



**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH – II CHENNAI**

CP(IB)/146(CHE)/2022

*(filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w
Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating
Authority) Rules, 2016)*

In the matter of **OM SHAKTHY AGENCIES (MADRAS) PRIVATE LIMITED**

MAHINDRA WORLD CITY DEVELOPERS LIMITED

Administrative Block, Central Avenue,
Mahindra World City, Chengalpattu Taluk,
Chengalpattu - 603 004 (Preciously Kanchipuram)
Tamil Nadu

... Applicant/ Operational Creditor

-Versus-

OM SHAKTHY AGENCIES (MADRAS) PRIVATE LIMITED

Om Shakthy Tower-II, TS-64, SIDCO,
Industrial Estate, Ekkattuthangal,
Guindy, Chennai – 600 032

... Respondent/ Corporate Debtor

Order Pronounced on **13th February 2023**

CORAM

**Dr. DEEPTI MUKESH, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

*For Operational Creditor: Srinath Sridevan, T.K. Baskar,
K. Harishankar, Aishwarya S Natha,
Surya Teja SS Nalla, Advocates*

*For Corporate Debtor: P.J. Rishikesh,
P. J. Sri Ganesh Advocates*

ORDER

Under Adjudication is an Application filed by **Mahindra
World City Developers Limited** (hereinafter referred to as
'Operational Creditor') through Mr.K.K.Viswanathan, Authorized
Signatory authorised vide board resolution dated 25.01.2022,



under section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC, 2016') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against **Om Shakthy Agencies (Madras) Private Limited** (hereinafter referred to as 'Corporate Debtor'). The prayer made in the instant Application is to initiate Corporate Insolvency Resolution Process against the Corporate Debtor, declare a moratorium and appoint an Interim resolution Professional (IRP).

2. From Part-I of the Application, it is seen that the Operational Creditor is an unlisted Public Limited Company having its Registered Office at Door No.17/18, Pattullous Road, Chennai-600 002. The Operational Creditor is engaged in the business of development, operation and management of Industrial Parks and Special Economic Zones and related activities.

3. Part II of the Application describes the details of the Corporate Debtor. It can be seen that the Corporate Debtor is a private limited company incorporated under the Companies Act, 1956 on 30.12.1991 with CIN: U52599TN1991PTC021932 the registered office of the Corporate Debtor is situated at Om Shakthy Tower-II, TS-64, SIDCO Industrial Estate, Ekkattuthangal Guindy, Chennai-600032.

4. From Part III of the Application, it is stated that the particulars of the Interim Resolution Professional are being filed



separately by way of a Memo along with the relevant written confirmation in Form-2.

5. From Part-IV of the Application, it is seen that the Operational Creditor has claimed a sum of Rs.70,63,07,704/- of which Rs.32,26,22,500/- is principal and Rs.38,36,85,204/- is interest and the date of default is mentioned as 08.06.2018.

6. Part V of the application describes the particulars of Operational Debt, documents, records and evidence of default.

7. Brief facts of the case:

7.1. As submitted the Operational Creditor and the Corporate Debtor had entered into a Land Procurement Agreement (hereinafter referred to as 'the Agreement') dated 20.12.2007, which was amended from time to time till 21.07.2011, wherein the Corporate Debtor undertook to procure 1000 Acre of patta land within the time frame. Further, the Operational Creditor made an advance to the Corporate Debtor and the same was secured by a mortgage entered into with certain third parties.

7.2. As of 31.12.2013, as against the committed extent of 1000 acres of land, the Corporate Debtor had acquired only 527 acres. The Operational Creditor has paid a total sum of Rs.226.99 crores under the Agreement.

7.3. It was submitted by the Operational Creditor that based upon the rates agreed in the Agreement, for 527 acres of land acquired

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by the Corporate Debtor it is entitled to only Rs.177.50 crore and hence an excess of Rs.49.49 crore has to be paid back to the Operational Creditor.

7.4. It was further submitted that after some partial payments made by the Corporate Debtor, it is liable to pay the principal outstanding of Rs.32,26,22,500/-. Vide letter dated 08.06.2018 it was also admitted by the Corporate Debtor as follows,

"...
We also refer you to our letter dated 18.07.2017 cited in reference (1) above and our earlier payment of Rs.1.69 crores. As mentioned to you, we have been continuously making our sincere efforts to sell our lands and pay your outstanding dues. As committed to you during the meeting. We hereby agree and undertake to pay you the entire outstanding dues of Rs.31 crore (Rupees Thirty-One Crore) on or before 31st July 2018. It is hereby agreed between us that immediately upon the payment of Rs.31 Cr. On part thereof operated through a separate Escrow Account, the mortgage registered on our property situated in Varadharajapuram, Chennai measuring about 36.25 Acres with you will be released on a pro rata basis unconditionally, along with the return of the original title deeds and other accompanying documents.

..."

7.5. Despite repeated reminders, the Corporate Debtor has not paid anything to the Operational Creditor and vide letter dated 06.01.2020 disputed the outstanding amount as only Rs.11,00,00,000/- as follows,

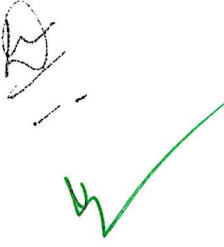


"...
Therefore, as per our understanding, the total principal payable by us is Rs.14.69 crores. Adjusting partial payments of Rs.3.69 crores the net payable as of today is Rs.11 crores.
..."

7.6. Since, the debt was secured by some immovable properties, the Operational Creditor, filed a suit before the Hon'ble High Court of Madras, in CS.No.193 of 2021. Wherein, Hon'ble High Court of Madras vide order dated 15.02.2022 gave a summary judgement in IA No.1979 of 2021 in CS.No.193 of 2021 against the Corporate Debtor for the sum of Rs.11,00,00,000/- together with interest of 11% from 06.01.2020. Further, submitted that still no payments made by the Corporate Debtor. Hence, this application.

7.7. In reply, the Corporate Debtor submitted that as per the agreement dated 20.12.2007 the Corporate Debtor has to procure more than 1000 acres of land on a contiguous basis for which the Operational Creditor has to make payments as sale consideration for securing these lands in the following rates:

- a) First 250 acres Rs.21.50 lakhs per acre.
- b) Next 250 acres Rs.26.75 lakhs per acre.
- c) Next 250 acres Rs.33.25 lakhs per acre.
- d) The last 250 acres are Rs.38.50 lakhs per acre.



The above rates were amended from time to time till 03.10.2013. Apart from the sale consideration the Operational Creditor agreed to pay Rs.10 crore to the Corporate Debtor.





7.8. In such a case the Operational Creditor argued that the transaction entered into between the Operational Creditor and the Corporate Debtor is not an operational debt. Further, stated as per the agreement, the Corporate Debtor is a service provider while the Operational Creditor is a service recipient and the transaction are not an operational debt for the purposes of IBC.

7.9. Further, the Corporate Debtor submitted that against the summary judgement dated 15.02.2022 passed by the Hon'ble High Court of Madras in IA No.1979 of 2021 in CS.No.193 of 2021 the Corporate Debtor preferred an appeal in OSA SR.No.262283/2022. Moreover, CS.No.193 of 2021 is filed for a claim of Rs.65.15 crore plus interest and the suit is still pending before the Hon'ble High Court of Madras.

7.10. In addition to that the Corporate Debtor submitted that another OSA 1/2022 is also pending before the Hon'ble High Court of Madras which for referring the above-said dispute between the parties for Arbitration. In such circumstances, pleased the application filed under Section 9 of IBC, 2016 is not maintainable.

8. Heard the submission of both parties, it now needs to be determined is,

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1. Whether the Applicant is an Operational Creditor? and
 2. Whether there is a pre-existing dispute between the parties?



Now we look into the relevant provisions of IBC, 2016.

Section 3:

(6) "claim" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

Section 5:

(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 [payment] 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;

The above provisions show that Operational Creditor is a person to whom an operational debt is owed. The expression operational debt is defined as a claim in respect of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the government.



9. In the decision of the Hon'ble Supreme Court of India in **Consolidated Construction Consortium Limited Vs. Hitro Energy Solutions Private Limited ((2022) 7 SCC 164)**, relied upon the Applicant, it was observed as follows,

"45. Similarly, in the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the Proprietary Concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the Proprietary Concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favor of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) of the IBC."

A conjoint reading of the above clarifies that all those who provide or receive operational services from the corporate debtor is an operational creditor and the transaction therein is operational debt. In the instant case, the Applicant received services from the Corporate Debtor through a land procurement agreement and is also an operational creditor and the transaction therein is an operational debt.

10. In so far as the 2nd issue is concerned, it is seen that a demand notice dated 20.04.2022 under Section 8 of IBC, 2016 was



served to the Corporate Debtor. The summary judgement in IA No.1979 of 2021 in CS.No.193 of 2021, was passed by the Hon'ble High Court of Madras on 15.02.2022. The appeal bearing SR.No.262283/2022 filed against the summary judgement is on 14.03.2022, which is before the issuance of the Demand Notice. Whether the appeal was numbered or rejected is not known to us.

11. Section 5 (6) of IBC, 2016 defines the expression dispute as follows,

"Section 5 (6): "dispute" includes a suit or arbitration proceedings relating to—

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty;"

In para 10 of the summary judgement dated 15.02.2022 in IA No.1979 of 2021 in CS.No.193 of 2021, it was recorded as follows,

"10. In the present case, the express admission made by the 1st defendant in the letter dated 06.01.2020, entitles the applicant /plaintiff to get a summary judgement for a sum of Rs.11 crore based on the mere admission. The larger amount claimed by the applicant in the suit is a matter to be gone into while considering the suit on merits by appreciating the oral and documentary evidence."

Further, it is seen that in the letter dated 06.01.2020, the corporate debtor had admitted its liability to the tune of Rs.11 crore and the same is reproduced below,



"...

Therefore, as per our understanding, the total principal payable by us is Rs.14.69 crores. Adjusting partial payments of Rs.3.69 crores the net payable as of today is Rs.11 crores.

...

We request you to kindly firm up the outstanding advances at Rs.11 crores, as outlined above. We also request you to give adequate payment timelines. Considering the tight liquidity conditions faced in discharging its obligations.

We shall be happy to discuss and explain the above proposal, to ensure an early and amicable closure. We reiterate our commitment to amicably settle all the dues between us. Considering the long association and mutual respect for each other."

This was also recorded in the summary judgement of the Hon'ble High Court of Madras and hence is manifest that there is no dispute between the parties with respect to the claim amount of Rs.11 crore.

12. Be that as it may, Section 9(5) of IBC, 2016 reads as follows,

"Section 9: Application for initiation of corporate insolvency resolution process by operational creditor.

...

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if, —

(a) the application made under sub-section (2) is complete;



(b) there is no [payment] of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any."

We observe that vide letter dated 06.01.2020, the Corporate Debtor had clearly admitted its liability to the tune of Rs.11 crore. Hon'ble High Court of Madras, in its summary judgement dated 15.02.2022, in IA No.1979 of 2021 in CS.No.193 of 2021 had confirmed the liability of the Corporate Debtor. The Demand Notice dated 20.04.2022 was served to the Corporate Debtor on 21.04.2022 and application in Form-5 is filed on 25.05.2022 which is within the limitation prescribed in Section 238A of IBC, 2016 and the crystallized claim of Rs.11 crore is beyond the threshold,

W Moreover the admission by the Corporate Debtor in its correspondence with the Applicant and the same being recorded in the judgement by Hon'ble Madras High Court, does not leave any doubt of debt and default by the Corporate Debtor.

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13. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Application, as filed by the Operational Creditor, is required to be admitted under Section 9(5) of the IBC, 2016. Since the



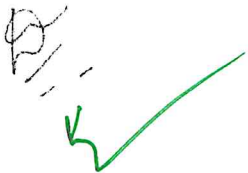
Operational Creditor has not named the Insolvency Resolution Professional, this Tribunal based on the latest list furnished by the Insolvency and Bankruptcy Board of India applicable for the period between January 2023- June 2023 hereby appoints **Mrs. Geetha Sridhar** with Registration Number **[IBBI/IPA-002/IP-N00854/2019-2020/12733]** **E-mail ID:- gs.gsconsultants@gmail.com**) as the "Interim Resolution Professional" subject to the condition that no disciplinary proceedings are pending against such an Interim Resolution Professional named and disclosures as required under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are made within a period of one week from the date of this order. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Sections 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

14. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:



- a. The institution of suits or continuation of pending suits or proceedings against the respondent including the 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 respondent 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 respondent 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 respondent.

Explanation.-For the purposes of this subsection, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;





15. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

- (2) 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.
- (2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.
- (3) The provisions of sub-section (1) shall not apply to
 - (a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
 - (b) a surety in a contract of guarantee to a corporate debtor.

16. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:



- (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

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 the Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

17. The Operational Creditor is directed to pay a sum of **Rs.2,00,000/-** (*Rupees Two Lakh Only*) to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the Code to meet out the expenses to perform the functions assigned to her in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

18. Based on the above terms, CP(IB)/146(CHE)/2022 stands **admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come into effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records.



Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI is also furnished with a copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

- Sd -

SAMEER KAKAR
MEMBER (TECHNICAL)

- Sd

Dr. DEEPTI MUKESH
MEMBER (JUDICIAL)

Gapishankar. D