



**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH – V, NEW DELHI**

C.P (IB)/2004(ND)2019

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:

**Suresh Yadav, Proprietor,
Govind Shuttering Store.**

N.H. 8, Jaipur Road, 42 Miles stone,
Near Toll Plaza KherkiDaula,
Gurugram Haryana

...Operational Creditor

Versus

S.P Contracts Pvt. Ltd.

S.23-26 Param Puri,
Uttam Nagar, New Delhi
110059

...Corporate Debtor

Coram:

SHRI P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Adv. Mohit Nagar

For the Respondent : Adv. Shohit Chaudhary

Order Delivered on: 28.03.2023



ORDER

SHRI P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL) AND **SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)**

This is an application filed by the Applicant M/s. Suresh Yadav, Sole Proprietor, Govind Shuttering store seeking to initiate corporate insolvency resolution process ("CIRP") under Section 9 of the Insolvency and Bankruptcy Code 2016 ("the Code") of the Respondent S.P Contractor Pvt. Ltd. for the alleged default on the part of the Respondent in clearing the debt of Rs.6,89,308. (Rupees Six Lakh Eight Nine Thousand Three Hundred and Eight only)

1. The details of the fact to the filing of this application as averred by the Applicant/Operational Creditor are as follows:
 - I. The Operational Creditor is involved in the business of providing Shuttering Material on lease/rent to the other companies
 - II. That pursuant to arrangement between the Operational Creditor and the Corporate Debtor; the Corporate Debtor placed several orders of shuttering material on rent to the Corporate Debtor on regular basis.
 - III. The Operational Creditor supplied the material as per the demands and requirement of the Corporate Debtor from time to time, and Operational Creditor raised various unpaid invoices upon the Corporate Debtor against the supply of the material on rent to



the Corporate Debtor.

- IV. That despite several requests and demands for payment of outstanding dues. The Corporate Debtor ignored all the demands. That in view of the aforementioned circumstances, the Operational Creditor having no recourse, and in compelling circumstances, issued a demand notice dated 21.12.2018 upon Corporate Debtor vide postal receipt dated 26.12.2018 under section 8 of 'the Code', 2016 in Form 3 for the demand of Rs.6,89,308/-, however, the same was returned. Therefore, applicant, not being left with any other option, issued the Demand Notice electronically through e-mail on 26.01.2019 and the same was delivered to the Corporate Debtor on the same day.
 - V. That on expiration of the 10 days provided under the statute to give reply of the Demand Notice, the Operational Creditor received an e-mail from the Corporate Debtor, claiming that no payment is due, thought the Corporate Debtor neither supported the same by any evidence nor raised any pre-existing dispute between the parties. Hence, the present application filed by the Operational Creditor to initiate the corporate insolvency resolution process "CIRP" against the Corporate Debtor
- 2.** Consequent to the notice issued by this Tribunal, the Counsel for the Corporate Debtor filed its reply on behalf of the Corporate Debtor stating as below:
- I. That the Operational Creditor/Applicant has initiated the present proceedings to initiate CIRP



of the Corporate Debtor by misrepresenting the facts and intentionally concealing the existence of dispute.

- II. Further the Corporate Debtor stated that the captioned petition has been filed by the Operational Creditor before this Hon'ble Tribunal on 05.07.2019 and the last alleged invoices were raised only in the year 2015. Therefore, more than 3 years have elapsed from the dates of alleged invoice, and thus, the claim of the Operational Creditor is time-barred and beyond the period of limitation.
- III. The Corporate Debtor further submitted that the payment claimed by the Operational Creditor has already been settled vide the settlement agreement between the both the parties on 23.04.2018.

3. The Counsel for the Operational Creditor has filed rejoinder stating that:

- a. The present Application is not barred by the limitation, and it is pertinent to mention herein that the petitioner has been maintaining continuous and running account of transactions with the Corporate Debtor. Hence it is wrong to say that the 3 years have elapsed from the date of default and it is time barred by the Limitation.
- b. The perusal of settlement agreement dated 23.04.2018 clearly shows that one director of the Corporate Debtor Mr Satish Gupta, has satisfied the payment only to the extent of his own share i.e 65.33% of total amount paid to the Operational Creditor and 34.67% is still to be paid.
- c. It is submitted that Mr Satish Gupta was not authorized



to sign, verify and to affirm the reply vide board resolution dated 20/11/2019 filed by him (Mr Satish Gupta) on behalf of Corporate Debtor. It is also mentioned that the present Petition has not been filed against Mr Satish Gupta in individual capacity but against the company i.e Corporate Debtor.

4. Issues

- I. Whether the present application is within the Limitation?
- II. Whether settlement agreement for payment of outstanding amount comes under the ambit of 'Operational Debt'?

Analysis and Findings

5. We have heard the Learned Counsel for the Operational Creditor and perused the averments made in the petition. Since the registered office of the respondent Corporate Debtor is in Delhi, this Tribunal is having territorial jurisdiction as the Adjudicating Authority in relation to prayer for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 9 of The Insolvency and Bankruptcy Code, 2016, against the Corporate Debtor
6. It is noted that various invoices have been raised by the Operational Creditor for the supply of Shuttering Material to the Corporate Debtor on lease/rent and the Corporate Debtor failed to make payment of alleged invoices due. Therefore, Operational Creditor through this application is seeking initiation of the CIRP against the Corporate Debtor for an outstanding amount of



Rs.6,89,308/-

7. As to the Issue no. 1, to determine whether the present application is within the Limitation. It is noted that the Petition has been filed by the Operational Creditor before this Tribunal on 05.07.2019. Further, the last alleged invoices, were raised by the Operational Creditor only in the year 2015. Therefore, more than 3 years have elapsed from the dates of the alleged invoices.
8. It is pertinent to note that for the extension of limitation u/s 18 of the Limitation Act, 1963, where there has to be a clear acknowledgement of debt within a period of 3 years from the date of default i.e.31.8.2015 and further that the documents provided by the Applicant in support of his application failed to show any clear acknowledgment of the operational debt that is due.
9. We further find that no unequivocal or clear cut acknowledgement of the debt was found in various payment invoice and e-mails produced by the Applicant. Further, the Applicant had not been able to establish an extension of limitation as required under section 18 of the Limitation Act, 1963 on the basis of a valid acknowledgement provided by the corporate debtor to the operational debt, which was in default from 2015. Therefore, it is observed that the section 9 application is barred by limitation. ***In B.K. Educational Services Private Limited v. Parag Gupta and Associates*** ((2019) 11 SCC 633) Hon'ble Supreme Court held:-

“42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the



Limitation Act gets attracted. “The right to sue”, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.”

10. As to the second issue, it is pertinent to mention that Mr. Satish Gupta is the Director of the Corporate Debtor company and the Settlement has been made by Mr. Satish Gupta while discharging his duties towards the corporate debtor and in the course of the business between the parties. Therefore, it is observed that the alleged unpaid share of 34.67% failed to be fulfilled. Hence it is to be considered as an unpaid amount as per the settlement agreement.

11. It is relevant to mention that the Hon’ble National Company Law Tribunal (NCLT), Allahabad Bench, vide its decision in ***Delhi Control Device (P) Ltd. vs. Fedders Electric and Engineering Ltd., 2019*** has made clear its stand regarding the claiming of debt due on account of settlement agreement between the parties. The Hon’ble NCLT has observed that:

“Unpaid instalments as per the settlement agreement cannot be treated as Operational debt within the meaning of its definition as prescribed to it under section 5 (21) of the code and any failure(s) or breach(es) of settlement agreement cannot be a ground to trigger CIRP against Corporate debtor under the provisions of the code and remedy may lie elsewhere but, not before the Adjudicating Authority”.



12. In view of the above facts and circumstances, we are of the considered issue that the present petition fails to fulfil the criteria laid down under the provisions of this code. Hence, this petition is sought to be dismissed on the grounds stated above. It is, accordingly, hereby ordered as follows: -

- a. The application bearing *CP (IB) No. 2004/ND/2019* filed by, Suresh Yadav, Proprietor Govind Shuttering Store, 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 S.P. Contracts Pvt. Ltd., stands dismissed.
- b. In terms of Section 9(5)(ii) of the Code, Court Officer is hereby directed to communicate this Order to the parties by Speed Post and email immediately, and in any case, not later than three days from the date of this Order.

13. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-

(SHRI RAHUL BHATNAGAR)

Member (Technical)

Sd/-

(SHRI P.S.N. PRASAD)

Member (Judicial)