

Per: Ajay Kumar Vatsavayi, Member (Judicial)

JUDGMENT

IA No.170/2020

The instant IA has been filed seeking to condone the delay of 40 days in filing the Rejoinder to the Reply in CP (IB) No. 484/Chd/Pb/2019. In the circumstances, the delay is condoned and the rejoinder is taken on record and the IA is disposed of accordingly.

CP (IB) No. 484/Chd/Pb/2019

This petition is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **Code**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as **Rules**) by M/s Heligo Charters Private Ltd. (**Operational Creditor**), for initiating the Corporate Insolvency Resolution Process (**CIRP**) in the case of M/s Dhillon Aviation Pvt Ltd. (**Corporate Debtor**).

2. The corporate debtor was incorporated on 20.08.2004 as a Private Limited Company under the provisions of Companies Act, 1956. The CIN of the corporate debtor is U62200PB2004PTC027427. As per master data, the registered office of the Corporate Debtor is 98- Radio Colony, Jalandhar, Punjab. Therefore, the jurisdiction lies with this Bench of the Tribunal.

3. It is stated that the corporate debtor availed helicopter rental services provided by the Operational Creditor under two helicopter charter

agreements, dated 28.01.2016 & 23.08.2016, for a Bell 412 or similar Helicopter operating under the Operational Creditor's non-scheduled operator permit (NSOP) for services to be rendered by the Corporate Debtor to the Reserve Bank of India (RBI) and separately to the Chhattisgarh State Police. It is also stated that apart from the above, helicopter services were also provided on an ad-hoc basis, on instructions from the Corporate Debtor.

4. It is further submitted that Annexure A to the Helicopter Charter Agreement for the RBI Services provides that on receipt of an invoice, the Corporate Debtor shall pay the invoice amount within a period of seven working days from the submission of the final invoice from the Operational Creditor or an interest rate @ 18% will be charged per annum. Further, clause IV (f) of the Helicopter Charter Agreement for the police services provides that in case of failure on the part of the Corporate Debtor to clear the outstanding dues within 25 days from the date of submission of invoice, the Corporate Debtor shall be liable to pay interest of 2% per month on the outstanding dues. Copy of the Helicopter Charter Agreement dated 28.01.2016, Amendment Agreement dated 24.05.2018, Agreement for Charter Hire dated 23.08.2016 and Amendment Agreement dated 24.05.2018 are attached as Annexures 6, 7, 8 and 9 respectively.

5. It is contended that the Operational Creditor has rendered its services to the Corporate Debtor and raised the invoices from time to time. Copy of the invoices are found at Annexure-4 (Colly) of this petition. It is submitted that the Operational Creditor has maintained a running account with respect to its transactions with the Corporate Debtor. Copy of the Ledger

Account of the Corporate Debtor in the books of the Operational Creditor is found attached as Annexure-24 of the petition.

6. It is stated that the Corporate Debtor had first defaulted on 05.07.2016 for an invoice in relation to the RBI Services and thereafter for an invoice in relation to the police services on 28.04.2017 and again on 21.05.2018 for an invoice in relation to the ad-hoc services. It is stated that the Corporate Debtor has defaulted on its payments despite timely invoices and multiple e-mail, reminders being sent by the Operational Creditor and subsequently, the above mentioned agreements were terminated on mutual terms and the agreements pertaining to RBI and Police Services were withdrawn on 15.02.2019 and 28.02.2019, respectively.

7. It is stated that pursuant to the meeting dated 15.02.2019 and the follow up by the Operational Creditor, the Corporate Debtor has made a part payment of Rs.1,64,04,992/- on 14.03.2019 and Rs.34,00,000/- on 16.03.2019. It is further stated that the Corporate Debtor has failed to pay the remaining sums thereafter.

8. As per Part IV of Form 1, the total amount due from the Corporate Debtor is ₹8,00,31,773/- as on 20.06.2019. It is stated that the total amount of debt includes principal of Rs.7,00,25,681/- and overdue interest as per agreement of Rs.80,06,092/-.

9. A demand notice is stated to be issued on 21.05.2019 (Form 3) being Annexure-19 of the petition. It is stated that the demand notice was accompanied by the Copies of all the above mentioned Agreements, invoices

along with debit notes and various reminders/emails asking the Corporate Debtor to honour its dues. It is further stated that due to a genuine and inadvertent error with respect to the percentage of interest mentioned in the demand notice dated 21.05.2019, the Operational Creditor re-issued the demand notice on 31.07.2019 upon the Corporate Debtor. However, the same was returned on 12.08.2019 with an endorsement as "premises closed". Further, the rectified demand notice (Annexure-21) is stated to be re-sent on 13.08.2019 to the Corporate Debtor and the same is received by the Corporate Debtor on 14.08.2019. Vide this demand notice, the Corporate Debtor was called upon to pay the outstanding debt of Rs.8,00,31,773/- in full within ten days from the receipt of the notice.

10. It is stated that upon the expiry of statutory period of ten days as stated in the above mentioned demand notice, on 10.06.2019, the Operational Creditor received a pre-dated letter of 04.06.2019, wherein the Corporate Debtor has denied its liability towards the Operational Creditor.

11. On 14.08.2019, a notice invoking clause 15 of the agreement for referring the disputes arising out of Lease Agreement to Arbitration and appointment of Arbitrator in accordance with the Arbitration and Conciliation Act, 1996 was served upon the Operational Creditor. It is submitted by the Operational Creditor that the said purported notice of arbitration cannot be deemed to raise a dispute that pre-exist the demand notice, since on the date of receipt of the demand notice by the Corporate Debtor, there was no dispute between the parties.

12. The petition is signed by Mr. Rahul Gupta, Authorized Signatory of the Operational Creditor, duly authorised vide Board Resolution dated 02.05.2019 (Annexure-2 of the petition).

13. In Part III of Form 5, the operational creditor has not proposed the name of IRP.

14. Notice of the petition was directed to be issued to the Corporate Debtor on 11.10.2019 as to why this petition be not admitted.

15. Reply has been filed vide diary No.565, dated 21.01.2020. The Corporate Debtor in its reply has denied all the averments, statements and contentions of the petition. It is submitted that the subject matter of the present petition is disputed and the respondent has already invoked the arbitration clause. Further, it is stated that no reply has been received by the respondent-Corporate Debtor in lieu of the notice sent seeking appointment of arbitrator in the above matter. Subsequently, the respondent has approached the Hon'ble Delhi High Court, wherein cognizance of the above matter has been taken and notice has been issued to the Operational Creditor for 26.03.2020.

16. It is submitted that the Helicopter Charter Agreement dated 28.01.2016 was entered into for a period of 14 days only and was renewed from time to time. It is also stated that by virtue of amendment agreement dated 24.05.2018, the said agreement was extended till 22.08.2019 and was to remain firm and fixed so long as the contract with the original contract remained current and valid and in the similar fashion the second agreement was also amended and was valid until the original contract was to remain valid.

It is contended that both these agreements were wrongly terminated by the Operational Creditor and thus repudiating the entire arrangement between the parties. The respondent-Corporate Debtor is stated to have been exposed to huge substantial losses and further got its image being tarnished, which impacted its future prospects as well. Copies of the agreement dated 28.01.2016 along with the amendment agreement dated 24.05.2018 are attached as Annexure R-3 of diary No.565.

17. Rejoinder has been filed vide diary No.2051, dated 16.03.2020. It is submitted that the petitioner did not receive any "Notice of Dispute" from the respondent-corporate debtor within the stipulated 10 days of the delivery of the notice demanding payment, as required under Section 9 (1) of the Code. It is stated that further the alleged dispute even assuming there is one, did not pre-exist the demand notice.

18. It is also submitted that the petitioner was served with the purported notice of arbitration dated 14.08.2019, issued by the respondent only after the receipt of the demand notice and the notice, therefore, cannot be said to be pre-existing dispute within the meaning of the Code. It is also contended that the respondent-Corporate Debtor has mis-led the Hon'ble High Court of Delhi to obtain an order in Arb.P.784/2019, dated 26.11.2019 with a view to obstruct the validly initiated insolvency proceedings in this matter.

19. It is further contended that the allegations made in the reply are vague and baseless in nature. With regard to the alleged date of withdrawal

of services by the petitioner, on page 2 of the respondent's letter to the petitioner received on 10.06.2019 and pre-dated as 04.06.2019 (Annexure-20 of the petition), the respondent claims that the RBI Services and the Police Services were withdrawn on 08.02.2019 and 28.02.2019, respectively. However, on page 3 of the same letter, pre-dated 04.06.2019, the respondent has specifically denied that the RBI services and the Police Services were withdrawn on 18.02.2019 and 28.02.2019, respectively. It is stated that the respondent has alleged that the petitioner has withdrew its services from January, 2019.

20. It is also pointed out that the respondent has once again changed the alleged date of withdrawal of services by the petitioner in para 14 of the reply, wherein it is alleged that the petitioner unilaterally terminated the arrangement and stopped the services on 15.02.2019.

21. Heard Mr. Anand Chhibbar, the learned senior counsel for the petitioner-operational creditor and Mr. Anupam Gupta, the learned counsel for the respondent-corporate debtor and perused the pleadings on record.

22. The learned senior counsel appearing for the petitioner-operational creditor submits that an operational debt exceeding Rs.1 lakh is due and payable by the respondent-corporate debtor to the petitioner and that there was no pre-existing dispute or pendency of any proceedings relating to the dispute as on the date of receipt of demand notice by the corporate debtor.

23. On the other hand, the learned counsel appearing for the respondent-corporate debtor submits that there was no operational debt due

and payable to the petitioner-operational creditor and that there was a pre-existing dispute between the parties with regard to the claimed amount and that the arbitration proceedings were already initiated and pending.

24. The learned counsel for the petitioner has relied upon the following judgments:

- i) *Mobilox Innovation V. Kirusa Software, 2018 (1) SCC 353*
- ii) *Innoventive Industries V. ICICI Bank, 2018 (1) SCC 407*
- iii) *Haryana Telecom V. Sterlite Industries, 1999 (5) SCC 688*
- iv) *Geron Engineering V. Ecogreen Energy, CP (IB) No.65/Chd/Hry/2019, NCLT Chandigarh*
- v) *Ahluwalia Contracts V. Raheja Developers, Company Appeal No.703 of 2018, NCLAT, New Delhi*
- vi) *K. Kishan V. Vijay Nirman Company, 2019 (1) ICC 974*
- vii) *Naresh Sevantilal Shah V. Malharshanti Enterprises, Company Appeal No.415 of 2020, NCLAT, New Delhi.*

25. The learned counsel for the corporate debtor has placed reliance on the following judgments:

- i) *Kay Bouvet Engineering Ltd. Vs. Overseas Infrastructure Alliance (India) Private Limited, Civil Appeal No.1137 of 2019, Hon'ble Supreme Court of India*
- ii) *Parmod Yadav & Anr Vs. Divine Infracon Pvt.Ltd., Company Appeal (AT) (Insolvency) No.251 of 2017, NCLAT, New Delhi*

26. In ***Mobilox Innovations Private Limited (supra)***, the Hon'ble Supreme Court of India observed as under:-

"34. Therefore, the adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

(i) Whether there is an "operational debt" as defined exceeding Rs.1 lakh? (See Section 4 of the Act)

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

If any one of the aforesaid conditions is lacking, the application would have to be rejected. Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

35. Another thing of importance is the timelines within which the insolvency resolution process is to be triggered. The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt."

27. In **Innoventive Industries Limited (supra)**, the Hon'ble Apex Court observed as under:-

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

28. It is to be seen that the execution of Helicopter Charter Agreement dated 28.01.2016 and the amendment agreement thereof dated 24.05.2018 and the Agreement for Charter Hire dated 23.08.2016 and the amendment agreement dated 24.05.2018 between the parties are not in dispute. The

occurrence of the conciliation meeting on 15.02.2019 between both the parties and preparation of minutes of the same was also not in dispute. Further, the respondent-corporate debtor has not disputed the fact of payment of Rs. 1,61,19,000/- on 14.03.2019 and Rs. 34 lakhs on 16.03.2019, towards the part payment of the total debt due, in pursuance of the minutes of meeting held on 15.02.2019. Therefore, it can be safely concluded that there was an operational debt due and payable by the respondent-corporate debtor to the petitioner-operational creditor amounting more than 1 lakh rupees.

29. It is also to be seen that the petitioner-operational creditor has issued a demand notice on 21.05.2019 to the respondent-corporate debtor demanding to pay an amount of Rs. 8,03,16,539/- from the respondent-corporate debtor and that the said notice has been received by the corporate debtor on 27.05.2019. The respondent-corporate debtor vide its reply dated 04.06.2019 to the demand notice dated 21.05.2019 of the petitioner-operational creditor, for the first time, raised dispute about its liability to pay any amount to the petitioner-operational creditor. It is also to be seen that the petitioner sent a revised demand notice on 30.07.2019 to add some more interest amount. The respondent though received the said notice but not given any reply however, vide notice dated 14.08.2019 invoked Clause 15 of the agreement for referring the disputes to arbitration.

30. In view of what is observed above, it is proved that there was an operational debt exceeding Rs. 1 lakh and that there was documentary evidence in support of the same. It is also proved that the demand notice was duly delivered on the respondent-corporate debtor.

31. It is to be seen that, even according to the respondent-corporate debtor, who invoked the arbitration clause, as available in the above referred agreements, vide letter dated 14.08.2019, it received the demand notice prior to the invocation of the arbitration clause. It is also to be seen that prior to the receipt of the demand notice from the petitioner-operational creditor, the respondent-corporate debtor has not raised any valid dispute which can be termed as a pre-existing dispute between the parties. Hence, all the contentions advanced by the respondent-corporate debtor fails and accordingly, the instant CP is liable to be admitted and Corporate Insolvency Resolution Process is liable to be initiated against the corporate debtor.

32. In view of the categorical declaration of law by the Hon'ble Apex Court in ***Mobilox Innovations Private Limited (supra)*** and since the requirements for admitting a CP under Section 9 of the IBC 2016 as mentioned in the said decision, have been satisfied in the instant case, there is no need to delve upon any other decision cited by either side. For the same reasons, the invocation of the Arbitration after receipt of the demand notice and the consequential orders of the Hon'ble High Court of Delhi, will not come in the way of this Adjudicating Authority in admitting the CP.

33. In the given facts and circumstances, the present petition being complete and having established the default in payment of the Operational Debt for the default amount being above ₹1,00,000/-, the petition is admitted in terms of Section 9 of the IBC and accordingly, moratorium is declared in terms of Section 14 of the Code. As a necessary consequence of the

moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

- “(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) Transferring, encumbering, alienating or disposing of by the corporate debtor 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 Securitization 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.
- (e) It is further directed that 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.
- (f) The provisions of Section 14(3) shall however, not apply to such transactions as may be notified by the Central

Government in consultation with any financial sector regulator and to a surety in a contract of guarantee to a corporate debtor.

- (g) The order of moratorium shall have effect from the date of this order till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.”

34. The operational creditor has not recommended any Interim Resolution Professional. In this regard a letter bearing File No. 25/02/2021-NCLT dated 01.07.2021 has been received from National Company Law Tribunal, New Delhi forwarding therewith a copy of letter no. IP-12011/1/2020-IBBI/1013/1965 dated 30.06.2021 along with the guidelines and the panel of resolution professional approved for NCLT Chandigarh Bench for appointment as IRP or Liquidator. The panel is valid from 01.07.2021 to 31.12.2021. We select Mr. Sawinder Singh Chug appearing at Serial No. 6 of the panel to be appointed as Interim Resolution Professional.

35. The Law Research Associate of this Tribunal has checked the credentials of Mr. Sawinder Singh Chug and there is nothing adverse against him. In view of the above, we appoint Mr. Sawinder Singh Chug, registration No. IBBI/IPA-003/IP-N000133/2017-2018/11459 Mobile No. 9417038006, e-mail ID: cma.sschug@gmail.com as the interim resolution professional subject

to the condition that the appointed IRP will furnish Form 2 within 1 week from the date of this order, if not filed. The IRP is directed to take the steps as mandated under sections 15, 17, 18, 20 and 21 of IBC 2016.

36. The Interim Resolution Professional shall after collation of all the claims received against Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Tribunal on or before the expiry of thirty days from the date of his appointment, and shall convene the first meeting of the Committee within seven days of filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Tribunal every fortnight.

A copy of order shall be communicated to both the parties. The learned counsel for the petitioner shall deliver copy of this order to the Interim Resolution Professional forthwith. The Registry is also directed to send copy of this order to the Interim Resolution Professional at his e-mail address forthwith.

Sd/-
(L.N. Gupta)
Member (Technical)

Sd/-
(Ajay Kumar Vatsavayi)
Member (Judicial)

September 30, 2021
YP