

**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI**  
**SPECIAL PRINCIPAL BENCH**

**(IB)-641(ND)/2018**

**IN THE MATTER OF:**

M/s. Lion Services Limited .....Operational Creditor/Petitioner  
v.  
M/s. Aura Management Services Private Limited  
.....Corporate Debtor/Respondent

**Judgement delivered on 15.01.2019**

**Coram:**

**CHIEF JUSTICE (RTD.) M.M. KUMAR**  
**Hon'ble President**

**SHRI S.K. MOHAPATRA**  
**Hon'ble Member (T)**

**PRESENTS**

For the Operational Creditor: Ms. Seema Tiwari, Advocate  
For the Operational Debtor : Mr. Gagan Gupta, Advocate

**M.M. KUMAR, PRESIDENT**

**JUDGMENT**

The 'Operational Creditor'-M/s. Lion Services Limited has filed the instant petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 with a prayer to trigger the Corporate Insolvency Resolution Process in the matter of M/s Aura Management Services Private Limited. The Operational Creditor is a company incorporated under the Companies Act, 1956 and it



is based at New Delhi. Its identification number is U74140DL1987PLC030046.

2. Dr. Jatinder Pal Singh Bakshi, Director of the Operational Creditor has been authorized by Board Resolution passed in the Minutes of the Meeting of the Board of Directors held on 04.04.2018 (pg No. 14) to submit and sign the petition.

3. The 'Corporate Debtor'-M/s. Aura Management Services Private Limited' was incorporated on 18.12.2006. Its identification number is U74140DL2006PTC156648. Its authorized share capital is 1,00,000/- and paid up share capital is Rs. 1,00,000/-. It is based at 8-C, Hansalaya Building, Barakhamba Road, Delhi-110001.

4. The case of the 'Operational Creditor' is that it entered into a Memorandum of Understanding (for brevity 'MOU') in the year 2007 with the Corporate Debtor for provision of Facility Management Services (House Keeping and Engineering/Building Services). As per said MOU, facilities were supplied to the respondent at their site known as 'Sunrise Plaza Mall', Plot No. 12A, Ahinsakhand, Indirapuram, District Ghaziabad, U.P. by providing requisite personnel. The facility was provided for



24x7x365 days in a year with weekly off with provision of relievers. As per the term of MOU respondent was to pay an amount of Rs. 8,60,660/- as contract charges on first day of every month by cheque as wages, rental for equipments, consumables and stores provided by the Operational Creditor and any additional services rendered.

5. The said contract was amended with effect from 19.03.2009 and the contract value was enhanced from Rs. 8,60,660/- to Rs. 9,79,800/- per month with specific understanding that the monthly bills/invoices would to be substituted on the 5<sup>th</sup> working day of each month. The bill must be paid on or before 15<sup>th</sup> day of the same month otherwise respondent would be liable to pay interest @ 18% per annum on the unpaid amount.

6. The Operational Creditor had been providing regular and best services to the Corporate Debtor and raising bill/invoices regularly. Over a period, an amount of Rs. 16,20,070/- became due but the respondent failed to pay the same. Accordingly, notice was served on the respondent dated 09.09.2009. Since no payment was made, Operational Creditor foreclose the contract on 24.09.2009 and served the respondent with legal notice dated

01.10.2009.



7. The Operational Creditor had deployed huge amount of equipment and machinery at the site for rendering services which were removed at the directions of the respondent. In fact, after foreclosing the contract respondent unlawfully and illegally redeployed work force of the Operational Creditor at the site on their own and through some other agents which was in breach of the terms of contract.

8. Subsequently, due to aforesaid disputes arising between the parties with regard to services rendered by the Operational Creditor, it commenced arbitration as per the arbitration clause incorporated under the Contract. The Learned Arbitrator after collecting evidence in the form of oral as well as documentary from both the parties, passed an award dated 02.12.2012 (at pgs. 20-38) in favour of the Operational Creditor whereby while deciding issues No. 2 & 6 held as under:-

**Issue No. 2**

*".....For the above reasons, I award an amount of Rs. 23,55,590/- in favour of the claimant and against the respondent."*

**Issue No. 6**





“Since Issue No. 2 has ben decided in favour of the claimant, claimant is entitled to interest @ 12% per annum on the amount awarded from the date the amount was due till realization.”

9. In light of aforesaid award dated 02.12.2012, the Operational Creditor initiated Execution Proceeding bearing No. 5685/2016 before the Additional District Judge-01, Patiala House Courts, New Delhi.

10. The Operational Creditor sent demand notice on 21.02.2018 to the Corporate Debtor as per mandatory provisions of Section 8 of the Code on its registered office address at 8-C, Hansalaya Building, Barkhamba Road, Delhi-110001 but the Corporate Debtor deliberately & purposely did not receive the said notice.

11. The Operational Creditor has also attached affidavit vide diary No. 9506 dated 29.11.2018 as per the requirements of Section 9 (3) (b) of the Code highlighting that it has not received any payment from the Corporate Debtor towards the operational debt nor received any notice relating to a dispute of the unpaid operational debt.

12. It is claimed that the Corporate Debtor is liable to pay an amount of Rs. 47,34,736/- (Rupees Forty Seven Lacs Thirty Four Thousand Seven Hundred Thirty Six Only) towards the unpaid

operational debt to the Operational Creditor wherein the principal amount is Rs. 23,55,590/- and the interest is Rs. 23,79,146/- @ 12% per annum w.e.f. October, 2009 till February, 2018.

13. Mr. Gagan Gupta, learned counsel for the Respondent has opposed the admission of the petition on the ground that the petitioner is resorting to forum shopping. It is submitted that the arbitration award dated 02.12.2013 is in execution and now pending before the Patiala House Courts, New Delhi. The argument looks attractive at the first blush but has no substance in it because the pendency of any proceeding does not create a bar for initiation of Corporate Insolvency Resolution Process against a Corporate Debtor. In that regard reliance may be placed on the observation made by Hon'ble the Supreme Court in the case of **Innoventive Industries Ltd. v. ICICI Bank and Ors.** (2018) 1 SCC 407 on Section 238 of the Code and it has been held that the later non-obstante clause of the Parliamentary enactment would prevail over the limited non-obstante clause of any earlier enactment. Therefore, the pendency of execution proceeding under the provisions of the Arbitration and Conciliation Act, 1996 would not exclude the jurisdiction of the



Tribunal under the Insolvency and Bankruptcy Code, 2016. Therefore, we have no hesitation to reject the aforesaid argument.

14. The other submission made by Mr. Gupta is that the arbitration award was announced on 02.12.2013 and the instant petition has been filed on 01.06.2018 which is barred by limitation. According to the learned counsel the amount became due and payable on 02.12.2013. Again, the argument suffers from misconception in as much as the arbitration award could attain finality only after the time for making an application to set aside the award under Section 34 of the Arbitration Act has expired. It is then subject to the provisions of sub section 2 of Section 36 that the award is to be enforced in accordance with the provisions of the Civil Procedure Code in the same manner as if it were a decree of the Court. Admittedly the petitioner is not sleeping over the matter and execution proceeding has already been initiated. The amount under the award has become payable once the execution of the award has been initiated well within time and the period for execution of the award/decreed is twelve years. Therefore, it cannot be concluded that the amount under the award is not due and payable as on today within the meaning of Section 3 (12) read with Section 7 (5) (a) of the Code. We have





already recorded our satisfaction that the default has occurred and the amount has become due and payable. Therefore, the question concerning limitation pale into insignificance and the reliance placed on the judgment of Hon'ble the Supreme Court in ***B.K Educational Limited v. Parag Gupta & Associates***, Civil Appeal No. 23988 of 2017, decided on 11.10.2018 is wholly misplaced.

15. Another argument raised is that the mandatory provisions of Section 9 (5) (ii) (c) of the Code have not been complied with in as much as the invoice and the notice for payment under Section 8 of the Code has not been received. The aforesaid objection would not require any detailed consideration because a perusal of the pleadings shows that the service has been effected on the registered office situated at 8-C, Hansalaya Building, Barakhamba Road, New Delhi. The argument raised is that the aforesaid address has undergone change and the petitioner was fully aware of the change of address which was disclosed in para 8 in reply filed by the Corporate Debtor before the Executing Court on 15.11.2017. Such an argument would pale into significance because there is no change in the address of the MCA record which continues to be 8-C, Hansalaya Building,



Barakhamba Road, New Delhi. Moreover, the resolution passed by the Corporate Debtor on 30.08.2018 (page 28) shows the registered office address which is 8-C, Hansalaya Building, Barakhamba Road, New Delhi. According 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 the service has to be effected on the address of the registered office which has been done. The insistence of Mr. Gupta that the service of invoices and notice under Section 8 of the Code should have been effected on the change address as disclosed in the affidavit filed by Mr. Karunesh Manchanda (page 20) would not be acceptable in view of 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 therefore, the argument lacks substance and the same is hereby rejected.

16. We have heard learned counsels for the parties and have perused the pleadings along with various affidavits with their able assistance. As per the invoices issued by the Operational Creditor from time to time with regard to services rendered by it in the form of providing requisite personnel to the Corporate Debtor at their site it is proved beyond doubt that 'services' in

terms of Section 5 (21) of the Code were procured by the Corporate Debtor from the Operational Creditor on various occasions. In this context, we draw support from an award dated 02.12.2013 of the Learned Arbitrator passed in Arbitration Proceeding when the matter travelled before him, while accepting the claim of the Operational Creditor, the Learned Arbitrator on the basis of the finding of fact recorded in relation to issue No.2 & 6 and opined that Operational Creditor is entitled for an award of an amount of Rs. 23,55,590/- along with interest @ 12% per annum on the awarded amount from the date the amount was due till realization.

17. The definition of the expressions Operational Creditor and Operational Debt as given in Section 5 (20) & (21) of the Code makes it clear that services rendered, *inter alia* constitute 'operational debt'. The definition clauses are set out below:-

**Section 5 (20) & (21)**

(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;





(21) "operational debt" means a claim in respect of the provision of goods or **services** including employment or a debt in respect of the 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.

‘Operational Creditor’ is a person inter alia, to whom operational debt is owed and includes any person to whom such debt has been assigned or transferred. The definition of Operational Creditor is not exhaustive but illustrative. It is capable of covering even those heads which are not specifically mentioned in the definition. The definition of operational debt postulates that it is a claim in respect of the provision of ‘goods’ or ‘services’ including employment etc. A perusal of the invoices issued by the Operational Creditor in the name of Corporate Debtor unfolds that Operational Creditor has rendered the services of supplying personnel to carry out the work of House Keeping and Engineering/Building Services which was to be performed and fulfilled by the Operational Creditor, at the behest of the Corporate Debtor. Therefore, Operational Creditor fulfils

the basic ingredients of the definition as given under Section 5(20) & 5(21) of the Code. It is thus covered by the provisions of Section 5 (20) & (21) of the Code.

18. There is no escape from the conclusion that 'Corporate Debtor' has committed default and the amount of Rs. 47,34,736/- has remained unpaid. Thus, default has been committed by the Corporate Debtor within the meaning of Section 3 (12) read with Section 4 and Section 9 (1) of the Code, 2016.

19. The Operational Creditor has failed to name anyone as Interim Resolution Professional and has requested us to appoint one for the Corporate Insolvency Resolution Process. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional for the period 01.01.2019 to 30.06.2019 in compliance with Section 16 (3) (a) of the Code in order to avoid delay. The list of recommended Insolvency Professionals provides instant solution to NCLT-Adjudicating Authority to pick up the name and make appointment. It helps in meeting the time line given in the Code and save unnecessary wastage of time in asking the Insolvency



and Bankruptcy Board of India to recommend the name and then to appoint such Interim Resolution Professional by NCLT-Adjudicating Authority. Accordingly, we appoint Mr. Mukesh Gupta, email id camukeship @rediffmail.com as an Interim Resolution Professional. His registration number is IBBI/IPA-001/IP-P01494/2018-19/12254. The aforesaid Interim Resolution Professional has no disciplinary proceeding pending against her nor anything else, has been pointed out with regard to her antecedents by IBBI. He shall file her written communication and all relevant paper immediately before Registrar of this Tribunal but not later than two days.

20. At this stage we may notice a judgment of Hon'ble the Supreme Court rendered in the case of **K. Kishan Vs. M/s. Vijay Nirman Company Pvt. Ltd.**, Civil Appeal No. 21824-21825 of 2017 decided on 14.08.2018. The principle of law laid down in aforesaid judgment is that if a suit or arbitration proceeding is pending then the amount would be considered to be disputed within the meaning of Section 9 (5) (ii) (d) of the Code. The judgment in **K. Kishan** case (supra) lays down the proposition of law that in respect of an Operational Debtor where an arbitral award has been passed against the Operational Debtor then on



Corporate Insolvency Resolution Process could be initiated if the award has not been finally adjudicated upon. In that case a petition under Section 34 of the Arbitration Act was pending and it was concluded by Hon'ble the Supreme Court that no Corporate Insolvency Resolution Process could be initiated.

In para 19 of the judgment it has been clarified that if a petition has been filed under Section 34 of the Arbitration Act challenging the Arbitral award which is time barred and the period of 90 days plus discretionary period of 30 days has expired then the Insolvency process may be put into operation. Para 19 of the judgment is set out below verbatim:-

'We may hasten to add that there may be cases where a Section 34 petition challenging an Arbitral Award may clearly and unequivocally be barred by limitation, in that it can be demonstrated to the Court that the period of 90 days plus the discretionary period of 30 days has clearly expired, after which either no petition under Section 34 has been filed or a belated petition under Section 34 has been filed. It is only in such clear cases that the insolvency process may then be put into operation.'

In the present case no petition under Section 34 of the Arbitration Act or appeal under Section 37 of the Arbitration Act is pending and the Arbitral award has attained finality. Therefore,

we find that the ratio of judgment in **K. Kishan** case (supra) has no application to the facts of the present case.

21. As a sequel to the above discussion, this petition is admitted.

22. In pursuance of Section 13 (2) of IBC we direct that public announcement shall be immediately made by the Interim Resolution Professional with regard to admission of this application under Section 9 of the Code. We also declare moratorium in terms of Section 14 of the Code. The consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) and thus the following prohibitions are imposed which must be followed by all and sundry:

- (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 Securitisation 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.

23. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government. Additionally, the supply of the essential goods or services to the Operational Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services.

24. The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, *interalia*, by Sections 15, 17, 18, 19, 20 & 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of Corporate Insolvency Resolution Process. His conduct should be above board & independent; and he should work with utmost integrity and honesty. It is further





made clear that all the personnel connected with the Operational Debtor, its promoters or any other person associated with the Management of the Operational Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the affairs of the Operational Debtor. In case there is any violation by the ex-management or its ex-directors the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Operational Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code.

25. The petitioner is directed to pay sum of Rupees two lakhs to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall however be subject to adjustment by the



Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

26. The office is directed to communicate a copy of the order to the Operational Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

S/d -  
**(M.M. KUMAR)**  
**PRESIDENT**

S/d -  
**(S.K. MOHAPATRA)**  
**MEMBER (TECHNICAL)**

15.01.2019  
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Pronounced today under Rule 151 of the NCLT Rules 2016 as Hon'ble Member (T), Shri S.K. Mohapatra is not holding Court today.

  
**(NIRMALA VINCENT)**  
**COURT OFFICER**