

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH - V
Company Petition (IB) No. 3496/ND/2019

In the matter of:

The Insolvency and Bankruptcy Code, 2016

AND

In the matter of:

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

AND

In the matter of :

Storm Export Private Limited

Having its registered office at:

H. No 91, Plot No. 45, Second Floor, Neelgiri Apartments
Sector - 9, Rohini, Delhi - 110085

...Petitioner/Operational Creditor

VERSUS

M/s Arsh Associates Private Limited

Having its registered office at:

H. No. 167/7, Third Floor, Hanuman Mandir Gali,
Sarai Jullena,
Delhi - 11002

Also at:

B52, GF, Greater Noida, Omicron 01,
201301.

Also at:

150, New Delhi, Sarai Jullena
110025.

Also at:

H. No. 8, 2nd Floor, Shalimar Garden Ext,
Gali No. 14, Zakir Nagar, Jamia Nagar, Okhla,
New Delhi.

Also at:

H. No. 88, Near SBI Bank, Zakir Nagar,
Jamia Nagar, Okhla, New Friends Colony,
South Delhi-110025

Also at:

H. No. B-34, Sector-5, Shatabdi Nagar,



Sector-E, Meerut, U.P.-250002

...Respondent No. 1/Corporate Debtor

Secretary, Ministry of Corporate Affairs

Government of India

Having its office at:

'A' Wing, Shastri Bhawan

Rajendra Prasad Road,

New Delhi- 110001

...Respondent No. 2

ORDER DELIVERED ON: 27.04.2021

CORAM :

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

Sh. Kapal Kumar Vohra, Hon'ble Member (Technical)

PRESENT: Adv. Kunal Anand and Adv. Shalya Aggarwal

ORDER

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

1. The petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rule, 2016 by the Applicant/ operational creditor, i.e. "**Storm Export Private Limited**" for initiation of Corporate Insolvency Resolution Process against the Respondent/ Corporate Debtor Company "**M/s Arsh Associates Pvt. Ltd. & Anr.**".

2. Brief Facts of the case are as follows:

- i. The Operational Creditor is a company registered under the Companies Act, 2013 and is involved in the business of wholesale trading of Stones and Marbles.
- ii. The Corporate Debtor is involved in the business of Construction.

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- iii.** In the first week of March 2017, the representatives of Corporate Debtor approached the representatives of Operational Creditor for buying stones and marbles for their ongoing construction projects.
- iv.** Pursuant to aforesaid discussions, The Corporate Debtor placed an order for Italian Marble - DYNA ("said goods"), for a total quantity measuring to 1843.97 sq. ft. The said goods were duly delivered on 16.03.2017 upon the instructions of Corporate Debtor at Site-Supertech, Supernova, Sector-94, Noida, Uttar Pradesh by the Operational Creditor and an Invoice bearing no. 012 dated 16.03.2017 for Rs. 4,96,1661/- was issued by the Operational Creditor upon the Corporate Debtor.
- v.** The Operational Creditor contended that the Corporate Debtor assured to release the complete payment immediately, on date of receipt of the tax invoice. It was further agreed by the Corporate Debtors, that in case of delay in payment after the due date i.e. 16.03.2017, interest@ 24% per annum is applicable and the said term was also mentioned in the invoice issued by the Operational Creditor.
- vi.** On 11.09.2017, the Corporate Debtor released part payment of Rs. 75,000/- through RTGS and further assured to clear the balance payment of Rs. 4,21,166/- as per the ledger account as maintained by the Operational Creditor herein within one week from that day.
- vii.** The Operational Creditor, vide email dated 03.10.2019, requested the Corporate Debtor for the release of balance amount due.
- viii.** The Operational Creditor sent a Demand Notice dated 11.11.2019 to the Corporate Debtor by speed post at the registered office address and the same was returned. Thereafter, the scan copy of the said Demand Notice dated 11.11.2019 was sent vide email dated 25.11.2019 on the registered Email of the Corporate Debtor i.e. arshapl25@yahoo.com, available as per the record of the Master Data of Ministry of Corporate Affairs and the same was duly delivered and served. Further, the copy of the Demand Notice



dated 11.11.2019 was sent to the addresses of the directors of the Corporate Debtor on 26.11.2019 and the same was duly served.

- ix.** It is contended by the Petitioner that despite the demand notice issued by the Operational Creditor and the demand for payment of the entire amount due upon the Corporate Debtor, it has failed to reply to the demand notice and has further failed to pay the amount of Rs. 7,46,480/- including interest@ 24% upto 31.10.2019 to the Operational Creditor. The same is evidenced from the Bank Statement of the Operational Creditor.
- x.** The Operational Creditor has delivered the said goods to the Corporate Debtor amounting to Rs. 4,96,166/- and received payments to the tune of Rs. 75,000/-

3. The amount claimed to be default is Rs. 4,21,166/- along with 24% p.a. interest which amounts to Rs. 3,25,314/-. The total amount due is Rs. 7,46,480/-. The above debt is due since 31.10.2019.

4. The Corporate debtor contended the following in its reply dated 09.03.2020:

- i.** Applicant has not filed the application under Section 9 (2) of the Insolvency and Bankruptcy Code, 2016 in the format of Form I as provided in the code itself.
- ii.** The Petitioner was not supplying the material to the Respondent but to Arsh Buildcom, which is a sole proprietorship concern of one Amit Gupta and Arsh Buildcom was purchasing material from Amit Gupta.
- iii.** Respondent was directly paying to the supplier Arsh Buildcom (Amit Gupta) for the material supplied and was not privy to the terms between the Petitioner and Arsh Buildcom (Amit Gupta) regarding the payments, disputes and date and time of delivery, quality and quantity etc.



- iv.** The Respondent has duly made all payments to Arsh Buildcom (Amit Gupta) and once on the instances of Arsh Buildcom (Amit Gupta) forwarded Rs. 75,000/- through RTGS.
- v.** There was no agreement between the Petitioner and Respondent.
- vi.** The Respondent has cleared all the dues on its part and there is no liability or claim pending against the Petitioner by the Respondent.
- vii.** The present application should be dismissed for non-joinder of necessary party and misjoinder of the Respondent as a party.
- viii.** Since there is no Bill of Transportation not any document/invoice counter signed by the Respondent confirming the delivery of the said goods.
- ix.** The Petitioner wrote email only in 2019 (which the respondent came to know about only after the present petitioner) for the alleged remaining payment since 2017.
- x.** When Arsh Buildcom raised dispute with the petitioner only then the Petitioner raised a malicious claim against the Respondent.

5. The Operational Creditor, in its rejoinder dated 17.03.2020, contends that:

- i.** The Operational creditor has filed the present application under the correct format i.e. Form No. 5 and Form No. 1 is not applicable to the present case.
- ii.** There is no Non-joinder of necessary party as the present application under Section 9 of IBC is filed for insolvency and as per the requirement both the Operational Creditor and the Corporate Debtor are made necessary parties.
- iii.** An endorsement was made upon the said invoice bearing No. 012 by the said Authorized Representatives of the Corporate Debtor.
- iv.** There is contract or business transaction between Operational Creditor and M/s Arsh Buildcom.

6. We have heard the Id. Counsel appearing for the Petitioner and perused the averments made in the petition, reply and rejoinder filed by the respective parties. No one appear on behalf of the Corporate debtor.



7. On perusal of averments made in the application, we notice that the Operational Creditor at page 41 of the application enclosed the demand notice and we notice, of course the Petitioner has not mentioned the form number but the content and format of notice show that the said demand notice was sent in Form-3.

8. Therefore, at this juncture, before considering the other submissions of the operational creditor, we would like to examine the provision of law, under which the Operational Creditor is required to deliver the demand notice. **The Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016** prescribed the procedure for sending the demand notice and the same is quoted below:-

Rule 5. Demand notice by operational creditor. -

(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely, -

(a) a demand notice in Form 3; or

(b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgment due; or

(b) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

9. The similar question was discussed by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 1354/2019 decided on



24.02.2020. Relevant paragraphs 44, 45, 46, 47 and 48 are quoted below:-

“44. The use of the phrase, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved’ in Section 8(1) does not provide the Operational Creditor, with the discretion to send the demand notice in Form 3 or Form 4 as per its convenience. Rather, it depends directly on the nature of the operational debt and applicability of Form 3 or Form 4 as per the nature of the transaction.

45. It is important to mention that legislative provisions are made with a larger perspective to deal with all the eventualities that may arise in the implementation of the said provisions. Therefore, the use of the word –OR in Section 8 cannot be interpreted as such, that the Insolvency and Bankruptcy Code has provided a choice or a discretion to an Operational Creditor, to provide an escape route from submission of the invoice, which can be treated as the most relevant document to prove the debt and amount in default.

46. On perusal of the language of Section 8, it is clear that an Operational Creditor on the occurrence of default has been provided with the option of delivering a demand notice of the unpaid operational debt or raising an invoice demanding payment of the amount involved. The two options available for initiation of Corporate Insolvency Process are provided to deal with all the eventualities that may occur. For example, if an operational debt is in the nature of salary dues, then in that situation, the question of submitting an invoice does not arise. To deal with such a situation, Section 8 contains the provision for issuance of demand notice of the unpaid operational debt. Form 3 of the Adjudicating Authority Rules has only laid down the condition that the applicant has to give the details of the amount of debt, details of the transaction on account of which such debt fell due and the date from which such



debt fell due, and as per Column 7 of the said Form 3, applicant has to attach the documents to prove the existence of operational debt and the amount in default. Likewise, where the operational debt involves the generation of the invoice, then in that case, invoice raising the demand may be sent to the Corporate Debtor demanding the invoice amount. In such a situation, the Operational Creditor has to issue the demand notice in Form 4 along with the invoice.

47. Thus, it is clear that the choice of issuance of demand notice u/s 8(1) of the Insolvency and Bankruptcy Code 2016, either in Form 3 or Form 4, under the Insolvency and Bankruptcy Code Application to Adjudicating Authority Rules 2016, depends on the nature of Operational Debt. Section 8(1) does not provide the Operational Creditor, with the discretion to send the demand notice either Form 3 or Form 4, as per its convenience. The applicability of Form 3 or Form 4 depends on whether the invoices were generated during the course of transaction or not. It is also made clear that the copy of the invoice is not mandatory if the demand notice is issued in Form 3 of the Insolvency and Bankruptcy Code Application to Adjudicating Authority Rules 2016 provided the documents to prove the existence of operational debt and the amount in default is attached with the application.

48. It is also made clear that for filing application u/s 9 of Insolvency and Bankruptcy Code 2016, in case the demand notice is delivered in Form 3 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, then the submission of a copy of the invoice along with the application in Form 5 is not a mandatory requirement, provided the documents to prove the existence of operational debt and the amount in default is attached with the application.”

10. Now, in the light of the aforesaid decision, we consider the case in hand and we notice, in this case, as per part IV of the application, the claim of the applicant is based upon the invoices but the applicant had sent the demand notice in Form-3 and not in Form-4. Therefore, in view of the decision

referred (SUPRA), we are of the considered view the demand notice is not in terms of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. And so the demand notice sent by the Operational Creditor is defective one and it shall not be treated a valid compliance of delivery of Demand Notice, in terms of Section 8(1) IBC 2016 read with Rule 5(1)(b) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

11. **In view of Section 9 of IBC 2016, an application u/s 9 of IBC 2016 shall be filed only after the expiry of the period of ten days from the delivery of the demand notice.** Since we held (supra) it shall not be treated as a valid compliance of delivery of Demand Notice, in terms of Section 8(1) IBC 2016 read with Rule 5(1)(b) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

12. Therefore, in view of Section 9 (5) (ii) (a) IBC, the present application is not complete, hence liable to be dismissed on this ground alone.

13. **Accordingly, the present Petition is dismissed. However, the petitioner is at liberty to file a fresh application after delivery of demand notice upon the corporate debtor in accordance with the provision of law.**

Sd/-

**Kapal Kumar Vohra
(Member Technical)**

Sd/-

29.04.2021

**AbniRanjan Kumar Sinha
(Member Judicial)**