

**IN THE NATIONAL COMPANY LAW TRIBUNAL****NEW DELHI (COURT NO. III)****Company Petition No. IB-529/ND/2021**

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

**IN THE MATTER OF:****Anil Agrawal****...Operational Creditor****VERSUS****Omega Icehill Private Limited****...Respondent/Corporate Debtor****Pronounced on:15.02.2022****CORAM:****SHRI BACHU VENKAT BALARAM DAS  
MEMBER (JUDICIAL)****SHRI NARENDER KUMAR BHOLA  
MEMBER (TECHNICAL)**

**For the Operational Creditor:** Mr Rohit Sharma, Rounak nayak, Arju chauhdary,  
Advocates

**For the Respondent:** Mr Nishant Menon, Ms Kavita Sarin, Ms Sarika Raichur, Mr Rajat  
Gav, Ms Mansumyer

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**ORDER**

**Per- Shri Bachu Venkat Balaram Das, Member (J)**

1. The Present Application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') by Anil Agrawal (for brevity 'Operational Creditor') with a prayer to initiate the Corporate Insolvency process against Omega Icehill Private Limited (for brevity 'Corporate Debtor').
2. The Operational Creditor was working as Managing Director of Corporate Debtor since its incorporation. During his tenure, he was entitled to Rs. 3,00,000/- p.m. as his remuneration from 16.01.2010, which was revised with effect from 01.08.2014 to Rs. 4,00,000/- p.m. However, the Operational Creditor was not paid the complete salary. Further, the payment made was always short of the agreed sum on account of the below par cash position of the company. It was agreed by the management of Corporate Debtor that the shortfall in the salary will be paid to the Operational Creditor as and when the cash position of the company improves. In May, 2019, the Operational Creditor was illegally removed by Corporate Debtor from the post of Managing Director with effect from 14.05.2019, without clearing his salary dues.
3. The Operational Creditor issued section 8 demand notice dated 07.08.2021 under the provisions of the I & B Code, 2016 (Under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 calling upon the corporate debtor to pay the operational debt of Rs 1,81,13,532/-. The Corporate Debtor has responded to the demand notice vide its Reply dated 19.08.2021.

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However, the Corporate Debtor has failed to give notice of existence of any dispute with respect to claim of Operational Creditor.

4. The operational creditor filed present application on 09.09.2021 under section 9 of IBC, 2016, to which the Respondent/Corporate Debtor has filed its reply by asserting the following:
  - i. that there is no existence of operational debt due or payable to the Operational Creditor and that there is existence of dispute with respect to the salary of the Operational Creditor.
  - ii. that the operational debt is barred by limitation as dues of 1st period (16.01.2010-31.07.2014) amounting to Rs 96,92,000/- became time barred on 30.07.2017 and 2nd period (01.08.2014-31.02.2016) amounting to Rs 18,00,000/- became time bared on 30.03.2019.
  - iii. that the alleged salary dues are imaginary and speculative and as per the AOA, the remuneration of managing director can only be fixed by board resolution.
  - iv. that the joint venture agreement was executed between Omega Engineering BV, FRA and Omega Icehill Pvt Ltd the operational creditor was not a party to this agreement in his personal capacity and thus cannot derive his rights form the said agreement.
5. The applicant has filed a rejoinder controverting the averments made in the reply and has asserted as follows:
  - i. that the corporate debtor has failed to produce a board resolution showing that the operational creditor's salary amount is as contended by the corporate debtor in its reply dated 19.08.2021 to the demand notice.

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- ii. that there is no dispute with respect to the operational debt owed by the corporate debtor to the operational creditor towards his outstanding salary dues.
- iii. that although there was no formal written contract between the operational creditor and the corporate debtor governing the terms of his engagement as MD, it is an undisputed position that the operational creditor served as MD of the corporate debtor from 16.01.2010 till 14.05.2019 pursuant to the JVA executed by the corporate debtor with its Indian and Dutch constituents. As per the JVA, to which the corporate debtor is a signatory, the applicant was to function as the MD of the corporate debtor. Further Clause 8.1 of the JVA specifically provides that Mr Anil Aggarwal, the applicant will be the MD who will manage the operations of the JVC, the corporate debtor's affairs of the company.
- iv. that the quantum of operational creditor's salary and its short payment is admitted by the shareholders/board of directors of the corporate debtor in several documents, which have been placed on record.
- v. the applicant's status as MD from 2009 to 2019 has also been duly admitted by the corporate debtor in its reply dated 21.10.2021. Further for the period 16.01.2010 to 31.07.2014, the operational creditor was entitled to Rs 3,00,000/- pm and his remuneration, which was revised with effect from 01.08.2014 to Rs 4,00,000/- pm and the same is reflected in the letter dated 01.08.2014 issued by the Dutch member of the Joint venture and duly signed by the operational creditor in his capacity as MD of the respondent.



- vi. that the letter dated 01.08.2014 also records that at the end of the march/beginning of April 2015, the payment of operational creditors overdue salary since the start of the Joint venture would be discussed and since the corporate debtor did not generate profits in the initial years, the operational creditor's was drawing lesser salary than his entitlement on the understanding that his entire salary would be paid once the corporate debtor starts generating profits.
- vii. that the short-payment of operational creditor's salary, and the respondent's liability to pay the short-fall was duly admitted by the shareholders / Board of Directors of the corporate debtor from time to time at the meeting of shareholders of the corporate debtor held on 12.05.2016, it was specifically recorded that "*Mr. Anil Agrawal also took lesser salary than what was agreed between shareholders and the statement of the same is enclosed. The statement will be checked and confirmed by Omega. This needs to be paid to him as and when Company's cash position improves and in a defined period of time. Besides this the salary will be reviewed with effect from 01st April 2016 as soon as agreement will be reached on the JV agreement and budget*". Further, in the Minutes of the Meeting of Board of Directors held on 19.03.2018, it was specifically recorded that "*Now that term loans have been repaid, the priority is to work out methodologies to pay Omega open invoices, MD's salary arrears, unsecured loans and alternative arrangements for repayment of SBLC*". And lastly in the Meeting of Board of Directors held on 09.07.2018, the Board sought more time on the issue of Managing Director's remuneration. In the Meeting of Board of Directors held on 08.09.2019, i.e., after the

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illegal removal of the corporate debtor from the position of Managing Director on 14.05.2019, the Board of Directors sought time to review and consider the salary arrears of the operational creditor.

6. Heard both the parties and perused the documents on record, the first objection taken by the corporate debtor is with respect to limitation. On careful perusal of the records, it is clear that the amount in default was continuing one and with every default fresh period of limitation commenced, therefore this Tribunal is of the opinion that the petition is not barred by limitation. The second objection raised by the corporate debtor was with respect to the pre-existing dispute but the corporate debtor in its reply has failed to produce any document or communication exchanged between the parties showing any pre-existing dispute with respect to the amount of operational debt. Further, the corporate debtor has for the first time raised its dispute in the reply to the application. Thirdly, the responded objection was with respect to JVA wherein the operational creditor was not a party, the operational creditor has filed written submission producing the JVA document on record wherein the operational creditor as MD was a signatory of the respondent. Moreover, the corporate debtor had admitted that the operational creditor served as MD of the company from 16.01.2010 to 14.05.2019, and that he was paid the salary.

Relevant extracts of the admission in the regards are as follows:

*“Your client has been paid his salary on regular basis and in fact until May 2019. Further as per the records of our client, you client was drawing salary which has been duly remitted to his account from the period 16.01.2010 to 15.08.2019”.*




Further, time and again it is seen that the corporate debtor in its reply to the demand notice has made contradictory statement with respect to the appointment of the operational creditor as MD. Therefore, the present case is fit for admission.

7. As per Form V, Part IV, the Corporate Debtor is liable to pay an outstanding sum of Rs. 1,81,13,532/-. The date of default as per Part IV is 14.05.2019, which the date of drawing salary of the director and the present application was filed on 09.09.2021, hence the debt is not time barred and the application is filed within the period of limitation.
8. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.
9. In the given facts and circumstances, the present application is complete and the operational creditor is entitled to claim its dues, which remain uncontroverted by the Corporate Debtor, establishing the default in payment of the operational debt beyond doubt. The present application is admitted, in terms of section 9 (5) of IBC, 2016.
10. The operational creditor has proposed the name of Mr Manoj Sehgal as IRP, the Tribunal hereby appoints him with registration number IBBI/IPA-002/IP-N00108/2017-18/10256, email: ([manojsehgal\\_1221@yahoo.co.in](mailto:manojsehgal_1221@yahoo.co.in)) who is and hereby appointed as the Interim Resolution Professional subject to the condition that no disciplinary proceedings are pending against such an IRP named who may act as an IRP in relation to the CIRP of the Corporate debtor and specific consent is filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.

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11. We direct the Operational Creditors to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr Manoj Sehgal, to meet out the expense 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. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.
12. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the Corporate Debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.
13. A copy of the order shall be communicated to the operational creditor, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. operational creditor is also directed to provide a copy of the complete paper book to the IRP. A copy of this order be also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

  
**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (Judicial)**

  
**(NARENDER KUMAR BHOLA)**  
**MEMBER (Technical)**