

**THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(Arguments through web-based video conferencing platform)**

CP (IB) No. 268/Chd/Pb/2019

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

In the matter of:

OGO USA Inc.

6400 Sheridan Drive Suite 140
Williamsville, NY 14221 USA IN
through its Vice President
Mr. Arindam Bhawani

...Petitioner-Operational Creditor

Vs.

Nachiketa Papers Limited

having its registered office at
Mubarakpur Tehsil Rajpura
Patiala Punjab India

Branch Office:

SCO 703 NAC Manimajra
Chandigarh
160101 Chandigarh
CIN No. U21012PB1988PLC008412

...Respondent-Corporate Debtor

Judgement delivered on: 05.01.2023

**Coram: Hon'ble Mr. Harnam Singh Thakur, Member (Judicial)
Hon'ble Mr. Subrata Kumar Dash, Member (Technical)**

For the Petitioner-
Operational Creditor : 1). Mr. Arjun Sheth, Advocate
2). Ms. Ekakshra Mandhar, Advocate
3). Ms. Rhea Sevak, Advocate

For the Respondent-
Corporate Debtor : Mr. Nikhil Goel, Advocate

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT

The present petition is filed, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**for brevity 'IBC' / 'Code'**), by **OGO USA Inc.** through its Vice President Mr. Arindam Bhawani (**for brevity 'Operational Creditor' / 'Petitioner'**), with a prayer to initiate Corporate Insolvency Resolution Process (**CIRP**) in case of Nachiketa Papers Limited (**for brevity 'Corporate Debtor' / 'Respondent'**).

2. The Corporate Debtor, namely, Nachiketa Papers Limited, is a Company incorporated on 25.05.1988 under the provisions of Companies Act, 1956 with CIN No. U21012PB1988PLC008412 with its registered office at Mubarakpur Tehsil Rajpura Patiala Punjab India. Hence, the territorial jurisdiction lies with this Adjudicating Authority. Copy of master data of corporate debtor is attached with the main petition and marked as Annexure O.

3. The facts of the case, briefly, as stated in the petition are that the corporate debtor requested the operational creditor to supply commodities being 222.550MT waste paper hard mixed. The agreement was recorded between the parties by execution of contract dated 16.01.2018. However, the corporate debtor failed, defaulted in making the entire payment towards outstanding dues. The operational creditor issued a demand notice dated 23.07.2018 seeking a sum of Rs.18,20,670/-. But no reply/notice of dispute was issued by the corporate debtor.

4. It is submitted by the petitioner in Form 5, Part IV that amount claimed to be in default is Rs. 18,20,670/- (Rupees Eighteen Lakhs Twenty Thousand Six Hundred and Seventy Only). The default occurred on 14.04.2018 i.e. date on which shipment had arrived on port of destination i.e. Mundra Port. The date of default was holiday being second Saturday. Hence, the said amount was payable on next working day being 16.04.2018. Copy of tabular computation of amount pending and dates of default (Annexure A), Invoice and bill of lading (Annexure B), Contract dated 16.01.2018 entered into between parties (Annexure C), and RBI Reference rate USD/INR dated 16.04.2018 (next working day after 14.04.2018) (Annexure L) are attached with the main petition.

5. A demand notice in Form 4 is stated to be issued by the operational creditor on 21.07.2018 and the same has been delivered to the corporate debtor vide registered post and corporate debtor had not replied to demand notice till date.

6. Accordingly, vide order dated 19.07.2019 notice of this petition has been issued to the corporate debtor to show cause as to why this petition be not admitted. The corporate debtor has filed reply vide diary No.2026 dated 16.03.2020, wherein it is stated that there was no default by corporate debtor as there was no amount outstanding towards the operational creditor. The proper accounting to compute the alleged default amount had not been given. It was further stated that there existed a valid dispute between the parties to the present demand as the material supplied was deficient in quality and the deficiency was duly communicated by the respondent to applicant vide email dated 14.04.2018 and 23.04.2018. The

applicant sent the respondent revised computation of quality loss claim accepting liability up to USD 7200 and offered to adjust the same against payment of invoice No.U1998. The respondent further stated that, the claim amount of USD 10,000 entire detention amount of USD 21,000 be sent first and thereafter, the containers will be released. The applicant was seeking claim reward against an invoice, the goods for which have already been sold by the Port Authority to a third party and therefore, there existed no subject matter against which the payment was to be made.

7. The rejoinder was filed vide Diary No.00585/1 dated 13.05.2022, wherein it is stated that the corporate debtor has committed a default of Rs.18,20,670/- (USD 27,818.750) and raised invoice No.U1998 and is liable to pay the same. The corporate debtor has nowhere denied this fact. Rather it has neither made payments towards the invoice No.U1998 dated 14.02.2018 nor has submitted any proof of payment made. There exists no dispute between the parties with respect to the present contract. The corporate debtor had not raised any dispute at the time of receiving the demand notice. The claim of \$7200 accepted by the operational creditor was in relation to the other shipment and not with respect to the commodity for which the invoice in question in the present matter was raised. It is stated that the corporate debtor is threatening and asking to send USD 10,000 plus demurrage and detention amount and then only the corporate debtor will release the document from the bank. The container lying at the Inland Container Depot Ludhiana Facility, auctioned by Port Authorities is due to the fault on part of the corporate debtor and therefore, he cannot run away from the liability to pay the amount.

8. The short written submissions have been filed by applicant vide Diary No.00585/2 dated 19.10.2022 wherein it is stated that the operational creditor supplied waste paper hard mix to corporate debtor and corporate debtor failed in making payments qua the invoice no. U-1998 dated 14.02.2018. Demand notice was issued dated 21.07.2018. The corporate debtor has neither disputed the delivery nor the quality of goods supplied by the operational creditor. On perusal of the reply, it seems that the Corporate Debtor is trying to create a pre-existing dispute between the parties by stating that there were some purported issues with respect to the quality of goods supplied pursuant to unpaid invoice no. U-1998. It is further stated that there is no pre-existing dispute in relation to the payment and corporate debtor has not raised any dispute at the time of receiving the demand notice and has not disputed its liability towards the payment of said amount. The corporate debtor has placed on record certain documents (including emails) which has no relation to the invoice and the averments made with respect to the first shipment of contract no. 130/IND/17-18 has no relation with the present proceedings.

9. The short written submissions have been filed by respondent corporate debtor vide diary No.00585/3 dated 02.11.2022, wherein it is stated that the petition is to coerce the corporate debtor by maligning their reputation and threatening them in order to gain undue advantage by securing payment against goods that were never received by the corporate debtor and in fact have been auctioned by the Port Authorities at ICD. The Operational creditor was to secure a settlement and had to withdraw the petition upon compliance of onerous terms and conditions. The operational creditor has

conceded to departure from the standard of quality in the goods. The warranty claim for deficiency in material quality of the goods supplied against contract no. 130 and 134 was to be fulfilled by giving discount against the payment of next invoice i.e. U-1998, which was ignored and invoices were not cleared from the ICD. In D/P Delivery terms, ownership is not transferred until there is release of the documents from the clearing bank. The counter offer regarding securing goods was made by the corporate debtor to the operational creditor vide email dated 04.09.2018. No further payment is due as the invoice U-1998 has never been received/ accepted by the corporate debtor. The invoice U-1992 dated 07.02.2018 was issued under contract no. 134 which is the same contract under which the disputed invoice i.e. U-1998 has been issued.

10. We have heard the learned counsel for the petitioner and corporate debtor and have perused the records.

11. The first issue for consideration is whether the demand notice in Form 4 dated 21.07.2018 was properly served. The demand notice was served through a registered post but same has not replied.

12. The next issue for consideration is whether the operational debt was disputed by the corporate debtor. It is submitted by learned counsel for the corporate debtor that there was no default as no amount is outstanding towards the operational creditor. Further, it is alleged that the proper accounts to compute the alleged default amount had not been given. There existed a valid dispute between the parties to the present claim as the material supplied was deficient in quality and the deficiency was duly communicated by the respondent to applicant by email dated 14.04.2018 & 23.04.2018. The

applicant sent the respondent revised computation of quality loss claim accepting liability up to USD 7200 and offered to adjust the same against payment of invoice No.U1998. This contention of learned counsel for Corporate Debtor is devoid of legal force because no reply has been sent by the Corporate Debtor to demand notice dated 21.07.2018. If there was deficiency in quality then this could have been pointed out by the Corporate Debtor earlier with some cogent and convincing evidence. Simple assertion in reply without proof is of no consequence. No counter affidavit to the affidavit under Section 9(3)(b) has been filed by the respondent/ corporate debtor. According to the operational creditor the said adjustment of USD 7200/- is against other invoice no. U-1992 having an independent contract as compared to invoice U-1998 raised qua contract no. 134/IND/2017-18 dated 16.01.2018 (Annexure-C). Moreover, it is stated by learned counsel for operational creditor that the corporate debtor has nowhere denied contract (Annexure-C) and thus corporate debtor could neither deny the liability of payment towards the invoice No.U1998 dated 14.02.2018 nor has submitted any proof of payment made thereunder. If at all the goods were auctioned by the Port Authority then it is due to the fault on the part of Corporate Debtor as per terms and conditions of contract dated 16.01.2018 (Annexure-C). Hence, it can be safely concluded that there is no pre-existing dispute regarding the claim in hand.

13. The other issue for consideration is whether this application is filed within limitation. A demand notice issued dated 21.07.2018 in Form 4 attached as (Annexure 1) was duly served on the corporate debtor. Therefore, the period of limitation would begin from the date of default i.e.

14.04.2018 i.e. date on which shipment had arrived on port of destination i.e. Mundra Port. The date of default was holiday being second Saturday. Hence, the said amount was payable on next working day being 16.04.2018. This application was filed vide Diary No. 4710 on 13.11.2018 and was re-filed on 15.04.2019 vide Diary No.1929. Therefore, this Adjudicating Authority finds that this application is filed within limitation.

14. We have gone through the contents of the application filed in the Form 5 and find the same to be complete. As discussed above, there is a total unpaid operational debt (in default) of Rs. 18,20,670/- (Rupees Eighteen Lakhs Twenty Thousand Six Hundred and Seventy Only). Copy of tabular computation of amount pending and dates of default (Annexure A), Invoice and bill of lading (Annexure B), Contract dated 16.01.2018 entered into between parties (Annexure C), and RBI Reference rate USD/INR dated 16.04.2018 (next working day after 14.04.2018) (Annexure L) are attached with the main petition. Accordingly, the petitioner proved the debt and the default, which is more than Rupees one lakh (prior to the amendment in threshold limit of one crore vide notification No. S.O.1205(E) dated 24.03.2020) by the respondent-corporate debtor.

15. It is noted that the corporate debtor has failed to payback the aforesaid amount due as mentioned in the statutory notice till date. Thus, the conditions under Section 9 of the Code stand satisfied. It is evident that from the aforesaid discussed facts that the liability of the corporate debtor is undisputed. Accordingly, the petitioner proved the debt and the default, which is above threshold limit.

16. In the present petition all the aforesaid requirements have been satisfied. It is seen that the petition preferred by the petitioner is complete in all respects. The material on record clearly goes to show that the respondent committed default in payment of the claimed operational debt even after demand made by the petitioner. 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 the CIR Process in the case of the Corporate Debtor, **Nachiketa Papers Limited** and also direct moratorium to take effect and appoint Interim Resolution Professional as below.

17. In Part-III of Form No. 5, no Interim Resolution Professional (IRP) has been proposed by the petitioner. The Law Research Associate of this Tribunal has checked the credentials of Mr. Dharmendra Kumar Bhasin and there is nothing adverse against him. In view of the above, we appoint Mr. Dharmendra Kumar Bhasin, Registration No. IBBI/IPA-002/IP-N00816/2019-2020/12564 , E-mail: ipdkbhasin@gmail.com, Mobile No. +91-9877932667, the Interim Resolution Professional with the following directions:-

i.) The term of appointment of Mr. Dharmendra Kumar Bhasin shall be in accordance with the provisions of Section 16(5) of the Code; subject to his written consent to be filed within 7 days of this order;

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 Suspended Board Of Directors is directed to give complete access to the Books of Accounts of the corporate debtor maintained under section 128 of the Companies Act. In case the books are maintained in the electronic mode, the Suspended Board of Directors are to share with the Resolution Professional all the information regarding Maintaining the Backup and regarding Service Provider kept under Rule 3(5) and Rule 3(6) of the Companies Accounts Rules, 2014 respectively as effective from 11.08.2022, especially the name of the service provider, the internet protocol of the Service Provider and its location, and also address of the location of the Books of Accounts maintained in the cloud. In case accounting software for maintaining the books of accounts is used by the corporate debtor, then IRP/RP is to check that the audit trail in the same is not disabled as required under the notification dated 24.03.2021 of the Ministry of Corporate Affairs. The statutory auditor is directed to share with the Resolution Professional the audit documentation and the audit trails, which they are mandated to retain pursuant to SA-230 (Audit Documentation) prescribed by the Auditing and Assurance Standards Board ICAI. The IRP/Resolution Professional is directed to take possession of the Books of Account in physical form or the computer systems storing the electronic records at the earliest. In case of any non-cooperation

by the Suspended Board of Directors or the statutory auditors, he may take the help of the police authorities to enforce this order. The concerned police authorities are directed to extend help to the IRP/RP in implementing this order for retrieval of relevant information from the systems of the corporate debtor, the IRP/RP may take the assistance of Digital Forensic Experts empanelled with this Bench for this purpose. The Suspended Board of Directors is also directed to hand over all user IDs and passwords relating to the corporate debtor, particularly for government portals, for various compliances. The Interim Resolution Professional is also directed to make a specific mention of non-compliance, if any, in this regard in his status report filed before this Adjudicating Authority immediately after a month of the initiation of the CIRP.

vii.) The Resolution Professional is directed to approach the Government Departments, Banks, Corporate Bodies and other entities with request for information/documents available with those authorities/institutions/others pertaining to the corporate debtor which would be relevant in the CIR proceedings. The Government Departments, Banks, Corporate Bodies and other entities are directed to render the necessary information and cooperation to the Resolution Professional to enable him to conduct the CIR Proceedings as per law.

viii.) 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

ix.) The Interim Resolution Professional is directed to send a regular progress report to this Tribunal every fortnight.

18. 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.

19. It is further directed that the supply of essential goods or services to the corporate debtor as may be specified, if any, 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.

20. 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.

21. The petitioner is directed to deposit an amount of ₹1,00,000/- (Rupees One lakh Only) with the Interim Resolution Professional to meet the immediate expenses of the CIRP within two weeks. The same shall be fully accountable by Interim Resolution Professional and shall be reimbursed by the Committee of Creditors (CoC) to the petitioner to be recovered as the CIRP cost.

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

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

23. This petition is accordingly admitted.

SD/-
(Subrata Kumar Dash)
Member (Technical)

SD/-
(Harnam Singh Thakur)
Member (Judicial)

January 05 , 2023
SD/TB