

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

Before Shri Jinan K.R., Hon'ble Member (J)

**I.A. (IB) No. 602/KB/2020 and
C.P. (I.B) No.767/KB/2020**

In the matter of:

An application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016;

-And-

In the matter of:

Universal International Creation Limited, having its office at Flat 609A, 6/F, Fookcheong Building, 63, Hoi Yuen Road, Kwun Tong, Kowloon, Hong Kong.

... **Operational Creditor**

-Versus-

Sarga Hotel Private Limited,(Previously named and styled as "Shristi Hotel Private Limited"), having its registered office at Plot No.X-1, 2 & 3, Block- EP, Sector - V, Salt Lake City, Kolkata, West Bengal-700091;

.... **Corporate Debtor**

Counsel attended:

For the Operational Creditor

1. Mr. Joy Saha, Senior Advocate
2. Mr. Aishwarya Kumar Awasthi, Advocate

For the Corporate Debtor

1. Mr. Supriyo Gole (AOR)
2. Mr. Zeeshan Haque, Advocate

**Date of hearing : 12th August, 2020
Date of pronouncing the order : 12th August, 2020**

ORDER

Per Shri Jinan K.R., Hon'ble Member (J).

1. Universal International Creation Limited, an operational creditor (in short OC) having its office at Hong Kong filed an application under section 9 of the Insolvency and Bankruptcy Code, 2016 (in short, I&B Code), read with Rule 11 of the National Company Law Tribunal Rules, 2016, against M/s. Sarga Hotel Private Limited, the Corporate Debtor (in short CD) for not making the payment of \$324,021.71 (Three Hundred Twenty Four Thousand and Twenty One Dollars And Seventy One Cents Only), which has become due and payable by the Corporate Debtor to the Operational Creditor, which is equivalent to Rs.2,30,06,458.39 (Rupees Two Crore Thirty Lakhs Six Thousand Four Hundred and Fifty Eight and Thirty Nine Paise Only). Pending the application the OC has filed an interim application I.A. (IB) No. 602/KB/2020 for an early hearing apprehending encumbering the assets of the CD so as to defeat the relief if any may be granted in favour of the OC and Ld. Sr.Counsel Mr. Mr. Joy Saha, pressed for passing an order of injunction restraining the Corporate Debtor and/or its Officers and/or any third party from dealing/ alienating / transferring/ selling the assets of the Corporate Debtor during pendency of this application.

2. This IA and CP was moved on today as I permitted to mention through video conference hearing, since the work of the Tribunal was disrupted due to Covid-19 pandemic and consequential lockdown in West Bengal up to 31st August ,2020. Today when this matter was taken up for hearing the Ld.Counsel Mr. Zeeshan Haque, submits that the CD is not selling or transferring its assets in question and that an order of injunction cannot be granted in a case of this nature since an application u/s.9 of the Code is also not a recovery proceeding. According to him the operational creditor in the instant case is resorting to coercive tactics by filing application under section 9 of IBC 2016 to recover their dues and such an attempt is not permissible under section 9 of the Code. However, by filing written notes of defence, the CD fairly admitted the claim of the OC and when asked for his readiness in hearing the CP as such on merit the Ld. Counsel for the CD fairly agrees with me and accordingly instead of hearing the IA, I heard the CP on merit.

3. The Ld.Sr.Counsel Mr. Joy Saha, for the applicant takes me to Form – 5 in order to satisfy me that all the requirements under section 9(3) of the Code has been complied along with supporting documents annexed to the application as Annexure – A to H. He submitted that in and around 2014, as requested by the Corporate Debtor, the Operational Creditor supplied marble slabs of certain dimension for use by the Corporate Debtor in its 5 Star hotel project in Rajarhat, Kolkata and the price was settled through negotiation, which was accepted by the Corporate Debtor. Thereafter, the Corporate Debtor had issued a Purchase Order to the Operational Creditor. Pursuant to which, the Operational Creditor had supplied the aforesaid marbles to the Corporate Debtor and the same supplies were accepted by the corporate debtor without any dispute regarding the materials supplied.

4. He further submitted that the Operational Creditor has successfully completed and fulfilled all its obligations under the aforementioned Purchase Orders without any dispute being raised by the Corporate Debtor in this regard. Running and continuous accounts were maintained by the Operational Creditor and Corporate Debtor and part-payments were made against the invoices/bills raised for the same and the last payment was made by the Corporate Debtor on June 07, 2017. However, after adjusting the payments received so far by the Operational Creditor from the Corporate Debtor, a principal amount of \$ 324, 021.71 (Three Hundred Twenty Four Thousand And Twenty One Dollars And Seventy One Cents Only) remains due and payable by the Corporate Debtor to the Operational Creditor towards certain unpaid invoices and in rupees, it amounts to Rs.2,30,06,458.39 (Rupees Two Crore Thirty Lakhs Six Thousand Four Hundred and Fifty Eight and Thirty Nine Paise Only) being the exchange value of (foreign currency denominated).

5. According to him, despite a number of verbal as well as written requests made by the Operational Creditor for payment of the above mentioned principal amount, the corporate debtor has not paid the same. Corporate Debtor had acknowledged its liability to pay the aforesaid

outstanding operational debt on multiple occasions vide letters dated 9th January, 2018 and 10th January 2019 and therefore claim is within the period of limitation.

6. He also highlighted the demand Notice dated 19th December, 2019 under section 8 of IBC issued to the Corporate Debtor for payment of outstanding dues, which is received by the corporate debtor on 20th December, 2019 as is evident from the reply letter dated 8th January, 2020. In reply to the demand notice, the corporate debtor replied that they are not in a position to pay the outstanding dues and need some more time. He also takes me to the demand notice annexed with the application as Annexure "F".

7. The Ld. Sr.Counsel further submitted that the Corporate Debtor is trying to sell and/or transfer and/or encumber its assets and create third party rights in order to pay off some of its elected creditors, to the exclusion of payment of the debt payable by it to the Operational Creditor and the Operational Creditor duly communicated its concern in relation thereto but the same was not satisfactorily replied by the Corporate Debtor and thereby he pressed for passing an order of injunction. However, he placed reliance on various correspondence marked as Annexure G for proving admission of the claim of the OC by the CD. Upon the above said submission he prays for passing an order of admission under section 9 of the Code.

8. Ld.Counsel for the CD, Mr. Zeeshan Haque, has submitted that they have accepted the claim of the operational creditor and admitted the outstanding dues but due to financial crunch, they have not been able to make payment. They have requested for some more time. According to him the corporate debtor runs a hotel and from the beginning of 2019, they are facing a liquidity crunch, for which it has defaulted in making payment of the outstanding dues to the operational creditor. Corporate debtor was trying to arrange for funds to clear the dues of the Operational Creditor. However, all efforts of the corporate debtor to arrange for funds were unsuccessful and the dues remained unpaid. He further stated that the corporate debtor is not selling or transferring its assets in question. This is also not a recovery proceeding. The operational creditor in the instant case is

resorting to coercive tactics by filing application under section 9 of IBC 2016 to recover their dues, which is not permissible and which is not the objective of IBC, 2016. Thus, this Hon'ble Tribunal should not entertain the petition as this is not a recovery proceeding.

9. Having heard the Ld.Counsel on both sides and upon perusal of the application and the documents, I am satisfied that the OC has succeeded in placing all the relevant documents so as to comply with the requirements to be meted out u/s.9 (3) of the Code. Pressing for an order of injunction in a case of this nature does not by itself indicate that this application was filed by the OC for recovery of money found admittedly due to the OC. Therefore the submission that the intention on the side of the OC is not to initiate CIRP but to initiate recovery proceedings is devoid of any merit. The application therefore is perfectly maintainable u/s. 9 of the Code.

10. Coming to the default, and the CD liability to pay the amount as demanded by the OC here in this case no dispute. On the other hand the admitted correspondence letters (Annexure- G) exchanged in between the OC and the CD, proves that the amount as claimed by the OC is due and payable by the CD. The claim of the OC is also not barred by limitation.

11. To prove that the applicant who filed this application has the authority to move like the application in hand the applicant has produced the copies of board resolution authorizing the applicant to represent the Company and to file an application of this nature as Annexure C. Copy of Demand Notice dated 19th December 2019 is marked as Annexure "E". Its reply by the corporate debtor and the invoices issued in the name of Corporate Debtor have also been annexed with it. An affidavit under Section 9(3)(b) to the effect that there is no notice given by the CD, Bank certificate and statement of bank account Annexure-H, written communication from the interim Resolution Professional in Form-2 in Annexure-D have also been produced for my perusal. Therefore, the application is complete, there is no payment of unpaid operational debt despite receipt of the demand notice, and there is no disciplinary proceeding pending against the insolvency resolution professional.

12. In view of the matter, this application deserves an order of admission under section 9 of the Code. Accordingly, the application is admitted upon the following Orders:-

ORDER

i. The application filed by the Operational Creditor under Section 8 and 9 of the Insolvency & Bankruptcy Code, 2016 is hereby admitted for initiating the Corporate Resolution Process against Sarga Hotel Private Limited,(Previously named and styled as “Shristi Hotel Private Limited”).

ii. I hereby declare a Moratorium and public announcement in accordance with Sections 13 and 15 of the Insolvency & Bankruptcy Code, 2016.

iii. The moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The Interim Resolution Professional shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- 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.
- v.** 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.
- vi.** 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.
- vii.** The order of moratorium shall have effect from the date of admission till the completion of the Corporate Insolvency Resolution Process.
- viii.** 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 Sec.33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix.** Necessary public announcement as per Section 15 of the IBC, 2016 may be made.
- x.** Ms. Savita Agarwal (Mob. No. 9831634214) of 16A, Shakespeare Sarani, New B.K. Market, 5th floor, Kolkata- 700 001, Email no. Savita_22@hotmail.com is appointed as Interim Resolution Professional registered with the ICSI Insolvency Professionals Agency having Registration No.IBBI/IPA-001/IP-P00101/2017-18/10201 as Interim Resolution Professional for ascertaining the particulars of creditors and convening a meeting of Committee of Creditors for evolving a resolution plan.
- xi.** The Interim Resolution Professional/Resolution Professional to conduct CIRP of the Corporate Debtor as per timeline prescribed under Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- xii.** The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xiii. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor and to the Interim Resolution Professional by Speed Post as well as through email.

xiv. List the matter on 19/09/2020 for filing of Progress Report in case the lockdown is lifted. If not, submit progress reports periodically by e filing.

13. The Registry is directed to send e-mail copies of the order forthwith to all the parties and to the IRP.

14. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Jinan K.R.)

Member(J)

Signed on this, the 12th day of August, 2020.

J