

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT-I

C.P. No. 1860/IBC/MB/2019

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

In the matter of

M/s. J. M. INDUSTRIES

Address for Correspondence at: Plot No. L – 195 & 196,
MIDC, Nimblak Road, Ahmednagar – 414111.

.....Operational Creditor/Petitioner

Vs

**M/s. EASHKRUPA SHIPPING & LOGISTICS (I)
PRIVATE LIMITED**

(U63000MH2014PTC254514)

Registered office at: Flat No. 302, Alder Wing, 3rd Floor,
Rosewood Heights, Plot No. 270, Sector 10, Kharghar
Navi Mumbai Raigarh MH 410210 IN

..... Corporate Debtor/Respondent

Order Reserved On : 02.05.2023

Order Pronounced On : 28.06.2023

Coram:

Hon'ble H.V. Subba Rao, Member (Judicial)

Hon'ble Anu Jagmohan Singh, Member (Technical)

Appearances:

For the Petitioner : Ms. Prachi Wazalwar, Advocate

For the Respondent : Mr. Ashish Verma, Advocate

ORDER

Per: H. V. Subba Rao, Member (Judicial)

1. The above Company Petition is filed by **M/s. J. M. INDUSTRIES** hereinafter called as “Operational Creditor” seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **M/s. EASHKRUPA SHIPPING & LOGISTICS (I) PRIVATE LIMITED** hereinafter called as “Corporate Debtor” by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with rule 6 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a Resolution of Operational Debt of Rs. 3,42,97,776/-.

2. The brief facts of the above Company Petition are as follows:

- I. *M/s. J. M. Industries the Petitioner herein being operational Creditors is filing this application seeking to invoke the Provisions under section 9 of the Insolvency and Bankruptcy code 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application of Adjudicating Authority) Rules 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor i.e M/s. Eashkrupa Shipping & Logistics (1) Private Limited.*
- II. *M/s. J. M. Industries is an Operational Creditor having registered office at Plot No. L 195 & 196, MIDC, Nimblak Road, Ahmednagar - 414111. M/s. Eashkrupa Shipping & Logistics (1) Private Limited is a Corporate Debtor with CIN U63000MH2014PTC254514 incorporated on 18/03/2014 and having registered office at Flat No. 302, Alder Wing, 3rd Floor, Rosewood Heights, Plot No.270, Sector 10, Kharghar Navi Mumbai Raigarh MH 410210 IN.*
- III. *The debt has arisen with respect to provision of services. The Corporate Debtor has hired operational creditor for availing certain services. The Corporate Debtor has been paid in excess with respect to the said*

services. The Corporate Debtor and the Operational Creditor had an account reconciliation meeting wherein Corporate Debtor has admitted and promised to pay the excess balance amount ("Claim Amount").

- IV. *The services inter alia is with respect to payment of IGST duty to Government authority on behalf of Operational Creditor.*
- V. *The parties maintained a running account wherein services were availed from time to time. The payments with respect to the services were demanded in advance by the Corporate Debtor. After reconciliation of accounts it was found that excess payments have been made against the services availed. A meeting held among the parties where the Corporate Debtor admitted and acknowledged that the payments have been made in excess. The Corporate Debtor that admitted and acknowledged that the claim amount herein is to be repaid to the Operational Creditor. The Corporate Debtor has also acknowledged the Ledger account.*
- VI. *Corporate Debtor on several occasion accepted the debt. There are various balance confirmation attached to the petition. Hence, the liability is admitted and is outstanding and payable on account of the above mentioned facts and Circumstance.*

3. The Corporate Debtor filed Affidavit in Reply of Mr. Navnath Gole, the Director and Authorized Officer of the Respondent Company strongly objecting the admission of the above Company Petition on various grounds. The important Paras of the Affidavit in Reply are extracted hereunder for ready reference:

A) Legal Objections:

i) The Applicant is not an "Operational Creditor" and the alleged amount is not an "Operational Debt":

*I say that the amount claimed by the Applicant is based on some alleged excess tax payments and confirmations given by the Respondent. I say that the scheme of the Code is well settled with regards to the definition of the term "**Operational Debt**", as settled by various judicial pronouncements. I accordingly say that in the present case, neither the Applicant has supplied any goods to the Respondent nor has he provided any services. Neither there are any unpaid invoices claimed nor annexed to the application. In fact the Application itself states that the amount allegedly due is under some account confirmation and reconciliation between the Applicant and the Respondent, which is seriously disputed by the Respondent and thus, the Applicant ought to have approached a Civil Court of competent jurisdiction for the determination of its disputed claims. Moreover, the Applicant has himself admitted that it is the Respondent who was hired by the Applicant for availing freight forwarding and custom clearance services and therefore, the alleged amount claimed by the Applicant cannot be said to be an "**Operational Debt**", the Applicant cannot be said to be an "**Operational Creditor**" nor the Respondent can be said to be a "**Corporate Debtor**" within the meaning of the provisions of the Code. Thus, the present Application deserves to be dismissed in limine.*

ii) Non compliance of section 9 (3) (c) of the Code:

I say that the present Application is not maintainable in law because it does not meet the mandatory requirements of section 9(3) (c) of the Code. I further say that the Applicant has failed to annex the certificate of the Banking institution or to give accounts for the period of the alleged transactions. Therefore, even on this ground, the Application deserves to be dismissed.

iii) False declaration under Section 9(3)(b) if the Code.

iv) The Applicant has indulged in Forum Shopping to harass the Respondent:

I say that in furtherance of his illicit intentions, the Applicant has also indulged in forum shopping by approaching different authorities and judicial Courts against the Respondent, in respect of its bogus claims, which have been categorically denied by the Respondent. I say that accordingly, after filing of the present Application, the Applicant had also approached the Navi Mumbai Police, Economic Offences Wing with a complaint against me and tried to exert undue pressure upon me through the said officers and extort money from me. I say that upon the said complaint of the Applicant, the Police had summoned me by its letter dated 19/07/2019 to appear, answer interrogatories and also submit documents in support of my contentions. I say that accordingly. I had visited the office of Shri. Ajit Gole, Sub Inspector of Police, EOW-2, Navi Mumbai and also submitted a reply letter dated 01/08/2019, along with all the documents and as the matter was sub-judice before this Hon'ble Tribunal, a copy was also sent to the Deputy Registrar, NCLT Mumbai, whereafter, the matter was closed.

B) Factual Objections:

i) Amounts claimed are not due and payable by the Respondent.

ii) Concealment of actual facts and transactions.

4. In the light of the above pleadings and the evidence of the parties, the first and foremost important issue that needs to be decided in the above matter is with regard to the very qualification of the Petitioner as “Operational Creditor” since the Petitioner cannot maintain a Section 9 petition unless he qualifies to be an “Operational Creditor”.

5. Heard Ms. Prachi Wazalwar, counsel appearing for the Petitioner and Mr. Ashish Verma, counsel appearing for the Respondent and perused the material available on record. In order to decide the above issue, it is important to read the definition of “Operational Creditor” and the “Operational Debt” as defined under the Code:

5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;

5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

6. It is the admitted case of the Petitioner in the above petition that the Corporate Debtor has hired the “Operational Creditor” for availing certain services and paid in excess with regard to the said services. It is also the admitted case of the “Operational Creditor” that the above Company Petition is filed for refund of the excess amount in view of an admitted liability by the Corporate Debtor.

7. The plain reading of the definition of an “Operational Creditor” makes it very clear that the “Operational Creditor” is one who has rendered certain services or supplied goods to the Corporate Debtor. In the present case on hand the present Company Petition is filed by the “Operational Creditor” who is the recipient of the services from the Corporate Debtor who cannot be termed as “Operational Creditor” within the meaning of the Code. Similarly, the above

amount claimed by the “Operational Creditor” is not towards rendering any services or supply of goods or advance paid for the above and therefore the same does not fall within the definition of “Operational Debt” within the meaning of the Code. Therefore, there is a legal force in the above contention raised by the Corporate Debtor with regard to the very qualification of the “Operational Creditor” and “Operational Debt” and the above Company Petition has to be dismissed on that score alone.

8. It is further observed that the “Operational Creditor” purposefully filed the above petition to convert the IBC proceedings into a recovery proceeding basing on the alleged admission of liability and reconciliation of accounts which is legally impermissible. It has been also observed from the reply filed by the Corporate Debtor that the “Operational Creditor” is exerting pressure by filing police complaint and N.I. Act case, etc. to avoid filing recovery proceedings since it is a time-consuming process.
9. This Bench further observes that the above Company Petition is nothing but a gross misuse and abuse of the process by the “Operational Creditor” as it was consciously filed through a legal expert and cannot be held as a bona fide prosecution.
10. For the aforesaid reasons, this Bench is of the considered view that there is no merit in the above petition and the above Company Petition has to be dismissed. Since the above Company Petition is dismissed on the threshold issue of the

qualification of the “Operational Creditor”, the other issues raised by the Corporate Debtor need not be answered and accordingly not dealt with it.

11. Accordingly, the above Company Petition is dismissed by awarding cost of Rs. 1,00,000/- payable by the “Operational Creditor” to Bharat Kosh within one week from the date of uploading of the order. If the “Operational Creditor” failed to pay the above amount and not filed compliance report before the Registrar in the aforesaid period, the above amount of Rs. 1,00,000/- shall be recovered by the Registrar of Companies as if it is a revenue due and payable to the Government on production of the above order copy either by the Corporate Debtor or by this Registry.
12. Accordingly, the above Company Petition is dismissed with cost.

Sd/-
ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)

Shubham

Sd/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)