

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 898 (ND)/2020

IN THE MATTER OF:

**M/S. Z-COM INDIA PRIVATE LIMITED
THROUGH ITS DIRECTOR
3/27 WEST PATEL NAGAR,
NEW DELHI -110008.**

...APPLICANT/OPERATIONAL CREDITOR

VERSUS

**M/S. FRONTLINE (NCR) BUSINESS SOLUTIONS PVT. LTD
B- 48, GROUND FLOOR, NARAINA INDUSTRIAL AREA,
PHASE-II, NEW DELHI- 110028**

....RESPONDENT/CORPORATE DEBTOR

SECTION: U/S 9 of IBC, 2016

Order delivered on: 06.10.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Applicant/Operational Creditor: Mr. Partho Bhattacharya

For the Respondent/Corporate Debtor:

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present petition has been filed under Section 9 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), praying for initiation of Corporate Insolvency

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Resolution Process of the Respondent/Corporate Debtor on grounds of its inability to liquidate its operational debt.

2. The facts mentioned in the application in brief are as follows:
 - i. That the applicant company is a subsidiary of a foreign company M/s. Z-Com Inc. company having its head quarter in the Hsinchu Science Park in northern Taiwan, Z-COM was established in 1995 and is inter-alia engaged in the manufacturing of various wireless networking solutions and dedicated R&D and has an established presence across Asia, Europe and also having globally well-known brand name “Z-Com” and operates its business activities through the Applicant Company in India.
 - ii. The Corporate Debtor have been procuring the goods from the Operational Creditor by raising purchase orders. The materials received by the Corporate Debtor were of impeccable quality. The Operational Creditor raised invoices against the goods supplied, which have been duly acknowledged by the Corporate Debtor.
 - iii. That the Applicant has maintained running ledger account of all the transactions between the Applicant and the Corporate Debtor and had to made entry with respect to the various invoices and have adjusted the payment received partly in the transaction between the parties.
 - iv. However, till 26.03.2019, the total Outstanding towards the Corporate Debtor is to the tune of Rs.9,37,76,299/- (which



is exclusive of interest) besides this the Operational Creditor also claims interest @ 18% amounting to Rs.2,11,63,888/- as due and payable to the Applicant.

- v. However, Applicant keeping in mind the business relationship with the Corporate Debtor did not emphasize much on the payment, however the applicant had been reminding the outstanding dues to be paid by the Corporate Debtor to the Applicant.
- vi. Moreover, the Applicant and their employees have made various attempts to recover the outstanding amount from the Corporate Debtor by contacting telephonically and frequent visit to the office but instead of making payments the Corporate Debtor kept on making false promises and assurances and further delayed the payment on one pretext to another.
- vii. However, to the utter shock of the Applicant herein there was no release of payment by the Corporate Debtor notwithstanding of the repeated reminder given to clear the outstanding dues of the Applicant and hence the Applicant was constrained to issue a Demand Notice through his counsel dated 02.07.2020 under Rule 8 of the Insolvency & Bankruptcy, Read with section 5 of the Insolvency & Bankruptcy 3 Code (Application to Adjudicating Authority) Rules, 2016 demanding the payment of the said outstanding dues.



- viii. Even after the expiry of 10 days no payment of the due amount has been brought to the notice of the Applicant by the Debtor. However, the Corporate Debtor replied to the said statutory notice vide reply/ notice of dispute dated 12.07.2020, wherein Corporate Debtor raised some disputes regarding delay in supply which are nothing but illusionary and moonshine to avoid legitimate dues payable to the Applicant.
- ix. Hence, the applicant has filed the present application under the Code for initiation of corporate insolvency resolution process.
3. We have heard the Ld. Counsel for the petitioner. Ld. Counsel for the petitioner in course of his arguments submitted that the first invoice was raised by the petitioner on 19.04.2018 and the last invoice was raised by the petitioner on 06.11.2019, therefore the application is within time.
4. He further submitted that the demand notice was duly delivered upon the petitioner and the petitioner also submitted that the reply to the demand notice and raised the frivolous grounds or disputes, which are not liable to be accepted, so, the notice may be issued upon the respondents.
5. In the light of the submissions made on behalf of the petitioner, we have gone through the averments made in the application as well as documents enclosed with the application and we noticed that the present application is filed on 14.08.2020



but before filing the application, it appears that the demand notice dated 02.07.2020 was duly delivered upon the respondents on 06.07.2020 and the respondent sent a reply of the demand notice on 12.07.2020 and the reply to the demand notice is at page 131 of the application. We have gone through the reply to the demand notice and we noticed that the respondent/Corporate Debtor in para 9 (g, h, I, j) raised the question of non-delivery of the goods in time and that is the reason, it is mentioned in para "g" that ***'at this stage it would be relevant to submit that even though Our Client required bulk delivery of 20000 APs over a period of six weeks, however, your client supplied the material sporadically as per their own whims and fancies thereby evidencing that from the very inception your client had no intention & capacity to complying with the purchase order received from Our Client. In fact, vide mail dated 26.05.2018, 27.05.2018, 28.05.2018, 31.05.2018, 01.06.2018, 12.07.2018, 13.07.2018,, our Client had specifically brought to the attention of your client that Our Client is being penalized by CSC for not honoring to the time line provided by them to CSC and the same was happening because of the fault on part of your client who had failed to deliver the desire quantity of goods in terms of the PO dated 11.04.2018. our Client again specifically brought to the attention of your client that all penalties that would be imposed by the CSC on Our Client, the same would be passed on back to back basis***



to your client. Moreover, Our Client had sent various reminders for an updates on delivery schedule but Your Client never even responded to the same. It is Clear that Your Client acted in al highly unprofessional manner and had never taken their obligations seriously. The e-mails dated 26.05.2018, 27.05.2018, 28.05.2018, 31.05.2018, 01.06.2018, 12.07.2018, 13.07.2018, are annexed hereto and marked as Annexure-R3 (Colly)."

6. We further noticed that in this para, some emails have been referred, which were sent much before the issuance of the demand notice and the first email was dated 26.05.2018 and the last email as referred in this para is 13.07.2018, all these emails are annexed as Annexure R-3, which is at page 153 onwards, when we have gone through the emails exchanged between the parties then we noticed that the email dated 01.06.2018 shows that on behalf of the respondent, the petitioner was informed that ***"Please be informed we are being penalized now for not giving schedule to CSC, all penalties will be passed on you back to back"***, this was email written by Mr. Sanjay Sinha addressed to Mr. Rajesh Kapoor and we further noticed that there was several correspondence in between the petitioner and the respondent and we further noticed vide email dated 26.05.2018 sent by Mr. Sanjay Sinha to Mr. Rajesh Kapoor, it appears to us the goods were not being delivered on time by the petitioner to the respondent.



7. We further noticed that at page 156, there is a email dated 13.07.2020, it was also written by Mr. Sanjay Sinha to Mr. Rajesh Kapoor in which he mentioned that :-

" Dear Mr. Rajesh,

Refer to our serious discussions, we are not seeing any solution with you for supply of AP to us. We are feeling blackmailed by not getting the material and we are being forced to enter into agreement with some other vendor as suggested by you time and again. we don't have time to believe on other vendors as they will be able to supply to us or not. This is gross violation of the terms agreed with us. Our client is after our life and has communicated to us for cutting down the size of business to us. This will give a huge loss to us, and please be informed all this loss will be passed on to you. Please give me a strict time line for the delivery as DOT has now intervened in this deal. They have ordered to Blacklist Z Com for operating in India for this lapse it the last time line given by them is not met. Till date I was hiding from them that we have all the AP in place but today I had to share with them the actual problem as you had also seen the mail from client to cut short the business."

8. Therefore, on the basis of these emails exchanges between the parties, we are of the considered view that as per the terms and conditions of the agreement, the petitioner was required to delivered the goods in time but it had not been delivered within



time and that is the reason, it causes the inconvenience to the respondent. We further noticed from these emails that some penalty was also likely to be imposed upon the respondent due to non-supply of the material in time by the petitioner.

9. Therefore, at this juncture, we would like to refer the definition of dispute which is defined under Section 5(6) of the IBC and the same is quoted below:-

(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;

10. Mere plain reading of the provision shows that the dispute includes the existence of the amount of debt and the quality of goods or service or the breach of a representation or warranty.

11. Here the respondent has raised the quality of service, the goods were not being delivered in time, which causes inconvenience to the respondent in performing their work and it also effected the goodwill of the respondent.

12. At this juncture, we would like to refer the Section 8 of the IBC, 2016 and the same is quoted below: -

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount



involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any , and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a “demand notice” means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

13. As per Section 8(2) of the IBC, we noticed that the Corporate Debtor has filed the reply and raised the dispute within the period



of 10 days of the receipt of the demand notice, therefore, they have complied the provision of Section 8(2) of the IBC and we further noticed they also raised the existence of the dispute by enclosing the emails exchanged between the parties prior to the issuance of the demand notice.

14. At this juncture, we would like to refer the Section 9 of the IBC and the same is quoted below:-

(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;



(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor by the corporate debtor, if available; and

(d) such other information as may be specified.

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(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 repayment 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.

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

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

(b) there has been repayment payment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or



(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under subclause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.

15. Mere plain reading of the said provisions shows that as per Section 9(5)(i), the Adjudicating Authority shall admit the application, if the application is made under Section 9(2) IBC is complete, there is no payment of unpaid operational debt and Section 9(5)(i)(d) says that no notice of dispute has been received by the Operational Creditor or there is no record of dispute in the information utility, whereas Section 9(5)(ii) (d) says if the notice of dispute has been received by the Operational Creditor or there is record of dispute in the information utility then the Adjudicating Authority shall reject the application.

16. Herein the case in hand, we have already discussed the emails exchanged between the parties and all the emails are prior to the issuance of the demand notice and the contents of the emails shows that the petitioner was not delivering the goods in



time and on several occasions these disputes have been raised by the respondent and as we have already discussed the definition of dispute in the aforementioned para and in our considered view that the emails exchanged between the parties shows the existence of dispute as defined under Section 5(6) of the IBC and read with Section 8(2) of the IBC.

17. For the reasons discussed above, when we shall consider the case in hand then we are of the considered view that in view of Section 9(5)(ii)(d) of the IBC, since, the dispute has been raised and documents enclosed with the application filed by the petitioner itself shows that a dispute has been raised prior to the issuance of demand notice, so, under such circumstances, we have no option but to hold that since there is a dispute raised by the respondent prior to the issuance of demand notice and by filing the reply, he brought all these facts to the notice of the petitioner, so, under such circumstances, we have no option but to dismiss the application.

18. Accordingly, the present application is DISMISSED as there is a dispute raised by the respondent prior to the issuance of demand notice and within the time prescribed under Section 8(2) of the IBC.

-Sd-

K. K. VOHRA
Member (T)

-Sd-

ABNI RANJAN KUMAR SINHA
Member (J)