IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

CP(IB) NO.809/KB/2018

In the matter of:

An application by Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, Rules, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

AND

In the matter of:

M/s. Sohom Shipping Private Limited CIN: U63090WB2001PTC093683, with its address for correspondence being 23A Netaji Subhas Road, 6th Floor Room No.2, Kolkata- 700001, West Bengal;

Applicant/Operational Creditor.....

VERSUS

In the matter of:

M/s. Guru Shipping and Clearing Private Limited, CIN: U60221WB2000PTC092479, having its Registered Office at 8, Lyons Range, Kolkata – 700001, West Bengal;

Respondent/Corporate Debtor....

Coram: Jinan K.R., Hon'ble Member (Judicial)
Harish Chander Suri, Hon'ble Member (Technical)

Sd/- Sd/-

Counsels on record:

For Operational Creditor : **Mr. Sailendra Tiwari, Advocate**
Mr. Saurav Jain, Advocate

Date of Pronouncement of Order: 25/10/2019

ORDER

Per Shri Jinan K.R, Hon'ble Member (J):

1. This is an application filed under Section 9 of the Insolvency and Bankruptcy Code, (in short, I&B Code), by M/s. Sohom Shipping Private Limited, hereinafter referred to as the "Operational Creditor" for initiating Corporate Insolvency Resolution Process, (in short, CIRP) as against the Corporate Debtor, M/S Guru Shipping and Clearing Private Limited, on the allegations that the Corporate Debtor committed default in payment of Rs. 48,69,965/-.(Rupees Forty Eight Lacs Sixty Nine Thousand Nine Hundred Sixty Five Only) on account of the service provided with respect to loading, unloading, handling charges and river transportation charges since financial year 2014-2015 till the date of this application.

2. The contention of the applicant, in brief, is the following:

a) The Operational Creditor was associated with the Corporate Debtor since 2009 for the transportation and other works. Corporate Debtor had authorized operational creditor to execute the transportation, Board Loading, Unloading & Shore Handling work from time to time, and accordingly issued several work orders to the operational

creditor. Copy of the several work orders issued from time to time dated 08.07.2009 and 08.06.2011 are enclosed with the application and collectively marked as Annexure II Exhibit B. The operational creditor was involved into transportation of goods of the Corporate Debtor. In the mean time to take another contract of river transportation, the operational creditor has given quotation on 10.10.2009. The copy of letter dated 10.10.2009 is annexed with the application as Annexure II Exhibit C.

b) To prove the transactions between the operational Creditor and Corporate Debtor Copy of the ledger of corporate debtor in the books of operational creditor for the period commencing form 01.04.2013 to 31.03.2018 and the provisional ledger for the period commencing from 01.04.2018 to 31.05.2018 is annexed and collectively marked as Annexure II Exhibit D.

c) Corporate Debtor has confirmed the books of accounts for the period from Year 2012-2013 only. The copy of the confirmation of the books of accounts for the period of from year 2012-213 is annexed and marked as Annexure II Exhibit E. Upon several reminders Corporate Debtor has not confirmed any books of accounts. But Operational Creditor on 28.07.2015 has sent the books of accounts for confirmation for the period of from year 2014-2015 through courier. The copy of confirmation of accounts for the period of 2014-15 is annexed hereto and marked as Annexure II Exhibit F. Despite sending

several reminders through Email, the Corporate Debtor has not cleared the dues. Neither Corporate Debtor has replied to the notice nor have they made any payments.

d) The Corporate Debtor was clearing the payment of bills in on account basis. So after adjusting all the payments the Operational Creditor has taken the pending bills in LIFO basis. Copy of invoices issued by Operational Creditor upon Corporate Debtor for the Loading, Unloading & Shore Handling charges for the period commencing from 12.12.2014 to 20.06.2015 is annexed here and collectively marked as Annexure II Exhibit G.

3. Upon the above said contentions the Operational Creditor prays for passing an order of admission.

4. The Corporate Debtor filed reply contenting in brief the following:

a) The Operational Creditor does not disclose the basis and the understanding upon which the invoices from the subject matter of the claim has been allegedly issued. There is no legal basis for the purported claim has been disclosed in the petition. The existence of the alleged arrangement or agreement between the parties is to be determined from the evidence led in the case. The application is not maintainable. The Operational Creditor has failed to take into account payment made from time to time by the Corporate Debtor. The purported account was not at all disclosed from the application. There is no running and

continuous accounts were ever envisaged to be maintained in respect of the entirety of transaction disclosed.

b) The understanding is that each assignment on the basis that services pertaining to a particular vessel shall form a separate and distinct transaction in the shipping industry. As such, the parties never envisaged any running and continuing account to be maintained generally for all details transactions between the operational Creditor and Corporate Debtor herein. Deduction of TDS is for the purpose of deposit of the amount to the government as a matter of statutory compliance. It does not amount to an admission of the invoiced amounts. In the demand notice there is no valid claim put forward. The details as to adjustment of payments against the invoices raised is absent in the demand notice. It is denied and disputed that the total amount of Rs. 48,69,965/- is due and payable by the Corporate Debtor. Corporate Debtor has never confirmed of any purported statement of the account of the petitioner. Taking into consideration of the payment made by the Corporate Debtor from time to time, no amount was also ever paid to the Operational Creditor by the corporate debtor. In fact, excess payment to the tune of Rs. 20,000,00/- in between the Operational Creditor and the corporate debtor was made. It is to be adjusted in proper transportation undertaking by and between the parties. It is incorrect to say that the Operational Creditor has sent several reminders demanding money and that Corporate Debtor has no reply to such notice. The alleged outstanding due is nothing more than a stale claim which was never

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demanded and the said alleged due does not conform to the invoices refers to as proof in the application. The claim, if any, of the Operational Creditor is barred by law of limitation. The application should be rejected with the costs.

5. When this case was taken up for hearing nobody appears on the side of the Corporate Debtor. Heard the learned Counsel appearing for on behalf of the Operational Creditor. Perused the records.

6. The transaction between the Operational Creditor and the corporate debtor has not been disputed in the case in hand. The Operational Creditor alleged that on account of service provided with respect to loading and unloading, handling charges and river transportation charges an amount of Rs. 48,69,965/- is due and payable by the Corporate Debtor. To prove the transaction between the Operational Creditor and Corporate Debtor the Operational Creditor has produced Exhibit. B, a copy of the works order issued from time to time dated 08.07.2009 to 08,06,2011. The Operational Creditor also alleged that the transaction between the Operational Creditor and Corporate debtor also include transportation of goods of the Corporate Debtor by way of river transportation and to prove the said transportation produced Exhibit C. The ledger copies of the Operational Creditor and Annexure D add strength to the transaction between the Operational and Corporate Debtor.

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7. According to the learned Counsel appearing for the Operational Creditor even on repeated reminders were issued for payments through Email directing the Corporate debtor, to clear off the dues the Corporate Debtor neither replied to the notice nor have made any payment to the claim of the Operational Creditor. According to the Operational Creditor, the arrangement between the Operational creditor and the Corporate Debtor is not on bill to bill basis, but on adhoc payment and parties are agreed to maintain a running account. He would further submits that as per the ledger account of the Operational Creditor and the Corporate Debtor the last payment on the side of the Corporate Debtor was on 17.04.2017. Rs. 2,00,000/- seen paid by the Corporate Debtor to the operational creditor and therefore the period of limitation would run from 17.04.2017 and not on the date of the Bill and therefore the application filed is perfectly maintainable and is not barred by limitation.

8. No pre-existing disputes seen pleaded or proved on the side of the Operational Creditor. The demand notice seen issued by the Operational Creditor on 14.03.2018. The notice was delivered to the Corporate Debtor on 16.03.2018. No reply seen send by the Corporate Debtor denying the liability or no notice of dispute seen issued by the Corporate Debtor to the operational creditor. Though reply affidavit was filed the corporate debtor not turned up for defending the case. The contentions in the reply affidavit is not satisfactory enough to hold that there was a pre existing dispute as alleged in the reply. On the other hand, the Corporate Debtor has annexed statement of accounts for the financial

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year 2017-2018 . The corporate debtor admitted its liability to the tune of Rs. 41,54,066.00/-.

9. The above said discussions leads to a conclusion that the Operational Creditor has succeed in proving that the claim of the Operational Creditor is not barred by limitation and that no notice of disputes has been issued on the side of the Corporate Debtor upon receipt of the demand notice. In compliance of section 9(3)(b) Operational Creditor has produced an affidavit to the effect that there is no notice given by the Corporate Debtor relating to a disputes of the unpaid Operational Debt. So also in compliance of Section 9(3)(c) the applicant has produced a copy of the accounts issued by HSBC Bank confirming that there is no payment of unpaid operational Debt by the Corporate Debtor. Accordingly the application is liable to be admitted under Section 9(3)(i) of the code upon the following :-

ORDERS

i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, **M/s. Guru Shipping and Clearing Private Limited**, is hereby **admitted**.

ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.

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iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

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 (54 of 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.

v) The services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

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vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.

viii) 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.

ix) Necessary public announcement as per Section 15 of the IBC, 2016 may be made.

x) **Mr. Santanu Bhattacharjee**, of N527 Diamond Heritage, 16, Strand Road, Kolkata 700001, having Registration No. IBBI/IPA-001/IP-P01141/2018-19/11868, E-mail ID: neeljanai@gmail.com, Mobile No. 9836943067 is appointed as Interim Resolution Professional by this Tribunal for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

xi) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of

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Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.

xii) The Operational Creditor/Applicant is directed to deposit Rs. 3,00,000/- (Rupees Three Lacs Only) in the ESCROW Account in SBI to be operated through the Registrar NCLT, Kolkata Bench for the purpose of meeting. the preliminary expenses for initiating the CIRP by the Interim Resolution Professional within one week of the date of this order.

xiii) Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor and to the I.R.P. by Speed Post as well as through email.

xiv) List the matter on **26.11.2019** for the filing of the progress report.

xv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

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(Harish Chander Suri)

Member (Technical)

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25/10/19.

(Jinan K.R)

Member (Judicial)

Signed on this the 25th day of October, 2019.

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