IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH-V

Company Petition (IB) No.1639/ND/2019

In the matter of:

The Insolvency and Bankruptcy Code, 2016

AND

In the matter of:

Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

AND

In the matter of :

Mr. Nawal Kishore Prasad
S/O Shri Upendra Kumar
Dhrubganj, PO:- Kharik Bazar,
District:- Bhagalpur, Bihar

............*Operational Creditor*

VERSUS

M/S Hospitech Management
Consultants Pvt. Ltd.
UG-6, World Trade Center,
Barakhamba Road, Connaught Place,
New Delhi-110001

.............*Corporate Debtor*

28.1.2020

ORDER DELIVERED ON: 21.01.2020

CORAM :

Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)

Smt. Sumita Purkayastha, Hon'ble Member (Technical)

For the Applicant/ Operational Creditor: Adv. Mani Bhushan Sinha

For the Respondent/ Corporate Debtor: Adv. Sagar Bansal and Adv. Simran Jyot Singh

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER, JUDICIAL

1. The present petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 ("Code") read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the Applicant/ Operational Creditor, i.e. ***"Mr. Nawal Kishore Prasad"*** for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company ***"M/S Hospitech Management Consultants Pvt. Ltd."***.

2. The Operational creditor is an Engineer by profession and has worked with many companies before joining to the Corporate debtor company.

3. In the month of July, 2014, the Operational Creditor approached by the Corporate debtor and was offered a job for a Project under work with Corporate Debtor at Raigarh.

4. The Corporate Debtor is in the busines of the Project Management Consultancy and used to take Contract and consultancy of govt. and Non-Govt projects mainly construction of building.

5. The Operational Creditor was selected by the Corporate Debtor and was asked to come to New Delhi Head Office of the Corporate Debtor to complete the joining formalities and to understand the work and his assignments. He signed two letters Viz. "Offer Letter" dated 10.07.2014 and "Reporting Instruction" Letter dated 14.07.2014.

6. As per averments made in the Application, the Corporate Debtor told him that the copy of the "Offer Letter" will be sent to the Operational Creditor by courier while he can take the "Reporting Letter" as he has to give this to the Chief Engineer at Raigarh as a part of reporting formalities and authorization by the Corporate Debtor. But the Corporate Debtor has not handed over the copy of Offer Letter with an assurance that the same would be sent to him with proper endorsement and signature of the Directors but till now neither the same is sent on email nor by post. Unaware of their intentions, he booked the ticket for Raigarh to report to the officer as per the instructions given in Reporting Instruction. Later after around 3 month, he came to

know that the Chief Engineer and Corporate debtor has developed misunderstanding and due to the internal disputes known to them the work assigned was stopped by the authority and accordingly the operational creditor has immediately been instructed to take charge of the new project at Raigarh (CG) but he was not willing to go there so he conveyed his unwillingness to the management and asked them to settle the accounts as he has not even paid salary for last 2 months in full.

7. Mr. A.S. Rahi Director with Corporate debtor called the Operational Creditor himself and told him that his salary would be cleared once he report at Raigarh (CG) and he would also get an increment of Rs. 7,000/- from the agreed salary and in addition to this, he would be getting other facilities like expenses of the lodging, boarding and commutation.

8. Accordingly the Operational Creditor finding the offer good took charge at Raigarh (CG) on 19.09.2014 and started working, he used to report to the assigned officer and the Head office.

9. The Operational Creditor continuously used to send the letter either directly or through the Dean of the College, where the project was running. Even dean of the College once intervened and has called a joint meeting with the Director of the ICMER and the Operational Creditor in which it was agreed by the Corporate Debtor that he would pay immediately Rs.

10,32,000/- but the same is also not honoured by the Corporate debtor.

10. Demand notice dated 27.03.2019 was sent to the Corporate debtor through Speed Post.

11. The total outstanding as overdue salary amount including expenses is Rs. 28,42,230.22/- plus interest @15% P.A. as on 31.05.2019 and Mental harassment Compensation of Rs. 15 lakhs and legal expenses of Rs. 3 Lakhs. Total cumulative amount of Operational debt is rs. 46,42,230.22/- calcultaed as on 30.05.2019. It is pertinent to note that till date Corporate Debtor has paid Rs. 2,63,385/- only and balance as on date is Rs. 22,24,583/-.

12. The Corporate Debtor in its reply to the application submits that:
    a. Petitioner's performance during the probation period in the given role was not upto the mark as he lacked the necessary Professional skills/ competency which he earlier represented to have causing immense inconvenience for the Corporate Debtor.
    b. During the time of interview, the petitioner assured the Corporate Debtor that he will do any work anywhere in the country and asked him to give another opportunity. Upon request of the petitioner, the Corporate Debtor asked him to join another organization namely International Consociation

for Medical Education & Research as admitted by Petitioner himself at page 30 (Part –IV, Para 12) of the petitioner filed.

c. ICMER is a charitable trust of public nature started in March 1997 and formally registered on 02.04.2000 under Indian Trust Act, 1882. Petitioner joind ICMER and was no more employee of Corporate Debtor form 19.09.2014 onwards.

d. The petitioner continued to render services to ICMER since January 2015 and never addressed any letter/ email to the Corporate Debtor because he himself knew he is no more an employee of Corporate Debtor as admitted by him.

e. The Petitioner has not disclose the email dated 21.04.2015 sent by the Corporate Debtor to the petitioner wherein the petitioner was decided to be transfer from Govt. Medical College Raigarh to Delhi w.e.f. 21.04.2015 and also directed to handover the charge alongwith all filed and documents pertaining to Govt. Medical college Raigarh to Shri Avanish Kumar Dwivedi, Project Engineer appointed by the Company in Petitioner's place.

f. The petitioner wrote an electronic mail dated 24.04.2015 replying to Director ICMER not Corporate Debtor in gibberish refusing to come to Delhi and instead of handling over the charge to new appointed personnel in his place, petitioner went on to threaten ICMER representative that he will sell documents and assets if not paid.

g. A serious Complaint dated 26.03.2015 was received against petitioner from PWD Department addressed to ICMER stating petitioner is not competent to render services related to Architectural and Engineering work and some else need to be appointed in his place otherwise ICMRT will not be paid for the work.

h. The Corporate Debtor did not reply to Section 8 Notice sent almost 3 months before the petition was filed as Petitioner has already threatened Corporate debtor and ICMER multiple times in past.

i. The petitioner has admitted the existence of dispute by non filing of Affidavit under Section 9(3)(b) which shall need to be filed in order to confirm that there is no notice given by the Corporate Debtor relating to a dispute of the unpaid operational debt.

j. The petitioner in Annexure A8 & A9 on page 65 of petition himself admitted that he was working for ICMER and for not Corporate Debtor.

k. The Petitioner was paid in full for services he rendered to corporate debtor for probationary period of 19.07.2014 to 19.09.2014 and as well as for two months notice period.

l. The outstanding amount if any, for services rendered to ICMER from January 2015 onwards is pending then that is not covered under the definition of Operational debt and ICMER is a public charitable trust and does not come under the definition of Corporate Debtor.

13. The Petitioner made the following averments in his rejoinder:

a. The Applicant was never on probation.

b. If the Corporate Debtor was not satisfied with the professional skills of the applicant then how and why the Corporate Debtor had not terminated the applicant after completion of the alleged probation period and despite alleged lacking in the professional skills the applicant worked with the Corporate Debtor for more than four year.

c. The Corporate Debtor has not submitted any proof of the fact that the applicant was on probation period since 19.07.2014.

d. Mr. A.S. Rahi never informed operational creditor that he is terminated from the job instead he was asked to join the project of ICMER at Raigarh, which is said to be the sister concern of the Corporate Debtor, as per the previous employment terms and conditions with increment as pleaded in the present application.

e. The Corporate Debtor has neither issued any such termination letter to the applicant nor issued any new appointment letter or e-mails pertaining to the same allegation.

f. As per the annexure R-1 of the reply (Page 27 & 28) it is clear that the Director of the Corporate Debtor and ICMER are same both being sister concern.

g. There were no pre-existing dispute between the Operational Creditor and Corporate Debtor.

h. Vide meeting dated 09.12.2018, the Corporate Debtor through ICMER agreed the outstanding salary of operational creditor for the 2014 and 2015 at the rate of 43,000/- per month total amounting to Rs. 10,32,000/-.

i. The corporate debtor is liable to pay total cumulative of amount of operational debt of Rs. 47,42,2230.22/- which Includes Unpaid Salary Principal with 15% interest and Compensation and legal Expenses.

j. The ICMER is the sister concern of the Corporate Debtor and the Corporate Debtor is taking illegal benefits of ICMER being registered as Charitable Trust.

14. We have heard the Ld. Counsels appearing for the Operational Creditor and Corporate Debtor and perused the averments made in the application, reply, rejoinder & written submissions filed on behalf of both the parties.

15. Ld. Counsel for the Operational Creditor in course of his arguments submitted that the Operational Creditor has been appointed by the Corporate Debtor and accordingly, the Operational Creditor has joined. He further submitted that in the offer letter, nowhere it is mentioned that there is any probation period rather it is specifically mentioned that the service of the Operational Creditor can be transferred to any other project in

India, if required. He further submitted that, as per the offer letter, an amount of Rs. 43,000/- was paid on 06.02.2016. He further submitted that after 2 or 3 months, the place of the Operational Creditor was relocated to new ongoing project and Corporate Debtor at the remote area of Raigarh (Chhattisgarh) at medical college but earlier the Operational Creditor was not inclined to join there but subsequently on the assurance given by the Director of the Corporate Debtor, he joined the new location at Raigarh on 19.09.2014. He further submitted that thereafter several demands were made by the Operational Creditor for the dues for which the Operational Creditor was entitled to get in lieu of the salary but the same has not been given. He further submitted that in response to the meeting dated 09.12.2018, the Operational Creditor submitted an application to the director of ICMER regarding the payment of the dues and the same was recommended by the Dean for payment on 22.12.2018 and so from the date of 22.12.2018, the application is within time. He further submitted that the Operational Creditor has also delivered a demand notice, which was admitted by the Corporate Debtor in his reply but Corporate Debtor has not given any reply to the demand notice and this has also been accepted by the Corporate Debtor in his reply, so in view of Section 8 of the Code, the Corporate Debtor has not raised any dispute within 10 days from receiving the demand notice therefore, any specific objection regarding the non-payment of the amount ~~payable~~ to be accepted.

He further submitted that even in reply, it is not disputed by the Corporate Debtor that he is not the employee of the Corporate Debtor. In course of arguments, he further submitted that Ld. Counsel for the Corporate Debtor raised this point that since his services were transferred to the ICMER, therefore, he is no more employee of the Corporate Debtor but this has not be corroborated by the Corporate Debtor because the Operational Creditor joined in that department, which is the sister concern of the Corporate Debtor, on the basis of the transfer made by Director of the Corporate Debtor, so the Operational Creditor is still an employee of the Corporate Debtor.

16. On the other hand, Ld. Counsel for the Corporate Debtor in course of his arguments submitted that the present application is barred by limitation because last amount was paid off on 14.08.2015 making present application barred by limitation as it has been filed on 07.06.2019, which is after the expiry of 3 years. He further submitted that the contention of the Operational Creditor that he received the last payment in June 2016 is not correct as, a matter of fact, the last payment was made on 14.08.2015. He further submitted that the Corporate Debtor has terminated from the services of the Operational Creditor and he was directed to join new assignment. So the contention of the Operational Creditor that he was directed to join at the instance of the Corporate Debtor is not liable to be accepted. He further

submitted that the services of the Operational Creditor was terminated telephonically in 2015 and all dues were paid by 14.08.2015. He further submitted that the Operational Creditor has fabricated the documents and further he is liable to be punished. He further submitted that the claim of the Operational Creditor does not come under the definition of operational debt.

17. Now, in the light of submissions made on behalf of the parties, we have gone through the averments made in the petition, reply, rejoinder & written submissions. Since, the Corporate Debtor has challenged the petition on the ground of limitation, therefore, we would like to consider the limitation at first. At this juncture, we would like to refer the averments made in part IV of the application. Of course, in part 4, para 1 at page 40, the Operational Creditor mentioned that the debt falls due on and from 14.07.2014 and is continuing as on date but in response to the meeting dated 09.12.2018, the Operational Creditor submitted ~~that~~ an application for the release of an amount which was recommended by the Dean of the Govt. Medical College, Raigarh on 22.12.2018, which would be evident from page 88 of the application.

18. At this juncture, we would also like to refer the Annexure A-16 which is at page 100 of the petition and saving account of the Operational Creditor which shows that the last payment of Rs. 40,000/- was made on 06.02.2016. Therefore, in our view, the

limitation runs from 06.02.2016 and not from 14.08.2015, whereas the recommendation for payment by the Dean of the Govt. Medical College was made on 22.12.2018 which within 3 years from the date of last payment, which in our opinion, is acknowledgment of debt within the period of limitation and therefore, in view of Section 18 of the Limitation Act, 1963, it is liable to be accepted that the limitation starts from the date of acknowledgment of debt. We further find that the issue of limitation was not raised by the respondent at the time of filing of the reply rather in course of his arguments, the respondent raised this therefore, we are unable to accept the contention of the learned counsel for the Corporate Debtor the present application is barred by the limitation.

19. Now coming to the second point, since the Corporate Debtor raised this point that the service of the petitioner has been terminated on telephone and thereafter the Operational Creditor joined the new assignment and so after 14.08.2015, the Operational Creditor is no more employee of the Corporate Debtor. In the light of the submissions, when we have gone through the averments made in petition, reply, rejoinder then we find that it is admitted by the Corporate Debtor that no termination order was issued by the Corporate Debtor. We further find that even the Corporate Debtor fails to convince us that the service was terminated on telephone rather on the basis of the documents that is the

recommendation made by the Dean of the Medical College on 22.12.2018, it can be said that the Operational Creditor is still working in that Medical College which is the sister concern of the Corporate Debtor and this has also not been disputed by the Corporate Debtor. The Corporate Debtor fails to produce any document to show that any fresh appointment letter was issued to the Operational Creditor to join the Medical College rather the Additional Documents filed by the Corporate Debtor on 21.10.2019 shows that the Corporate Debtor has enclosed the offer letter dated 10.07.2014 and in this offer letter the compensation per month is mentioned and it is also specifically mentioned that the services of the Operational Creditor can be transferred to any another project in India if required. The Corporate Debtor has not disputed that the Medical College is not run by the Corporate Debtor as a sister concern. The only contention of the learned counsel appearing for the Corporate Debtor is that it is running by the trust not by the Corporate Debtor. Since there is no document to show that the services of the Operational Creditor has been terminated in the light of offer letter dated 10.07.2014, therefore, we are unable to accept the contention of the Corporate Debtor that the Operational Creditor joined in the Govt. Medical College after termination of his services from the place,where he joined on the basis of offer letter issued by the Corporate Debtor and which is under the control of the Corporate Debtor.

20. At this juncture, we would also like to refer this fact that in course of hearing, learned counsel appearing for the Corporate Debtor submitted that since the Operational Creditor was on probation, therefore, his services ~~were~~ was terminated without any notice. If I shall consider this submission of the Corporate Debtor along with Offer Letter dated 10.07.2014 then we find, nowhere in the offer letter, it is mentioned that the Operational Creditor is on probation, of course, it is mentioned that the services are liable to be terminated at any time in case his performance has reported not to be satisfactory or superior by the client. In the light of that condition, at this juncture, we would also like to consider, the reply if any filed by the Corporate Debtor in pursuance of the demand notice issued by the Operational Creditor under Section 8 (1) of the IBC. We find that the Corporate Debtor in para 13 of the reply specifically mentioned that he has not sent any reply to the demand notice. Therefore, at this juncture, we would like to refer Section 8 of the IBC and the same is quoted below:-

> "**8. Insolvency resolution by operational creditor-**
> *(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, 1[if any, or] 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 2[payment] 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 3[payment] operational debt in respect of which the default has occurred."

21. Mere plain reading of the provision shows that the Corporate Debtor shall within a period of 10 days of the receipt of the demand notice of copy of invoices mentioned in Section 8(2), bring to the notice of the Operational Creditor existences of disputes if any or record of pendency of suit or arbitration proceeding filed by the receipt of such notice or invoice in relation to such dispute but admittedly this has not been done by the Corporate Debtor. Now at this juncture, we would like to refer Section 9 and the same is quoted below :-

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

(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 1[by the corporate debtor, if available;]

2[(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 any 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 3[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 1[payment] of the unpaid operational debt;

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

National Company Law Tribunal New Delhi

(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 sub-clause (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."

22. Mere plain reading of the provision shows that an application under Section 9 can only be rejected on the following grounds mentioned in Section 9 Sub Section 5 (ii) and if it is not covered under any of the clause of Section 9 Sub Section 5 (ii) then the Adjudicating Authority in view of the decision of **Innoventive Industries Limited Vs. ICICI Bank reported in 2018 (1) SCC 407** has no option but to admit the application under Section 9 (5) (11) of the Code. In the light of such provision, when we shall consider the case in hand then we find that admittedly no dispute was raised under Section 8 sub Section 2 of the Code and the amount claimed by the Operational Creditor has not been paid by the Corporate Debtor and we have also noticed that the application is complete and there is no disciplinary proceeding pending against the proposed IRP who has also given his consent. We further find that the amount claimed by the Operational

Creditor is more than Rs. 1 lakh which is the minimum threshold limit fixed under IBC, 2016 therefore, under such circumstances we have no option but to reject the contention of the Corporate Debtor that the application is not maintainable and it is liable to be rejected rather we are of the considered view that the Operational Creditor has succeeded to establish this fact that he was duly appointed by the Corporate Debtor and joined new assignment and a transfer was made by Corporate Debtor in terms of offer letter and the amount claimed in the petition is not paid to the Operational Creditor, which he is entitled to get in lieu of services rendered by him.

23. Considering the aforesaid circumstances this Adjudicating Authority is inclined to admit this petition and initiate CIRP of the Corporate Debtor. Accordingly, this petition is admitted. A moratorium in terms of Section 14 of the Insolvency & Bankruptcy Code, 2016 shall come into effect forthwith staying:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debt or 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;

(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.

Further:

(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 moratorium period.

(3) 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.

(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 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."

राष्ट्रीय कम्पनी विधि अधिकरण
National Company Law Tribunal
नई दिल्ली बेंच
New Delhi Bench

24. The Operational Creditor has proposed the name of Mr. Kumud Shekhar as the IRP. His details are as registration no. IBBI/IPA-003/IP-N00206/2018-19/12358, email:kumud.shekhar@gmail.com. The consent of the Mr. Kumud Shekhar is on record along with the copy of his certificate. We accordingly confirm his appointment as the IRP. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report.

25. The Operational Creditor is directed to deposit a sum of Rs. 2 lakhs to meet the immediate expenses of IRP. The same shall be fully accountable by the IRP and shall be reimbursed by the CoC, to the Operational Creditor to be recovered as CIR costs.

26. Copy of the order be sent to both the parties as well as to the IRP.

27. To come up for further consideration.

Sd/-
Sumita Purkayastha

(Member Technical)

Sd/-
Abni Ranjan Kumar Sinha

(Member Judicial)

Pronounced today under Rule 151 of the NCLT Rules 2016 as Mrs. Sumita Purkayastha, Hon'ble Member (T) is sitting in Principal Bench today.

राष्ट्रीय कम्पनी विधि अधिकरण
National Company Law Tribunal
सत्यमेव जयते
नई दिल्ली बैंच
New Delhi Bench

Sd/-

(PRABHAT KUMAR SHARMA)

COURT OFFICER

28.1.2021
Deputy Registrar
National Company Law Tribunal
CGO Complex, New Delhi-110003