

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

CP (IB) No.136/Chd/Hry/2018

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

In the matter of:

M/s Ashok Kumar and Brothers, having Registered Office at 29, Anaj Mandi,
 Dhand, Kaithal, Haryana- 136020

... Petitioner-Operational Creditor

Versus

K.T.C Foods Private Limited, having Registered Office at 5 Milestone, Karnal
 Road, Nissing, Haryana- 132024

...Respondent-Corporate Debtor

Judgment delivered on 29.08.2018.

**Coram: HON’BLE MR. JUSTICE R.P.NAGRATH, MEMBER (JUDICIAL)
 HON’BLE MR. PRADEEP R.SETHI, MEMBER (TECHNICAL)**

For the Petitioner : Mr. Rakesh Kumar, Advocate

For the Respondent : 1) Mr. Anand Chhibbar, Senior Advocate
 2) Mr. Vaibhav Sahni, Advocate
 3) Mr. Mast Ram, Resolution Professional

Per: R.P.Nagrath, Member (Judicial):

JUDGMENT (ORAL)

This petition has been filed by M/s Ashok Kumar and Brothers,
 the Operational Creditor under Section 9 of the Insolvency and Bankruptcy
 Code, 2016 (for short to be referred hereinafter as the ‘Code’) for initiating
 Insolvency Resolution Process against the respondent-Corporate Debtor.
 The Operational Creditor is a proprietorship concern and Mr. Ashok Kumar is

the Sole Proprietor. The application has been filed in Form-5, as prescribed in Rule 6(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity the 'Rules'). The contents of the application are supported by the affidavit of Mr. Ashok Kumar.

2. The respondent-Corporate Debtor was incorporated on 17.01.2012 under the Companies Act, 1956, and has its authorized share capital of ₹ 25,00,00,00/- and the paid up capital of ₹ 17,35,76,200/-. The Registered Office of the respondent-Corporate Debtor is at Nissing in District Karnal, in the State of Haryana. The matter, therefore, falls within the territorial jurisdiction of this Tribunal.

3. It is stated that the petitioner-Operational Creditor was regularly supplying paddy to the Corporate Debtor from the year 2012 and the last such consignment was delivered on 09.11.2015. The Corporate Debtor had been making payments partly and since April, 2017, the payments became irregular and in small amounts. The Corporate Debtor even issued a cheque dated 30.12.2017 for an amount of ₹ 20,00,000/- which on presentation to the bank bounced and a dishonour memo dated 28.03.2018 was issued by the bank. The last payment made by the Corporate Debtor was on 04.04.2018 to the tune of ₹ 5,00,000/- and therefore, it is contended by the learned counsel for the petitioner that the instant petition is within limitation.

4. The petitioner has also attached the ledger account of the respondent, being maintained by the petitioner in the regular course of business. Copy of the same from the year 2014 to 2018 is at Annexure 6

along with copy of the audit reports for the year 2014-15 and 2015-16 [Annexure 7 (Colly)].

5. It is further alleged that the Corporate Debtor defaulted in making payment of the amount of ₹ 3,43,21,069/-. The last date on which the default occurred is 04.04.2018 when part payment was made. The total amount claimed to be in default is ₹ 5,49,73,699/-, which includes the interest amounting to ₹ 2,06,52,630/- @ 19.8% per annum.

6. The petitioner sent a demand notice [Annexure 9 (Colly)] dated 16.04.2018 in Form-3, making the demand of the aforesaid outstanding amount inclusive of the interest. Along with demand notice, the invoices, copies of Form L-I, Form L-II issued by the Commission Agent and Cess respectively and Ledger Account, were also sent. The Notice in Form 4 of the even date was also sent along with the notice in Form 3. It is further submitted that Corrigendum dated 01.05.2018 in Form No.3 and 4 were again sent with the requisite documents which are at Page Nos. 268 to 277 of the paper book. The learned counsel for the petitioner submits that the Corrigendum was issued because in the earlier notice, the amount of interest was not added. This notice was sent by speed post as per postal receipt (Page 391 of the paper book) and delivered to the respondent-Corporate Debtor as per tracking report which is at Page No. 391 of the paper book.

7. There is also the affidavit of the sole proprietor of the Operational Creditor at Page No. 142 of the paper book, categorically stating that there is no dispute of the unpaid operational debt pending between the parties before

the issuance of the demand notice in order to comply with the requirement of Section 9(3)(b) of the Code.

8. When the matter was listed on 25.05.2018, notice was directed to be issued to respondent-Corporate Debtor. The petitioner at the same time was also directed to file the ledger account of the Corporate Debtor maintained in the books of account of the petitioner upto 31.03.2017 with reconciliation, if any, with the ledger account filed along with the petition.

9. The petitioner filed the affidavit of compliance, vide Diary No.2429 dated 11.07.2018 by filing the copy of the ledger account, as directed, and the affidavit also contains the statement about service to the respondent. With this affidavit, the petitioner also filed copy of the reply dated 11.05.2018, [Annexure 3 (Colly)], received from the Corporate Debtor. It is stated in Para No. 5 of this affidavit that copy of the reply to the demand notice sent by the respondent was not filed with the petition as the same was received at the Delhi Office of the counsel after sending the petition to be filed before the Tribunal at Chandigarh. Learned counsel for the petitioner, however, submits that the reply to the notice is dated 11.05.2018, but the same was received later on.

10. Appearance on behalf of the respondent was made on 16.07.2018 and adjournment was requested to file reply with the submission that certain police complaints were also filed against the respondent. When the matter was listed on 09.08.2018, learned senior counsel for the respondent stated that the respondent is not to contest the petition and therefore, reply/objections was not to be filed.

11. We have heard learned counsel for the petitioner, learned senior counsel for the respondent assisted by Mr. Vaibhav Sahni, Advocate, and perused the record quite carefully.

12. The petition under Section 9 of the Code can be filed after serving of the demand notice issued under Section 8 of the said Code. The application has to be filed in Form 5, as prescribed in Rule 6(1) of the Code in order to comply with the requirement of Section 9(2) of the Code.

13. The petitioner has also furnished his affidavit dated 14.05.2018 along with the petitioner and that there is no dispute of unpaid operational debt pending between the parties before issuance of the demand notice in order to comply with the requirements of Section 9(3) (b) of the Code.

14. The petitioner has also filed certificates from Oriental Bank of Commerce and Central Bank of India, where the petitioner is maintaining the account and the amounts from the Corporate Debtor are being received. These certificates are dated 12.04.2018 [Annexure 2 (Colly)]. As per the certificate issued by the Oriental Bank of Commerce, the last payment was received from the respondent-Corporate Debtor on 20.08.2016 in the account of the operational creditor and no payment was received thereafter. As per the Certificate of the Central Bank of India, an amount of ₹ 5,00,000/- was credited from the account of the respondent-Corporate Debtor in the account of the petitioner for the last time. Learned counsel for the petitioner referred to Page No. 25 of the account statement of the petitioner, maintained by the Central Bank of India, showing the last payment was received from the respondent on 04.04.2018. This is also the allegation of fact set up by the

petitioner in the application form. With the filing of above bank certificates the petitioner is shown to have complied with the requirement of Section 9(3)(e) of the Code.

15. The amount of outstanding debt, which the petitioner has claimed to be in default is supported from the ledger account of the respondent, being maintained by the petitioner, which is attached as Annexure 2 with Additional Affidavit filed vide Diary No. 2429 dated 11.07.2018. The amount outstanding as on 31.06.2018 is ₹ 3,43,21,069/-, which is tallying with the statement made in Column No.I of Part IV of the application form. Apart from that, the petitioner has also filed copies of all the invoices under which the transactions between the parties took place. The index of all these invoices is at Page No. 57 and 58 of the paper book. The petitioner has also filed the computation of the outstanding amount which is Annexure I at Page 278 of the paper book. In the end, amount of interest has also been added, which shows that the amount of interest was not being added in the ledger account in the regular course.

16. The only question to be determined is whether there is existence of dispute between the parties. No such issue has been raised on behalf of the respondent during course of arguments nor reply to the instant petition is filed. Rather it is submitted by learned senior counsel for the respondent that respondent is not to contest the instant petition.

17. In any case, we have also perused the reply dated 11.05.2018 (Annexure 3) of the respondent to the demand notice attached with the affidavit filed vide Diary No. 2429 dated 11.07.2018. It is stated that the

amount as claimed is disputed and no amount as demanded is due. It was also stated that as per record of the respondent-company, no amount is payable to the petitioner. The demand notice is said to have been issued with mala fide and ulterior motive. It has also been alleged that the petitioner in fact defaulted as it abandoned the supply of paddy midway. It is further stated that the quality of the paddy was substandard for which the respondent-company had to incur additional expenditure.

18. The learned counsel for the petitioner vehemently contended and rightly so, that there is no reference in this reply of the fact whether there was any correspondence from the Corporate Debtor raising any dispute before the receipt of the demand notice, so as to constitute a pre-existing dispute. Even no such issue was raised by Learned Senior Counsel for the respondent during the course of arguments.

19. Reference can be made to a principle of law laid down by the Hon'ble Supreme Court in **Mobilox Innovations Private Limited Versus Kirusa Software Private Limited (2018), 1 SCC 353**, in which, it was 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.”

20. Though the petitioner being the Operational Creditor is not obliged to propose the name of the Resolution Professional to be appointed as Interim Resolution Professional, but in the instant case, the petitioner has proposed the name of Mr. Mast Ram, the Registered Resolution Professional, having Registration No. IBBI/IPA-002/IP-N00211/2017-18/10664. Mr. Mast Ram is also present today. His written communication is at Annexure 11, dated 14.05.2018. He has furnished the required information as mentioned in the form, giving his consent for being appointed as such. Presently, he is serving as Resolution Professional in one case. It is also certified that there is no disciplinary proceedings pending against him with the Insolvency and Bankruptcy Board of India or the Indian Institute of Insolvency Professionals of ICSI.

21. As all the requirements of Section 9 of the Code have been fulfilled, we find that the application for initiation of Corporate Insolvency Resolution Process ('CIRP') against the respondent-corporate debtor deserves to be admitted.

22. Before parting with judgment, we must deal with the claim of ₹2,06,52,630/- towards interest @19.8% per annum. The petitioner has filed the ledger account for the year 2014 to 13.06.2018 showing the outstanding

balance of ₹ 3,43,21,069/- and there was no entry reflecting the addition of interest. The petitioner seems to have relied upon the clause of interest for delayed payment @ 1.65% mentioned at the foot of each bill. However, keeping in view the fact that the ledger documents do not contain any entry of addition of interest having accrued over the amount in default the same cannot be accepted. However, being the default in respect of the commercial transaction, we allow the interest @ 9% per annum over the amount in default from the date of last payment made on 04.04.2018. In case the petitioner has to still claim higher rate of interest, it may avail remedy before the Civil Court.

23. Accordingly, the petition is admitted and moratorium is passed under 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 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 corporate debtor.

24. 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 financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

25. 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 pass an order for liquidation of corporate debtor under Section 33 as the case may be.

26. The matter be listed on 07.09.2018 for passing of the formal order of appointment of the Interim Resolution Professional.

Copy of this order be communicated to both the parties.

Sd/-
(Pradeep R. Sethi)
Member (Technical)

Sd/-
(Justice R.P. Nagrath)
Member (Judicial)

August 29, 2018
Mohit Kumar