

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH(Court No – II)

KOLKATA

C.P (IB) No. 82/KB/2020

An application 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:

Cosmos Lifters and Technical Services Private Limited [CIN U71100MH2005PTC152175], a company incorporate under the Companies Act, 1956, having its registered office at B-307, Shankar Dhan Plaza, Above Hdfc Bank, J.N. Road, Mulund (W), Mumbai 400080.

...Operational Creditor

Versus

Hindusthan Facing Industry Private Limited [CIN U29248WB2011PTC165789], a company incorporate under the Companies Act, 1956, having its registered office at 5/25, Sebak Baidya Street, Kolkata – 700029.

...Corporate Debtor

Date of Hearing: 28.07.2022

Date of pronouncing the order: 06.09.2022

Coram:

Shri Rohit Kapoor : **Member (Judicial)**

Shri Balraj Joshi : **Member (Technical)**

Appearances (through Video Conferencing/physical hearing)

For Operational Creditor : Mr. Sujit Banerjee, Advocate

: Mr. Nilay Sengupta, Advocate

ORDER

Per Rohit Kapoor, Member (Judicial)

1. The Court convened *via* hybrid mode.
2. This is a Company Petition filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (*‘the Code’*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Mr. Abdeali Arviwala, Manager, Cosmos Lifters and Technical Services Private Limited duly authorised *vide* Board Resolution dated 29 November, 2019¹ (*‘Operational Creditor’*) for initiation of Corporate Insolvency Resolution Process (*‘CIRP’*) against Hindusthan Facing Industry Private Limited (*‘Corporate Debtor’*).
3. The present Petition was filed on **08 January, 2020** before this Adjudicating Authority. The total amount claimed in default is Rs.77,52,944/- (Rupees Seventy Seven Lakh Fifty Two Thousand Nine Hundred Forty Four only) [*Principal - Rs.53,46,858; Interest – Rs.24,06,086*], including interest @18% with effect from 04 May, 2017 to 31 October, 2019. The date of default has been stated to be?
4. In part II of the Petition the authorized share capital of the Corporate Debtor is Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh only) with subscribed share capital of Rs.80,50,000/- (Rupees Eighty Lakh Fifty Thousand only).
5. ***Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor.***
 - 5.1 The Operational Creditor is engaged in supplying heavy duty crane(s) and on 23 June 2011, Corporate Debtor, issued a work order (*‘First Work Order’*) for such requisite crane inter alia with a hire charges of Rs.3,20,000/- per month for an initial period of 15 months. The said First Work Order was extended four times. [*Annexure - P/4, Page 39-44*].

¹Annexure P-3, page 38 of the Petition.

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- 5.2 Thereafter, on 18th December 2012, Corporate Debtor again placed another work order for one Crawler Mounted Crane 100 Ton Capacity, for an initial period of 3 months, in consideration of Rs.10,00,000/- being a lump sum amount for a period of three months (***Second Work Order***). The said Second Work Order was extended one time. [*Annexure - P/5, Page 45-46*].
- 5.3 Finally, on 5th October 2013, Corporate Debtor further issued another work order for supply of 1 no. TATA 955 ALC Crawler Crane at their Amlohiri Project of NCL (***Third Work Order***) in consideration of hire charges of Rs.2,75,000/- per month for the period of 24 months. [*Annexure - P/6, Page 47*].
- 5.4 It was agreed between the parties that upon the expiry of a respective month, the Operational Creditor will raise its bills upon the Corporate Debtor and the Corporate Debtor shall clear the due by maintaining running and current accounts.
- 5.5 Accordingly, for the aforesaid 3 work orders, from FY 2011-2012 to FY 2015-2016, Operational Creditor duly raised their value bills at agreed rates and terms, and the Corporate Debtor duly accepted the same and used to pay part of the dues from time to time by maintaining running and current accounts thereof. However, the last payment was made on 04 May 2017.
- 5.6 Thereafter, various demands were made to the Corporate Debtor to pay the dues of the Operational Creditor but the Corporate Debtor failed to clear the bills of the Operational Creditor.
- 5.7 However, by letter dated 08 April, 2016 the Corporate Debtor duly handed over 5 (five) cheques having an aggregate value of Rs.50,00,000/- with assurances that they will be honored upon presentation. But before the Operational Creditor could deposit those cheques with their banker the managing director of the Corporate Debtor requested the Operational Creditor not to deposit, as they had failed to arrange the fund.

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- 5.8 Further, the managing director of the Corporate Debtor further requested that remaining 4 (four) cheques could be produced for encashment only after having clear clearances from him. Thus, without having any alternative, the Operational Creditor waited till 6th September, 2016 and ultimately returned back those cheques only to maintain cordial relationship with the Corporate Debtor [*Annexure – 18 at page 133 – 137*].
- 5.9 However on 31 October, 2018 the Corporate Debtor approached the Operational Creditor and offered to pay the outstanding sum of Rs.53,46,858/- by various installments and the same was recorded in the minutes of the meeting held at the office of the Corporate Debtor [*Annexure – 19 at page 138*]. Further, the Corporate Debtor also assured that they shall clear the aforesaid dues but they failed to do so.
- 5.10 Finding no other alternative, The Operational Creditor on 08 November 2019 issued a demand notice under section 8 of Code to the Corporate Debtor, demanding for the outstanding sum of Rs. 77,52,944/- (including interest), however, the said notice was returned as unclaimed by the Corporate Debtor after keeping the same on hold from 09 November, 2019 till 25 November, 2019.

6. Issue

- 6.1 Whether the notice under section 8 of the Code when returned with the endorsement 'Unclaimed' is a good service or not?
- 6.2 Is there any default by the Corporate Debtor? Is the same is being acknowledged by the Corporate Debtor within the limitation period?

Analysis & Findings

7. We have heard the Ld. Counsel appearing on behalf of the Operational Creditor and perused the record.

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8. With respect to the first issues, we rely on ***Crown Worldwide Holding Limited & Another v. Crown Relocations Movers and Packers***² by the Hon’ble High Court at Bombay, where the court held that *this is settled by a long line of authority on an interpretation of Section 27 of the General Clauses Act and Section 114 of the Evidence Act. Hence, is a well-established presumption that the return of packet with the endorsement “unclaimed” is good service.* The Hon’ble High Court also relied on the Judgment in ***Ispat Industries Ltd.***³ After reviewing the case law, S.J. Vazifdar J. (as he then was), said:

“14. The Supreme Court thereafter went on to hold that a notice which is returned as unclaimed but which was dispatched in the manner prescribed with the correct address on it is deemed to have been served.

15. The judgment would apply to a notice under Section 434(a)(1) of the Companies Act with greater force. Section 138 of the Negotiable Instruments Act entails criminal consequences, whereas Section 434(1)(a) involves only civil consequences. Moreover the requirements of a notice under Section 138 of the Negotiable Instruments Act are stricter and wider. Despite the same, the Supreme Court held that a person who properly addresses a notice and mails it would be deemed to have fulfilled his obligation of sending the notice even if the same is returned unclaimed. On a parity of reasoning, it must be held that a notice though returned unclaimed, if duly mailed by registered post addressed to the registered office of the company, must be deemed to have been “delivered” within the meaning of that expression in Section 434(1)(a) of the Companies Act.

16. I would come to this conclusion even or principle. Any other view would permit a dishonest company to avoid service of a notice in a variety of ways by refusing to claim the same from the postal authorities despite intimation

²2016 SCC OnLine Bom 15503 decided on 22 November, 2016

³2005 (2) Bom CR 94

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of the delivery thereof. Take a simple example. Companies are known to have their registered office in premises where they do not carry on any significant manufacturing, trading or administrative activities. The premises are used as a registered office only for the purpose of convenience and for complying with statutory provisions. In such a case, the company could well avoid service of notices and then refuse to claim the same despite notification from the postal authority to do so.”

- 9.** We also rely on the judgment of *Castle Industries Private Limited v. Cubs International Petrochem Limited*⁴ by the Hon’ble High Court at Calcutta, where the Hon’ble High Court has held that ‘unclaimed’ is a good service inasmuch as having regard to the fact that there is no contemporaneous denial on the claim of the petitioner and the company has evaded the service of the notice, it can be presumed that the company has no defence to the claim of the petitioning creditor.
- 10.** Furthermore, in this instant case it can be construed that there is no contemporaneous denial on the claim of the petitioner, by the Corporate Debtor because they have duly acknowledged the outstanding dues in the minutes of meeting dated 31 October, 2018 [*at page 138 of the Petition*]. It is also pertinent to mention that as per the tracking record [*at page 181*] of the Petition, the delivery of the Section 8 notice was put on hold on the Addressee Instructions i.e., the Corporate Debtor.
- 11.** There are many instances when the Operational Creditor upon direction from this Adjudicating Authority has served the petition along with court order [*page 9 of the Affidavit Service dated 18 April, 2022*]. Further, the Operational Creditor also made a paper publication on 19 January, 2021, in two newspapers, namely, Business Standard and Aajkal, indicating the next date of hearing [*Page 2 – of the Affidavit Service dated 24 February, 2021*]. After

⁴2016 SCC OnLine Cal 11606 decided on 04 July, 2016

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giving several opportunities to the Corporate Debtor, the matter was set ex-parte on 12 may, 2022.

- 12.** With respect to the limitation period, it is pertinent to mention that the last bill dated 05 October, 2015 fell due on 05 November, 2015. Technically, the limitation period would end on 05 November, 2018 but since, the minutes of meeting between the parties was on 31 October, 2018, where the Corporate Debtor acknowledged the debt and assured to make the payment in four instalments. This acknowledgement of the Corporate Debtor is within the limitation period, hence, attracting section 18 of the Limitation Act, 1963.
- 13.** In view of the above facts and circumstances, we are satisfied that the present petition made by the Operational Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time. Further, as envisaged under section 9(3)(b) of the Code, an affidavit has also been filed by the Operational Creditor.
- 14.** It is, accordingly, hereby ordered as follows:-

 - a) The application bearing *CP (IB) No. 82/KB/2020* filed by Cosmos Lifters and Technical Services Private Limited, the Operational Creditor, under section 9 of the Code read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Hindusthan Facing Industry Private Limited, is *admitted*.
 - b) There shall be a moratorium under section 14 of the IBC.
 - c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an

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order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

- d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- e) *Ms. Anubrata Gangoly*, registration number **IBBI/IPA-001/IP-P-02662/2022-2023/14072**, email: **ca.a.gangoly@gmail.com**, is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- g) The IRP/RP shall submit to this Adjudicating Authority periodical reports with regard to the progress of the CIRP in respect of the Corporate Debtor.
- h) The Operational Creditor shall deposit a sum of **Rs.3,00,000/- (Rupees Three Lakh only)** with the IRP to meet the expenses arising out of

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issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).

- i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- j) Additionally, the Operational Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

- 15. *CP (IB) No. 82/KB/2020* to come up on *15.11.2022* for filing the periodical report.
- 16. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 06th day of September, 2022

SA [LRA]