 31.07.2017, the Operational Creditor has submitted his resignation to the Corporate Debtor and sought to be relieved from the employment. It was submitted that at the time of his resignation the Operational Creditor was holding the post of 'Branch Chief Engineer' and was entitled for a gross pay of Rs.84,002/- per month

7. It was submitted that the resignation letter dated 31.07.2017 issued by the Operational Creditor was accepted by the Corporate Debtor through email on 31.07.2017 itself and it was also informed that the Operational Creditor would be relieved on 30.09.2017 after completing necessary formalities.

8. The Operational Creditor was relieved from service on 30.09.2017 and upon contacting the Accounts Department of the Corporate Debtor, a full and final settlement for a sum of

Rs.22,04,333/- was found to be due and was duly approved by the said Accounts Department by their letter dated 17.10.2017 which was signed and handed over to the Operational Creditor.

9. It was submitted by the Operational Creditor that even after arriving at a final settlement for a sum of Rs.22,04,333/- which was duly approved by the Accounts Department of the Corporate Debtor by their letter dated 17.10.2017, the Corporate Debtor has not disbursed the said sum to the Operational Creditor.

10. It was submitted that the Operational Creditor has not been paid salary from the month of January 2017 till the date of his resignation. Even after representations having been made by the Operational Creditor to the Corporate Debtor, the Corporate Debtor had failed to settle the full and final claim made by the Operational Creditor.

11. It is further brought to the notice of this Tribunal that Operational Creditor has preferred an Application before the Deputy Commissioner of Labour vide PG/61/2018 and the Learned Deputy Commissioner of Labour has passed an order dated 20.07.2018 by allowing the said Petition and directed the Corporate Debtor to pay a sum of Rs.7,56,202/- with the interest @ 10% from 01.01.2017 till the date of realisation.

12. It was submitted that the Corporate Debtor even failed to make this payment to the Operational Creditor in accordance with the said order. The Operational Creditor has issued a Demand Notice to the Corporate Debtor, as mandated under Section 8 of the IBC, 2016 on 12.12.2019. However, the same got returned with an endorsement as "door locked". However, it is submitted that Demand Notice, addressed to the Managing Director of the Corporate Debtor has been delivered.

13. It was submitted that since the Operational Creditor has not received any reply from the Operational Creditor, he was constrained to present this Application before this Tribunal. It is also seen from the record that the Operational Creditor has filed an Affidavit as stipulated under Section 9(3)(b) of IBC, 2016 disclosing the said fact. In the circumstances, Learned Counsel for Operational Creditor has submitted that debt and default on the part of the Corporate Debtor is proved and as such prayed for initiation of the CIRP against the Corporate Debtor.

14. In relation to the Corporate Debtor it is seen from the records that the matter first came up for hearing on 18.09.2020 before this Tribunal and there was no representation on behalf of the Respondent and this Tribunal vide order dated 06.11.2020

permitted the Petitioner to serve a fresh notice to Respondent and also upon request being made by the Petitioner to serve notice to the Counsels for the Corporate Debtor who are representing the Corporate Debtor at different forums, this Tribunal accordingly directed the Petitioner and to file affidavit of service in this regard.

15. In compliance of the said order, it is seen from the record of the proceedings vide order dated 10.12.2020 that notice was taken to the Directors of the Company as reflected in the Master Data as mentioned in the order dated 06.11.2020. In relation to the Directors, it is represented by Learned Counsel for the Applicant that save R1 Director of the Company, notice which was sent to all other Directors, the consignment has been returned with the endorsement 'unclaimed'.

16. In this regard it is relevant to refer to the decision of the Hon'ble NCLAT in the matter of **Shri Bijay Pratap Singh –Vs- Unimax International and another** in *Company Appeal (AT) (Insolvency) No. 1273 of 2019*, wherein at para 37 it has held as follows;

"37. One of the essential features for consideration of an Application under Section 9 of I & B Code is service of notice. A mere perusal of the paragraph 11 of the Impugned Order passed by the Adjudicating Authority patently indicates that a perusal of the pleadings showed that the proper 'service' was effected on the registered office of the 2nd Respondent/ Corporate Debtor situated at D-410, Pocket 16, Sector VII,

Rohini, New Delhi – 110085. Also, it was observed by the Adjudicating Authority that there was no change in the address of the 'Corporate Debtor' in the 'Ministry of Corporate Affairs Record' which also shows the same address. Even the Resolution passed by the 'Corporate Debtor' on 27.03.2019 had shown the same 'Registered Office' address. Therefore, the Adjudicating Authority had very rightly adverted 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 in and by which the 'service' is to be effected on the 'Registered Office' address and that process was carried out. Therefore, this Tribunal holds that it was 'Sufficient service' of the 'Demand Notice'. As such, the plea taken on behalf of the Appellant that there was no service effected upon the 'Corporate Debtor' is not acceded to by this Tribunal. The other plea taken that there was no service by hand or electronic mail service to the 'Corporate Debtor' relegates to the background and it pales into insignificance because of the fact that failure/omission to effect service by hand or electronic mail service is not fatal to the instant case."

17. Further, the Hon'ble NCLAT in the matter of **Ashok Agarwal –Vs- Amitex Polymers Private Limited** passed in *Company Appeal (AT) (Insolvency) No.608 of 2020* dated 5th February 2021, in para 35 has held as follows;

"35. In view of the fact that service of notice under section 8 of the 'The Insolvency and Bankruptcy Code 2016', Respondent/Company at its official e-mail ID as available in the web site portal is a valid service, it is held by this Tribunal to be a valid and proper service upon the Respondent/Corporate Debtor, in the eye of law.

18. In the said circumstances as per the decision of the Hon'ble NCLAT, the service effected by the Operational Creditor has to be considered as to be 'Deemed service' and based on the notice delivered to the Directors of the Company as per the order of this

Tribunal dated 10.12.2020, this Tribunal holds that the service of notice in relation to the Corporate Debtor is complete and since there was no representation on behalf of the Corporate Debtor, we are constrained to proceed in this matter in the absence of the Corporate Debtor.

19. From the submission made by Learned Counsel for the Operational Creditor and from the documents placed in support of the claim being made in Part IV of the Application, it is seen that the claim as made by the Operational Creditor is admitted by the Corporate Debtor and there is no dispute in relation to the same. Further, the said debt fell due on 31.07.2017 and the present Application being filed before this Tribunal on 06.01.2020 and hence the present Application falls well within the period of limitation.

20. Thus the Operational Creditor has proved the existence of an 'Operational debt' and its 'default' on the part of the Corporate Debtor and in the absence of any objection being raised by the Corporate Debtor, we are of the considered view that the Corporate Debtor has committed 'default' in the repayment of the 'Operational debt' to the Operational Creditor and in the said circumstances we are constrained to initiate the CIRP in relation to the Corporate Debtor.

21. Further in relation to the pecuniary jurisdiction enhanced from Rs.1 lakh to Rs. 1 crore on and from 24.03.2020, it is seen the present Application was filed before this Tribunal on 06.01.2020 and as such this Tribunal has got pecuniary jurisdiction to entertain the present Application.

22. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition, as filed by the Operational Creditor, is required to be admitted under Section 9(5) of the IBC, 2016. Since the Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by Insolvency and Bankruptcy Board of India applicable for the period between January – June 2021 appoints **Y.N. Ramachandran**, with Registration No. *IBBI/IPA-001/IP-P01764/2019–2020/12722* (*email id:- ynramachandran@gmail.com*) as the “Interim Resolution Professional” subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as

envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

- a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent in respect of its property including any action under the Securitization 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 respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that

there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

23. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(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 moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

- (a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
- (b) a surety in a contract of guarantee to a corporate debtor.

24. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

- (4) The order of moratorium shall have effect from 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, as the case may be.

25. The Operational Creditor is directed to pay a sum of **Rs.2,00,000/-** (*Rupees Two Lakhs Only*) to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

26. Based on the above terms, the Application stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the

Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

-Sd-

ANIL KUMAR B
MEMBER (TECHNICAL)

-Sd-

R. VARADHARAJAN
MEMBER (JUDICIAL)

Raymond